COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

SUFFOLK, SS. NO. SJC-12890

COMMONWEALTH,
Appellee,

v.

NELSON MORA, ET AL.,
Appellants.

ON RESERVATION AND REPORT FROM THE
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF FOR THE COMMONWEALTH

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QUESTION PRESENTED

Whether the trial court correctly declined to suppress evidence derived from pole cameras that were installed in public locations without a warrant and recorded video but not audio of publicly-viewable areas in front of appellants' residences.

STATEMENT OF THE CASE

As a result of a multi-agency wiretap investigation, a grand jury sitting in Essex County returned indictments against appellants Nelson Mora, Lymbel Guerrero, Randy Suarez, and nine others in August and September 2018, charging them with conspiracy to violate the Controlled Substances Act, Mass. G.L. 94C, and various substantive narcotics offenses. *See generally* App. 4, 6, 12-34, 107-108.[1] In September 2018, a Bristol County grand jury returned additional indictments against Mora and two of his co-defendants. App. 12. The Bristol County indictments were subsequently transferred and consolidated with the Essex County cases. *See* App. 6, 10.

Mora is charged with one count of trafficking 100 grams or more of oxycodone, one count of trafficking 36 grams or more of oxycodone, four counts of trafficking 18 grams or more of heroin, one count of trafficking 10 grams or more of fentanyl, two counts of distributing a Class B substance (oxycodone and

[1] This brief will refer to pages of appellants' appendix as "App. ____," and to pages of appellants' brief as "Appellants' Br. ___."

fentanyl), and three counts of conspiracy to violate the Controlled Substances Act. App. 4, 12-34. Guerrero is charged with one count each of trafficking 36 grams or more of heroin, trafficking 36 grams or more of oxycodone, trafficking 36 grams or more of cocaine, trafficking 10 grams or more of fentanyl, and possession with intent to distribute a Class A substance (fentanyl), as well as two counts of conspiracy to violate the Controlled Substances Act. Suarez is charged with one count of trafficking 200 grams or more of heroin, one count of possession with intent to distribute a Class B substance (oxycodone), one count of possession with intent to distribute a Class A substance (fentanyl), and two counts of conspiracy to violate the Controlled Substances Act.

In July 2019, Mora, Suarez, and Guerrero moved to suppress evidence derived from the warrantless use of pole cameras, including "any fruits therefrom." App. 35-63. Four co-defendants were permitted to join in those motions. *See* App. 113. The Commonwealth opposed the motions. App. 64-101. The parties jointly stipulated to a series of facts relevant to the motions. App. 102-06. The Superior Court (Feeley, J.) held a non-evidentiary hearing on October 21, 2019, and denied the defendants' motions on November 4, 2019. App. 9-10, 107-24.

On November 19, 2019, Mora filed a notice of appeal. App. 125. On December 10, 2019, Mora, Suarez, and Guerrero filed a joint application for leave to pursue an interlocutory appeal and to stay the proceedings in the trial court.

App. 130-43. The Single Justice (Lenk, J.) allowed the application on January 29, 2020, and ordered that the case proceed in this Court. App. 144-45.

STATEMENT OF THE FACTS

I. Using various investigative methods, law-enforcement officers uncover extensive evidence of drug trafficking by appellants.

This case arises from a long-term narcotics investigation by members of the Massachusetts State Police, Massachusetts Attorney General's Office, Drug Enforcement Administration, Lynn Drug Task Force, Danvers Police Department, and Beverly Police Department. App. 108. The investigation began in November 2017, after a confidential informant told police that an individual known to the informant as "Nelly" was distributing large quantities of oxycodone in and around Lynn. *Id.* The informant also advised that "Nelly" used Shepard Street in Lynn as his primary location for meeting with drug customers. App. 111 n.3. Though the informant did not know "Nelly's" true name, investigators ultimately identified Mora as "Nelly" and determined that Mora resided on Hillside Avenue in Lynn. App. 108, 110. With assistance from the informant, investigators successfully introduced an undercover trooper to Mora. App. 108. Between December 2017 and March 2018, the undercover trooper made a series of nine controlled buys of various amounts of oxycodone, heroin and fentanyl from Mora. *Id.*

On March 19, 2018, the investigative team sought a wiretap warrant for the cell phone Mora used to communicate with the undercover trooper for each of the

controlled buys. *Id.* Superior Court Justice Feeley issued the wiretap warrant, authorizing the interception of communications pertaining to illegal narcotics activities over Mora's phone. *Id.* The wiretap portion of the investigation ran for approximately two months. App. 108-09. On various dates in April and May 2018, Justice Feeley issued three additional wiretap warrants authorizing continued interceptions of communications over Mora's phone, as well as the interception of communications over several other phones identified as being used to facilitate narcotics distribution. *Id.* While the wiretap was ongoing, Justice Feeley also issued warrants authorizing police to install and monitor global positioning system ("GPS") devices on certain vehicles and to obtain "ping" location data for certain cell phones. App. 109.

Based on intercepted communications, investigators identified defendants Guerrero and Richard Grullon-Santos as heroin and fentanyl suppliers for Mora, and defendant Erick Delrosario as Mora's primary oxycodone supplier. App. 107-08. Investigators also identified several others who were closely associated with Mora or served roles within this drug distribution network, including defendants Suarez, Frantz Adolphe, Gregory Inuyama, and Aggeliki Iliopoulos. App. 107.

The investigation resulted in the arrests of thirteen people and the coordinated execution of search warrants on May 22, 2018, at nine locations, including the residences of Mora, Suarez, Guerrero, Adolphe, Iliopoulos, Inuyama,

and Grullon-Santos. App. 109. In total, the search warrants yielded almost 2,400 oxycodone pills, more than a kilogram of heroin and fentanyl, 75 grams of cocaine, and approximately $415,000 in cash. *Id.*

II. Investigators install pole cameras that video-record public areas and capture relevant evidence.

As part of the investigation into Mora and his drug distribution network, investigators used what are commonly known as "pole cameras" to conduct surveillance before and during the wiretap portion of the investigation. App. 102. The first pole camera went up in December 2017, after police had conducted controlled drug buys from Mora through the confidential informant. The Massachusetts State Police installed the pole cameras in various public locations near, but not on, the property of several of the defendants. In their stipulations, the parties described the locations and footage obtained from the pole cameras as follows:

a. *68 Hillside Avenue, Lynn, MA*, which is the residence of defendant Nelson Mora. The Hillside Avenue camera afforded a view of a portion of the front of the house, as well as the street on which the house is situated and the sidewalk that runs in front of it. The pole camera footage for this location runs from December 6, 2017 at 11:43 a.m. through May 23, 2018 at 3:19 p.m. Mora was regularly seen on the footage from the Hillside Avenue camera. On a few occasions, defendants Inuyama, Adolphe, Guerrero and Suarez and/or vehicles investigators knew to be operated by them were also seen on the footage from this location.

b. *8-10 Swampscott Avenue*, Peabody, MA, which is the residence of defendant Randy Suarez. The Swampscott Avenue camera afforded a

view of the front of the residence, as well as a driveway in front of the house (partially obscured by a neighboring Dunkin' Donuts), part of a second driveway on the side of the house, and the street on which the house is situated. The pole camera footage for this location runs from March 23, 2018 at 12 p.m. through May 23, 2018 at 3:19 p.m. Suarez was regularly seen on the footage from the Swampscott Avenue camera. On a few occasions, Guerrero was also seen on the footage from this location.

c. *Shepard Street, Lynn, MA*. Defendant Frantz Adolphe resides at 9 Shepard Street, though the Shepard Street camera was not focused on his residence or any other particular residence. The camera afforded a view down the length of Shepard Street, which included a partial view of the top of the driveway to Adolphe's residence. The pole camera footage for this location runs from April 4, 2018 at 8:48 a.m. through May 23, 2018 at 3:20 p.m. Mora and Adolphe were regularly seen on the footage from the Shepard Street camera. On at least one occasion, Grullon-Santos was seen on the footage from this location.

d. *7 Ruthven Terrace, Lynn, MA*, which is the residence of Grullon-Santos. The Ruthven Terrace camera afforded a partial view of the front of the house, which was largely obscured by a tree in a neighboring yard. The pole camera footage for this location runs from May 18, 2018 at 8:13 a.m. through May 23, 2018 at 3:20 p.m. On at least one occasion, Grullon-Santos was seen on the footage from the Ruthven Terrace camera.

e. *9 South Elm Street, Lynn, MA*, which is the residence of Carlos Perez. Perez is not a charged defendant in this case. The pole camera footage for this location runs from May 9, 2018 at 7:35 a.m. through May 23, 2018 at 3:20 p.m.

App. 102-03.

Each of the cameras captured video, but not audio. App. 103. While the cameras were operating, investigators could remotely view the video from a web-based browser in real time. *Id.* Investigators could also search and review previously-recorded footage. *Id.* The cameras had zoom and angle movement

capabilities, which could be operated remotely by investigators, in real time only. *Id.* The zoom function could allow investigators to read the license plate on a car in some instances. *Id.* The cameras did not have infrared or night-vision capabilities. The cameras recorded everyone coming and going from the above-listed locations. The cameras captured only publicly-viewable areas and activity; they did not enable investigators to see inside any residence. *Id.*; *see also* App. 88-101 (photos showing views from pole cameras).

While the investigation was ongoing, the data from each pole camera was stored on a State Police server. App. 103. After the cameras were turned off, the data was removed from the server and transferred onto hard drives for storage and discovery purposes. *Id.*

Observations made by investigators using the pole cameras were included in affidavits submitted in support of the various search warrants obtained during the investigation, including warrants authorizing GPS tracking of vehicles, electronic surveillance of telephones, and searches of the defendants' residences. App. 72.

SUMMARY OF THE ARGUMENT

The police set up five pole cameras that captured video but not audio footage of the activities on public streets and in front of particular residences for periods ranging from less than one week to about six months. The cameras could neither peer inside any home nor observe behavior that would not have been readily

apparent to any passerby or neighbor. Unsurprisingly, courts have found no reasonable expectation of privacy on such facts in case after case, spanning decades. Appellants have offered no persuasive reason for this Court to turn its back on such longstanding precedent. *See infra* at 20-26.

Appellants rely on a series of decisions addressing location-tracking technologies—in particular, global positioning system (GPS) surveillance and cellular site location information (CSLI)—to support a different result here. But none of those decisions purported to overturn the general principle that people cannot reasonably expect privacy in things or activities exposed to the public. Instead, those cases were decided based on the unique characteristics of location-tracking technologies, including their ability to comprehensively track individuals, and to capture individuals' movements in both public *and* private spheres. *See infra* at 26-32.

The pole cameras used here are wholly different from location-tracking technologies. First, they captured only public conduct. Second, they did not paint anything approaching the "'intimate picture of one's daily life'" that location-tracking technologies produce. *Commonwealth v. Augustine,* 467 Mass. 230, 248 (2014) (citation omitted). While the pole cameras captured some personal details, they were limited by what happened to cross their field of view; the pole cameras could not, as a cell phone does, follow appellants through all of their movements

throughout the day. Third, the pole cameras here captured solely the discrete acts that appellants *knowingly* exposed to public view; location-tracking devices capture much more. Fourth, unlike location-tracking devices—which implicate this Court's special solicitousness of privacy in the face of revolutionary advances in technology—pole cameras as used in this case are a traditional technology, with a long history of judicial analysis under settled Fourth Amendment principles. Whether other types of cameras or other technologies not used in this case would raise privacy concerns is simply not presented on this record. *See infra* at 32-42.

All of these points support the conclusion that appellants had neither a subjective nor objectively reasonable expectation of privacy in the evidence captured by the pole cameras here. On the subjective component, appellants never manifested the least intention to keep the conduct viewed by the pole cameras private. On the objective component, any expectation of privacy would have been objectively unreasonable, given that the pole cameras were installed in public locations and captured only conduct that was fully visible to the public. *See infra* at 42-45.

Finally, even if this Court holds that a warrant was required, it should nonetheless affirm because the police acted in good faith. Neither this Court nor the United States Supreme Court has ever held that the use of a pole camera constitutes a search, and the vast majority of courts to consider the issue have held

to the contrary. It was therefore reasonable for police to believe that they need not have obtained a warrant. Application of the exclusionary rule is neither necessary nor appropriate in this context. *See infra* at 46-48.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a ruling on a motion to suppress, this Court ordinarily "accept[s] the judge's subsidiary findings of fact absent clear error but conduct[s] an independent review of his ultimate findings and conclusions of law." *Commonwealth v. Almonor*, 482 Mass. 35, 40 (2019) (citation omitted). The Court "review[s] any factual 'findings of the motion judge that were based entirely on the documentary evidence' de novo," however. *Commonwealth v. Johnson*, 481 Mass. 710, 714 (2019) (citation omitted).

II. THE USE OF POLE CAMERAS HERE WAS NOT A SEARCH UNDER EITHER THE FOURTH AMENDMENT OR ARTICLE 14.

A search occurs under the Fourth Amendment and Article 14 "when the government's conduct intrudes on a person's reasonable expectation of privacy." *Augustine*, 467 Mass. at 241. Appellants had no reasonable expectation of privacy in conduct that they knew was visible to every passing stranger. There was therefore no search in this case, and the decision below should be affirmed.

A. Individuals Have No Reasonable Expectation of Privacy In Discrete Acts or Things That They Knowingly Expose to Public View, as Appellants Did Here.

Time and again—including in many of the cases cited in appellants' brief—both this Court and the Supreme Court have reaffirmed that people do not have a reasonable expectation of privacy in discrete acts or things that they willingly expose to the public. The Supreme Court articulated the principle in *Katz v. United States*: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. 347, 351 (1967).[2] The Court reiterated that rule in *California v. Ciraolo*, stating that "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." 476 U.S. 207, 213 (1986). The *Ciraolo* Court held that a homeowner had no reasonable expectation of privacy in his fenced-in backyard viewed by police flying overhead in a private plane. *Id.* at 215. Similarly, the Court in *Florida v. Riley* held that a respondent had no reasonable expectation of privacy in his greenhouse viewed by police from a helicopter. 488 U.S. 445, 448-50 (1989). The *Riley* Court noted that "the police, like the public, would have been free to inspect the backyard garden from the street if their view had been

[2] This brief at times refers to this principle as the "public-view principle," as a shorthand.

unobstructed." *Id.* at 449-50; *see also id.* at 449 ("As a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be'" (quoting *Ciraolo*, 476 U.S. at 213)).

The Supreme Court has applied this same principle to find no reasonable expectation of privacy in garbage bags left on a curb outside a house, *see California v. Greenwood*, 486 U.S. 35, 40 (1988) ("respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection"); in magazines in an adult bookstore, *see Maryland v. Macon*, 472 U.S. 463, 469 (1985) ("respondent did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and to transact business"); in the vestibule of a house while the door was open, *see United States v. Santana*, 427 U.S. 38, 42 (1976) (no reasonable expectation of privacy where respondent "was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house"); and in voice exemplars, *see United States v. Dionisio*, 410 U.S. 1, 14 (1973) (no reasonable expectation of privacy because "[t]he physical characteristics of a person's voice, its tone and manner . . . are constantly exposed to the public"). *See also Greenwood*, 486 U.S. at 41 ("the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public"); *New York v. Class*, 475

U.S. 106, 114 (1986) ("The exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a 'search.'"); *United States v. Karo*, 468 U.S. 705, 730 (1984) ("If personal property is in the plain view of the public, the possession of the property is in no sense 'private' and hence is unprotected.").

This Court has affirmed the same principle on many occasions. Just last year in *Almonor*, the Court noted that a person "would certainly not have a reasonable expectation of privacy in his or her real-time location while standing on a public sidewalk, visible to any onlookers, including police, who would care to look in the individual's direction." 482 Mass. 35, 42 n.11. In *Commonwealth v. Rivera*, the Court held that a defendant who "shouted threats and obscenities at a clerk in a convenience store open to the public" could not suppress a surveillance camera recording based on a federal statute requiring a "legitimate expectation of privacy," because he "could not reasonably have expected such remarks—whether overheard by a customer, a passerby, a store employee, or a surveillance camera recording his words—to be confidential." 445 Mass. 119, 128-29 (2005). And in *Commonwealth v. D'Onofrio*, the Court found that the defendants had no reasonable expectation of privacy in a club that admitted an undercover police officer, noting that the Fourth Amendment "was not designed to protect persons from police presence in areas open to the general public." 396 Mass. 711, 717-18 (1986) (noting that defendant failed to offer sufficient "evidence to show

reasonable enforcement of a policy to exclude persons other than members and their guests"). Similarly, the Court held in *Commonwealth v. Sergienko* that the defendant had no reasonable expectation of privacy with respect to an officer's observation inside the defendant's car, where "'[t]he general public could peer into the interior of [the defendant's] automobile from any number of angles.'" 399 Mass. 291, 294 (1987) (citation omitted). *See also Commonwealth v. Connolly*, 454 Mass. 808, 819 (2009) ("Under the Fourth Amendment, there is no reasonable expectation of privacy in the publicly visible exterior of a vehicle."); *Commonwealth v. One 1985 Ford Thunderbird Automobile*, 416 Mass. 603, 608-10 (1993) (no reasonable expectation of privacy where police observed defendant's marijuana plants growing in a swimming pool behind a house by flying overhead in a helicopter). The public-view principle is thus strongly rooted in both Massachusetts and federal law.[3]

It is not surprising, then, that a great many courts across the country—the vast majority to address the issue—have applied this principle to find no reasonable expectation of privacy in pole-camera cases, both before and after the

[3] The longstanding acceptance of this principle make sense, since it is based on a wholly intuitive notion. *See Commonwealth v. Starr*, 55 Mass. App. Ct. 590, 593 (2002) ("Societal beliefs, reflecting our common sense, undoubtedly support the conclusion that it is unreasonable to claim privacy in that which one consciously places in public view.").

Supreme Court's decisions in *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (addressing CSLI technology), and *United States v. Jones*, 565 U.S. 400 (2012) (addressing GPS technology), on which appellants heavily rely. *See, e.g.*, *United States v. Edmonds*, No. 2:18-CR-00225-01, 2020 WL 573272, at *3 (S.D. W. Va. Feb. 5, 2020) (unreported) (pole-camera evidence was "footage of vehicles coming and going from the residences—something that can be observed by any neighbor, passer-by, or officer physically surveilling the area"); *United States v. Kelly*, 385 F. Supp. 3d 721, 727 (E.D. Wis. 2019) (citing *Ciraolo*, 476 U.S. at 213, for proposition that Fourth Amendment protection "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares"); *United States v. Tirado*, No. 16-CR-168, 2018 WL 3995901, at *2 (E.D. Wis. Aug. 21, 2018) (unreported) (denying *Carpenter*-based motion for reconsideration, where cameras did not "permit the police to see things an officer standing on the street could not see"); *United States v. Tuggle*, No. 16-CR-20070-JES-JEH, 2018 WL 3631881, at *3 (C.D. Ill. July 31, 2018) (unreported) (pole cameras "only captured what would have been visible to any passerby in the neighborhood"); *United States v. Houston*, 813 F.3d 282, 287 (6th Cir. 2016) (camera captured "same view enjoyed by passersby on public roads"); *United States v. Bucci*, 582 F.3d 108, 116 (1st Cir. 2009) (individual "does not have an expectation of privacy in items or places he exposes to the public"); *United States*

v. Jackson, 213 F.3d 1269, 1281 (10th Cir. 2000) (pole cameras "were capable of observing only what any passerby would easily have been able to observe").[4]

The facts here offer no persuasive reason to depart from this longstanding and overwhelming precedent. It is undisputed that the pole cameras in this case

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[4] *See also United States v. Kubasiak*, No. 18-CR-120-PP, 2018 WL 4846761, at *7 (E.D. Wis. Oct. 5, 2018) (unreported); *United States v. Robert Reno-1*, No. 4:16CR380 CDP (SPM), 2018 WL 10298007, at *12 (E.D. Mo. Nov. 7, 2018), *report and recommendation adopted sub nom. United States v. Reno*, 2018 WL 6413709 (E.D. Mo. Dec. 6, 2018) (unreported); *United States v. Kay*, No. 17-CR-16, 2018 WL 3995902, at *1 (E.D. Wis. Aug. 21, 2018) (unreported); *United States v. Bailey*, No. 15-CR-6082G, 2016 WL 6995067, at *33 (W.D.N.Y. Nov. 29, 2016) (unreported); *United States v. Cantu*, 684 Fed. Appx. 703, 704 (10th Cir. 2017) (unreported); *United States v. Wymer*, 654 Fed. Appx. 735, 744 (6th Cir. 2016) (unreported); *State v. Rigel*, 97 N.E.3d 825, 831 (Ohio Ct. App. 2017); *State v. Duvernay*, 92 N.E.3d 262, 270 (Ohio Ct. App. 2017); *United States v. Campuzano-Chavez*, No. CR-15-00154-HE, 2016 WL 879326, at *4 (W.D. Okla. Mar. 7, 2016) (unreported); *United States v. Gilliam*, No. 02:12-CR-93, 2015 WL 5178197, at *9 (W.D. Pa. Sept. 4, 2015) (unreported); *United States v. Birrueta*, No. 13-CR-2134-TOR, 2014 WL 11369624, at *9 (E.D. Wash. Mar. 21, 2014) (unreported); *United States v. Krawczyk*, No. CR12-01384-PHX-DGC, 2013 WL 3853213, at *2 (D. Ariz. July 25, 2013) (unreported); *United States v. Baltes*, No. 8:11-CR-282 (MAD), 2013 WL 11319002, at *7 (N.D.N.Y. Apr. 22, 2013) (unreported); *United States v. Nowka*, No. 5:11-CR-474-VEH-HGD, 2012 WL 6610879, at *5 (N.D. Ala. Dec. 17, 2012) (unreported); *United States v. Brooks*, 911 F. Supp. 2d 836, 843 (D. Ariz. 2012); *United States v. Adams*, No. 3:08-CR-77, 2011 WL 13161193, at *5 (N.D.W. Va. Feb. 23, 2011) (unreported); *State v. Torres*, No. 2 CA–CR 2010–0283, 2011 WL 4825640, at *4 (Ariz. Ct. App. Oct. 12, 2011) (unreported); *United States v. Aguilera*, No. 06-CR-336, 2008 WL 375210, at *2 (E.D. Wis. Feb. 11, 2008) (unreported). *But see People v. Tafoya*, No. 17CA1243, 2019 WL 6333762 (Colo. App. Nov. 27, 2019) (unreported); *United States v. Moore-Bush*, 381 F. Supp. 3d 139 (D. Mass. 2019); *State v. Jones*, 903 N.W.2d 101 (S.D. 2017); *United States v. Vargas*, No. CR-12-6025-EFS 2014 U.S. Dist. LEXIS 184672 (E.D. Wash. Dec. 15, 2014) (unreported); *Shafer v. City of Boulder*, 896 F. Supp. 2d 915 (D. Nev. 2012); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 250 (5th Cir. 1987).

were directed on limited street scenes, in one location for each camera, and they recorded activities that were entirely visible to passing drivers and pedestrians. *See* App. 88-101 (photos showing views from pole cameras). The cameras could not peer inside houses or record conversations. The conduct on view was just as visible to the public as the exterior of a car, *see Class*, 475 U.S. at 114, or garbage bags left on a curb, *see Greenwood*, 486 U.S. at 40. A person has no reasonable expectation of privacy in his or her location "while standing on a public sidewalk, visible to any onlookers, including police, who would care to look in the individual's direction." *Almonor*, 482 Mass. at 42 n.11. Because the Fourth Amendment does not "require law enforcement officers to shield their eyes when passing by a home on public thoroughfares," *Ciraolo*, 476 U.S. at 212, the decision below should be affirmed.

B. Decisions Addressing Location-Tracking Technologies Do Not Overrule the General Public-View Principle.

In arguing that a search occurred here, appellants never directly confront the public-view principle, instead simply presuming that it is no longer good law. *See, e.g.*, Appellants' Br. 18-19 (asserting that, if the First Circuit's decision in *Bucci*—which rests on the public-view principle—"once stood on generally accepted legal principle, it no longer does"). But appellants have not pointed to any decision of this Court or the Supreme Court—including the cases relating to location-tracking on which appellants so heavily rely—that has overruled the principle. And

critically, the location-tracking decisions make clear that their outcomes and holdings turned on the unique characteristics of the technologies at issue. They do not broadly (whether expressly or impliedly) cast aside the long-held principle that there generally is no reasonable expectation of privacy in particular actions and things exposed to public view.

Several of the decisions finding that use of location-tracking technology constitutes a search rely on a trespass theory unrelated to privacy or public view. In *Jones*, for example, the majority held that the government's installation and use of a GPS device on a target's vehicle constituted a search because the government "physically occupied private property for the purpose of obtaining information." 565 U.S. at 404. Similarly, this Court concluded in *Connolly* that use of a GPS device on the defendant's minivan was a seizure under Article 14 because police "interfere[d] with the defendant's interest in the vehicle" and used "private property (the vehicle) to obtain information for their own purposes." 454 Mass. at 823. Such property-based theories have no relevance on the narrow facts presented here.[5]

[5] Appellants suggest in a heading of their brief that a trespass theory entitles them to relief. *See* Appellants' Br. at 31 ("THE GOVERNMENT INTRUSION IN THIS CASE IS A SEARCH UNDER EITHER TRESPASS OR EXPECTATION OF PRIVACY ANALYSIS"). But neither the text under this heading nor any other part of appellants' brief provides analysis of a trespass theory. And there is

(footnote continued)

In other location-tracking cases, courts do apply a privacy rationale, but those decisions do not reflect a wholesale rejection of the public-view principle; instead, they state narrow holdings closely tied to the specific nature of location-tracking technology. In *Carpenter*, for example, the Supreme Court emphasized the "unique nature of cell phone location records" in holding that police use of CSLI was a search. 138 S. Ct. at 2217; *see also Jones*, 565 U.S. at 415 (Sotomayor, J., concurring) (referring to "some unique attributes of GPS surveillance"). And the *Carpenter* Court stated that its decision was a "narrow one," tied specifically to CSLI technology, that did not "call into question conventional surveillance techniques and tools, such as security cameras." *Id.* at 2220.[6]

(footnote continued)
simply no basis to assert a physical trespass here, since the pole camera was not installed on appellants' property.

[6] This reference to security cameras provides even more support for the view that *Carpenter* does not govern in this case. In *United States v. Moore-Bush*, a federal district judge found that a pole camera is not a "security camera" as described in *Carpenter* because security cameras are used to guard against crime (e.g., to "monitor a heavily trafficked area or commercial establishment") rather than for investigatory purposes. 381 F. Supp. 3d 139, 145-46 (D. Mass. 2019). But there is no basis for interpreting *Carpenter's* reference to "security cameras" in that way. Indeed, that interpretation is counterintuitive, given that *Carpenter* dealt specifically with Fourth Amendment requirements relating to police investigative techniques. And regardless, there can be no dispute that the *Carpenter* Court specifically limited its holding to the CSLI technology at issue. 138 S. Ct. at 2220.

Similarly, in addressing police use of warrantless cell phone "pings" to determine a phone's location, this Court in *Almonor* emphasized the unique nature of cell phone location-tracking technology, noting that, since cell phones are now "'almost a feature of human anatomy,'" police can use them to "'locate a person entirely divorced from all visual observation,'" *Id.* at 45 (citations omitted)—something the pole cameras in this case could not do. The Court also pointed to the "intrusive nature of police action that causes an individual's cell phone to transmit its real-time location" as raising "distinct privacy concerns." *Id.* at 45. The Court held that cell phone location technology "finds no analog in the traditional surveillance methods of law enforcement." *Id.* at 46; *see also Augustine*, 467 Mass. at 251-52 (referring to the "distinctive characteristics of cellular telephone technology and CSLI").

Moreover, the expectation of privacy that courts have identified in these cases is in *detailed, comprehensive location information*—information of the kind that location-tracking technologies are uniquely capable of capturing and transmitting, and which is not at issue with the fixed cameras here. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2219 (Carpenter had reasonable expectation of privacy "in the whole of his physical movements"); *id.* at 2217 (CSLI implicates reasonable expectation of privacy because it "provides an all-encompassing record of the holder's whereabouts"); *Jones*, 565 U.S. at 416 (suggesting "reasonable societal

expectation of privacy in the sum of one's public movements"); *Johnson*, 481 Mass. at 716 (individuals have reasonable expectation of privacy "in a detailed comprehensive documentation of their physical movements over an extended period of time"); *Almonor*, 482 Mass. at 46 ("[a]llowing law enforcement to immediately locate an individual whose whereabouts were previously unknown by compelling that individual's cell phone to reveal its location" violates reasonable expectation of privacy); *Augustine*, 467 Mass. at 246 ("Clearly, tracking a person's movements implicates privacy concerns."); *id.* at 254 (GPS data and historical CSLI implicate a person's reasonable expectation of privacy "by tracking the person's movements"); *id.* at 255 (defendant had subjective and objective privacy interest "in his location information as reflected in the CSLI records"); *Commonwealth v. Rousseau*, 465 Mass. 372, 382 (2013) ("under art. 14, a person may reasonably expect not to be subjected to extended GPS electronic surveillance by the government, *targeted at his movements*, without judicial oversight and a showing of probable cause" (emphasis added)).

Courts have also emphasized that a particular danger of location-tracking technologies is their ability to track individuals *in private places*—a point wholly consistent with the public-view principle. In *Augustine*, for example, the Court found "no real question that the government, without securing a warrant, may use electronic devices to monitor an individual's movements *in public* to the extent

that the same result could be achieved through visual surveillance." 467 Mass. at 252 (emphasis added). Private spaces are different, however—the Court noted that the "distinction between privacy interests in public and private spaces makes CSLI especially problematic, because cellular telephones give off signals from within both spaces, and when the government seeks to obtain CSLI from a cellular service provider it has no way of knowing in advance whether the CSLI will have originated from a private or public location." *Id.* at 252-53. "Given that art. 14 protects against warrantless intrusion *into private places*," the Court went on, "we cannot ignore the probability that, as CSLI becomes more precise, cellular telephone users will be tracked in constitutionally protected areas." *Id.* at 253 (emphasis added); *see also id.* at 249 (CSLI "tracks the user's location far beyond the limitations of where a car can travel"); *id.* at 251 (CSLI "may yield a treasure trove of very detailed and extensive information about the individual's 'comings and goings' *in both public and private places*" (emphasis added)). And in *Almonor*, as noted above, this Court reiterated the view that the reasonable expectation of privacy in location information does not extend to fully-public areas. 482 Mass. at 42 n.11 (no reasonable expectation of privacy in person's "real-time location while standing on a public sidewalk, visible to any onlookers, including police, who would care to look in the individual's direction"). The Supreme Court evinced the same concern for the use of CSLI in private spaces in

Carpenter, noting that a cell phone "faithfully follows its owner *beyond public thoroughfares* and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." 138 S.Ct. at 2218 (emphasis added).

The location-tracking decisions of this Court and the Supreme Court thus do not reflect broad holdings eliminating the public-view principle, as appellants suggest; rather, they are decisions that respond to the unique constitutional implications of a technology that can trace all of a person's whereabouts, and that courts have found can allow the government to create a sketch of a person's entire life.

C. Pole Cameras are Different from Location-Tracking Technologies.

Not only have recent decisions on novel location-tracking technologies not overruled the public-view principle, but these recent cases do not govern here because the pole cameras used in this case differ from those technologies in myriad ways, including as to several key dimensions.

First, the pole cameras here captured only conduct and areas fully exposed to the public. Location-tracking technologies, on the other hand, provide information about a person's movements in both public and private places, as discussed above. *See supra* at 30-32. That reach into the private sphere was a particular focus of this Court in *Augustine*. *See* 467 Mass. at 253 (expressing concern that CSLI could result in tracking "in constitutionally protected areas").

Second, the pole cameras did not capture comprehensive location information, and therefore did not—in contrast to location-tracking technologies—"generate a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring). The pole cameras could not record appellants' activities outside of the cameras' narrow field of view. While the pole camera *could* capture certain personal details—such as when appellants left home and returned each day, and who visited—this is not comparable to a modern location-tracking device, which can "achieve[] near perfect surveillance, as if [the government] had attached an ankle monitor" to the defendant. *Carpenter*, 138 S.Ct. at 2218; *see also Almonor*, 482 Mass. at 45 (cell phones are essentially a "hidden tracking device that can be activated by law enforcement at any moment").

Thus, the pole cameras at issue here, unlike a cell phone, could not "faithfully follow[] its owner" into "private residences, doctor's offices, [or] political headquarters." *Id.* at 2218. The pole cameras, unlike CSLI, could not capture trips to "the psychiatrist" or "the abortion clinic" or "the mosque, synagogue or church," and certainly could not track an individual from one of those places to another. *Jones*, 565 U.S. at 415 (Sotomayor, J. concurring). The pole cameras therefore did not enable the government "to ascertain, more or less at

will, [an individual's] political and religious beliefs, sexual habits, and so on." *Id.* at 416 (Sotomayor, J., concurring). The pole cameras simply could not provide the same "'intimate picture of one's daily life'" provided by location tracking. *Augustine*, 467 Mass at 248 (citation omitted). Since the pole cameras recorded only what happened to cross their limited range of sight, they were not nearly as intrusive as location-tracking technology.

Moreover, appellants' description of the pole cameras as "around-the-clock video surveillance," Appellants' Br. 17, is misleading. The vast majority of people do not spend all, or even a significant portion, of their day directly outside their house, where the cameras' views were fixed. Thus, while cameras may be on for 24 hours a day, they generally provide no personal information about their targets for huge portions of that time. *See Kubasiak*, 2018 WL 4846761, at *6 ("Even for twenty-four hours a day over several months, [the pole camera] could 'observe' the defendant only when he was in his backyard, within view of the camera."). This is in direct contrast to modern location-tracking technologies, which may well identify an individual's location at every moment of every day.

Multiple courts have made similar findings in pole camera cases. *See, e.g.*, *Houston*, 813 F.3d at 290 (pole camera "was not so comprehensive as to monitor Houston's every move; instead, the camera was stationary and only recorded his activities outdoor on the farm"); *Kelly*, 385 F. Supp. 3d at 727 (defendant "takes

Carpenter's reasoning too far," because a "process that records only what someone standing in the apartment hallway, or outside the apartment complex, could have seen" is different from a "process [that] follows a person into homes, places of worship, hotels, bedrooms, restaurants and meetings"); *Reno*, 2018 WL 10298007, at *13 ("the level of intrusiveness resulting from a continuously recording station[a]ry pole camera trained exclusively on an area accessible to the public seems to be dramatically different from the level of intrusiveness resulting from the use of other types of surveillance like a GPS tracker"); *Mazzara*, 2017 WL 4862793, at *12 ("While it is true that the Pole Camera here recorded *all* of Mazzara's public activities within the Surveilled Area, it did not record *any* of his activities outside the camera's narrow field of view."); *Kubasiak*, 2018 WL 4846761, at *6 ("Because the surveillance camera was fixed, it could observe the defendant in only one location—his back yard."); *Tuggle*, 2018 WL 3631881, at *3 ("Pole cameras are limited to a fixed location and capture only activities in camera view, as opposed to GPS, which can track an individual's movement anywhere in the world.").[7]

[7] To the extent that the pole cameras here captured certain personal details, that fact alone does not render their use a search. By analogy, the phone numbers that individuals dial from their home phones reveal personal information, but individuals nonetheless have no reasonable expectation of privacy in that information. *See Smith v. Maryland*, 442 U.S. 735 (1979); *Commonwealth v. Vinnie*, 428 Mass. 161, 178 (1998). In *Augustine*, this Court noted the "enormous

(footnote continued)

Third, the pole cameras here captured solely the discrete acts that appellants *knowingly* exposed to public view. Appellants knew that the actions they took outside their homes were in full view of the public, including any passerby or neighbor; precisely that same conduct was recorded by the pole cameras. Location-tracking technologies lack that perfect correspondence between public conduct and captured information—while such technologies do capture certain public conduct, they go a significant step further, using a multitude of locations to create "an all-encompassing record of the holder's whereabouts" without that person's knowledge. *Carpenter*, 138 S. Ct. at 2217. As this Court described in *Almonor*, "individuals are constantly, and often unknowingly, carrying a hidden tracking device that can be activated by law enforcement at any moment" and can "secretly and instantly identify a person's real-time physical location at will." 482 Mass. at 45-46 (citation omitted). This tool is "'entirely divorced from all visual observation.'" *Id.* at 45. Nothing in a person's public conduct implies consent to

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(footnote continued)
difference" between a call log and CSLI; while "a call log relating to a land line may indicate whether the subscriber is at home, but no more," CSLI "may yield a treasure trove of very detailed and extensive information about the individual's 'comings and goings' in both public and private places." 467 Mass. at 251. What these decisions show is that the specific *degree* of intrusiveness is an important factor. Here, pole cameras do not reveal anything close to the degree of intimate, all-encompassing detail revealed by location-tracking technologies.

such "detailed, encyclopedic" location-tracking, whether by the public or anyone else. *Carpenter*, 138 S. Ct. at 2216.[8]

This Court has commented on the involuntary nature of location-tracking technologies. *See Augustine*, 467 Mass. at 250 ("No cellular telephone user . . . voluntarily conveys CSLI to his or her cellular service provider in the sense that he or she first identifies a discrete item of information or data point like a telephone number . . . and then transmits it to the provider."). In *Almonor*, this Court described how, "[w]hen the police ping a cell phone . . . they *compel* it to emit a signal." 482 Mass. at 43 (emphasis added). "This action and transmission . . . is done without any express or implied authorization or other involvement by the individual cell phone user." *Id.* "Pinging" thus allows police to "secretly manipulate our personal cell phones . . . for the purpose of transmitting our

[8] Appellants suggest that the pole cameras here had a similar encyclopedic reach because they collected an "aggregate of information" over a long period. Appellants' Br. 30. One reason this comparison is flawed is that a person could reasonably expect a member of the public to gain a similar "aggregate of information" over time. As the court noted in *United States v. Mazzara*, "[t]here are numerous people—a neighbor, mail carrier, student, or dog walker, just to name a few—that might be expected to pass by the Surveilled Area every day, perhaps even multiple times per day." No. 16 CR. 576 (KBF), 2017 WL 4862793, at *10 (S.D.N.Y. Oct. 27, 2017) (unreported). Those individuals "have a routine and continuous opportunity to observe [appellants'] public conduct within the Surveilled Area . . . . Anyone who has ever had a 'nosy neighbor' certainly knows that to be true." *Id.*

personal location data." *Id.* at 44. This element of user ignorance and compulsion is wholly lacking with pole cameras.

Appellants appear to suggest that their conduct was not knowing here because they did not expect to be surveilled by police. *See* Appellants' Br. 24 ("people do not have an expectation that they will be covertly surveilled or eavesdropped upon in public without any objective warning"). But the reasonable expectation of privacy test relates to knowledge of *public* exposure, not *police* exposure. *See Katz*, 389 U.S at 351 ("What a person knowingly exposes *to the public*, even in his own home or office, is not a subject of Fourth Amendment protection." (emphasis added)). Whether appellants expected police to be watching is irrelevant. *See D'Onofrio*, 396 Mass. at 717-18 (finding no search where undercover officer gained admittance to club under false name, because, "[i]f the public was freely admitted, the defendants did not have a reasonable expectation of privacy").

Fourth, pole cameras are not a new technology—a key point of analysis to which both this Court and the Supreme Court have shown particular attention. In *Johnson*, for example, this Court noted "the difficulty of defining expectations of privacy that are implicated by novel applications of new technologies." 481 Mass at 716 (citation omitted); *see also Carpenter*, 138 S.Ct. at 2222 ("When confronting new concerns wrought by digital technology, this Court has been

careful not to uncritically extend existing precedents."). Location-tracking, courts have found, is just such a new technology, which "does not fit neatly under existing precedents." *Id.* at 2214; *see also id.* at 2219 (referring to the "seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years"); *Almonor*, 482 Mass. at 41 (in response to "ubiquitous use of cell phones, and the technology allowing for the tracking of their location," courts "increasingly have been tasked with addressing whether these enhanced surveillance capabilities implicate any objectively reasonable expectations of privacy").

Pole cameras fall within a category of well-understood technology that, in contrast to location-tracking, *does* "fit neatly under existing precedents." *Carpenter* itself referred to "security cameras" within the category of "conventional surveillance techniques and tools" that the Court's decision did not disturb. 138 S. Ct. at 2220. And pole cameras have been in use and under judicial consideration for years. Two decades ago, the Tenth Circuit held that pole cameras overlooking residences did not intrude on any reasonable expectation of privacy. *United States v. Jackson*, 213 F.3d 1269, 1280 (10th Cir. 2000); *see also United States v. Cuevas-Sanchez*, 821 F.2d 248, 250 (5th Cir. 1987) (finding search where government installed pole camera overlooking appellant's 10-foot high fence bordering his backyard in 1987); *State v. Holden*, 964 P.2d 318, 321-22 (Utah Ct.

App. 1998) (addressing hidden police video surveillance of front yard of residence in 1998); *Tuggle*, 2018 WL 3631881, at *3 ("while the Supreme Court has recently extended Fourth Amendment protections to address surveillance methods implicating new technologies, the [pole camera] surveillance here used ordinary video cameras that have been around for decades"); *Kubasiak*, 2018 WL 4846761, at *5 ("the defendant's implication that a stationary video camera is some form of advanced technology that requires an evolved view of Fourth Amendment jurisprudence has no merit").

Appellants attempt to address this flaw in their reliance on location-tracking cases by suggesting that the pole cameras used here were highly advanced compared to traditional video surveillance. *See* Appellants Br. 19 ("in 2020, we may as well be a century away from the technology employed in *Bucci*"); *id.* at 20 (the technology used here was "frightening in comparison to that used in 2003"). Appellants offer no support for these hyperbolic statements, however.[9]

The parties' stipulations make clear that the pole cameras used in this case in fact had fairly basic capabilities: they could zoom and angle in different directions,

[9] Indeed, appellants agreed to a set of stipulations that include nothing on this subject. App. 102-06. Appellants therefore failed to develop a record in the lower court to support this argument. *See ZVI Const. Co., LLC v. Levy*, 90 Mass. App. Ct. 412, 423 (2016) (declining to consider argument "not factually developed in the record before us").

and investigators could remotely view the video in real time, as well as search and review previously-recorded footage. At least as of 2000, pole cameras could "zoom in close enough to read a license plate." *Jackson*, 213 F.3d at 1276. The pole cameras here did not have any infrared or night vision capabilities. *See* App. 102-04. Certainly, the cameras did not have "facial recognition" or "biometric identification," and could not "captur[e] . . . things no person could ever anticipate a casual passerby seeing," Appellants' Br. 20. Whether new technologies *not used here*, in combination with pole cameras or on their own, could raise Fourth Amendment concerns is simply not a question presented on this record, and appellants'—and amici's[10]—arguments on these grounds need not and should not be reached here.

In sum, pole cameras are entirely dissimilar from location-tracking technologies with respect to the elements critical to the reasonable expectation of

[10] *See* Brief Amicus Curiae Of The American Civil Liberties Union, The American Civil Liberties Union Of Massachusetts, Inc., The Electronic Frontier Foundation, And The Center For Democracy And Technology (Dkt. No. 17), at 31-34 (describing "a camera small enough to be affixed to a drone, which can identify a face from 1,000 feet and read serial numbers from 100 feet"; cameras that "zoom in and read text messages off a phone"; and a camera "that could see any object a centimeter-and-a-half wide from 150 meters"). None of these technologies are at issue in this case, where the parties' stipulations make clear that the cameras were in a fixed location and had no better viewing capability than the average person walking by.

privacy analysis in *Carpenter*, *Almonor*, *Augustine*, and other relevant precedent. That precedent, therefore, does not require reversal here.

D. Appellants Had No Reasonable Expectation of Privacy in Video Footage Captured by Pole Cameras in This Case.

A person has a reasonable expectation of privacy only if (1) he or she "'manifested a subjective expectation of privacy in the object of the search,'" and (2) "'society is willing to recognize that expectation as reasonable.'" *Almonor*, 482 Mass. at 40 (quoting *Augustine*, 462 Mass. at 242); *see also Carpenter*, 138 S.Ct. at 2213. The defendant bears the burden of establishing both elements. *Almonor*, 482 Mass. at 40. Appellants cannot establish either element here.

First, appellants did not manifest a subjective expectation of privacy in their conduct captured by pole cameras. Under the subjective prong, the "relevant question is whether [appellants were] 'seek[ing] to preserve as private' the evidence at issue." *United States v. Rheault*, 561 F.3d 55, 59 (1st Cir. 2009) (finding subjective prong satisfied where defendant demonstrated "an intent to hide" a gun and drugs by placing them inside a washing machine); *see also United States v. Walton*, 763 F.3d 655, 658 (7th Cir. 2014) (subjective prong "looks 'to the individual['s] affirmative steps to conceal and keep private whatever item was the subject of the search.'"). Here, appellants did not demonstrate any intent to preserve their conduct as private. The telephone poles on which the cameras were installed are located on densely populated residential streets, and appellants have

not erected fences or other obstructions that could prevent prying eyes. *See* App. 88-101. When appellants walked outside, they did so with full knowledge that they might be viewed by the public, yet they made no attempt to hide their activities. *See Tuggle*, 2019 WL 3631881, at *3 (where defendant's residence "was located in a populated residential area and had no fence, wall, or other object that would obstruct the view of a passerby," the "lack of any attempt to obscure [defendant's] driveway or residence from public view weighs against a finding" of a subjective expectation of privacy). Appellants therefore cannot establish a subjective expectation of privacy.[11]

Second, any expectation of privacy would have been objectively unreasonable. Under the objective prong of the expectation-of-privacy test, this Court considers "'various factors,' including the 'nature of the intrusion,'" "whether the public had access to, or might be expected to be in, the area from which the surveillance was undertaken; the character of the area (or object) that was the subject of the surveillance; and whether the defendant has taken normal precautions to protect his or her privacy." *Almonor*, 482 Mass. at 42-43 & n.10.

[11] In *Moore-Bush*, the court found that the defendant's choice to live in a "quiet residential neighborhood in a house obstructed by a large tree" suggested a subjective expectation of privacy. 381 F. Supp. 3d at 143, 144. Whether or not such an inference was justified in that case, the facts here do not support any similar inference; there is no evidence at all that appellants wished or attempted to conceal their conduct from public view.

The inquiry is "'highly dependent on the particular facts and circumstances of the case.'" *Id.* at 42 n.10 (citing *One 1985 Ford Thunderbird Automobile*, 416 Mass. at 607).

As described above, the pole cameras here were installed in public locations and recorded only discrete areas that were visible to the public from the street. They recorded only conduct that could be viewed by the public in those discrete areas. Appellants did not take "normal precautions"—in fact, they took no precautions at all—to protect their privacy. An expectation of privacy in this entirely public setting is not one that "'society is willing to recognize . . . as reasonable.'" *Almonor*, 482 Mass. at 40 (citation omitted).[12]

Appellants mistakenly rely on *Katz*, arguing that, just like the petitioner in that case, appellants had a reasonable expectation of privacy. Appellants' Br. 22-25. But a person who walks into a telephone booth and closes the door, as in *Katz*, has taken steps to avoid being overheard, and government wiretapping in that case therefore "violated the privacy upon which [the petitioner] justifiably relied." 389

[12] That Massachusetts' wiretap statute bans secret *audio* recording but does not implicate non-audio videotaping, *see* Mass. Gen. Laws ch. 272, § 99, further undermines appellants' claimed expectation of privacy as one that society recognizes as reasonable. *Cf. One 1985 Ford Thunderbird Automobile*, 416 Mass. at 609 (legality of police conduct, while not "conclusive," is "nonetheless a consideration in determining whether an individual's expectation of privacy is objectively reasonable").

U.S. at 353. Appellants, by contrast, knew they were in full view of anyone who happened to walk by, and took no analogous steps to preserve their privacy. *Katz* is therefore inapposite here. As the *Katz* Court made clear, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." 389 U.S. at 351.[13] Appellants had no reasonable expectation of privacy in this case.[14]

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[13] Indeed, given the ubiquity of video cameras in public spaces today, it could be argued that assuming one is never being filmed in public is not reasonable. *Cf., e.g.*, *Mazzara*, 2017 WL 4862793, at *11 ("The reality is that society has come to accept a significant level of video surveillance. . . . It is simply unreasonable for any person to believe that their public conduct, as it might be and often is recorded by . . . security cameras, nonetheless should remain private from observation."); *United States v. Stefanyuk*, No. 4:17-CR-40042-KES, 2018 WL 3235569, at *7 (D.S.D. June 15, 2018) ("The idea that you can step outside your door and not be filmed by someone or another is no longer an unassailable assumption."), *report and recommendation adopted*, No. 4:17-CR-40042-KES, 2018 WL 3222556 (D.S.D. July 2, 2018), *aff'd*, 944 F.3d 761 (8th Cir. 2019).

[14] Appellant Guerrero's home was not the subject of any pole camera surveillance in this case; his claim presumably is based only on the fact that he occasionally appeared in pole camera footage installed at the residence of others. *See* App. 102-03. That makes Guerrero's claim even more tenuous than that of the other appellants here, as Justice Feeley concluded. *See* App. 113-14. There was simply no reason for Guerrero to expect privacy in publicly-visible locations in front of the residences of *other people*. *See, e.g.*, *United States v. Cruz*, No. CR1800827001PHXDGC, 2019 WL 5268881, at *3 (D. Ariz. Oct. 17, 2019) (unreported) (defendant could not claim reasonable expectation of privacy where pole camera was focused on co-defendant's home, rather than on property owned or occupied by defendant).

III. AFFIRMANCE IS WARRANTED IN ANY EVENT BECAUSE POLICE ACTED IN GOOD FAITH.

If this Court holds that police should have obtained a warrant to install the pole cameras, it should nonetheless affirm because the police reasonably believed, based on the state of the law at the time, that their actions were lawful.

Application of the exclusionary rule would be inappropriate in this context. "The primary purpose of the exclusionary rule is to deter future police misconduct . . . ." *Commonwealth v. Santiago*, 470 Mass. 574, 578 (2015). Another purpose is to "preserve judicial integrity by dissociating courts from unlawful conduct." *Commonwealth v. Nelson*, 460 Mass. 564, 571 (2011). "Where those purposes are not furthered, rigid adherence to a rule of exclusion can only frustrate the public interest in the admission of evidence of criminal activity." *Commonwealth v. Brown*, 456 Mass. 708, 715 (2010) (declining to apply exclusionary rule where it "would plainly frustrate the public interest disproportionately to any incremental protection it might afford"); *Commonwealth v. Wilkerson*, 436 Mass. 137, 142 (2002) (citing *United States v. Janis*, 428 U.S. 433, 454 (1976), for the proposition that "where 'the exclusionary rule does not result in appreciable deterrence, then,

clearly, its use . . . is unwarranted'") (alteration in original); *Nelson*, 460 Mass. at 571.[15]

That principle should result in affirmance here. As described above, none of the decisions of this Court or of the Supreme Court bar warrantless installation of pole cameras, and the vast majority of courts to directly address the issue—including the First Circuit—have upheld such installation under the Fourth Amendment.[16] The police acted in good faith based on this precedent, and there is no evidence of police misconduct or any other unlawful behavior. *Cf. United States v. Curtis*, 901 F.3d 846, 849 (7th Cir. 2018) ("even though it is now established that the Fourth Amendment requires a warrant for the type of cell-phone data present here, exclusion of that information was not required because it was collected in good faith"). Since suppression of the pole camera evidence here

[15] *See also Commonwealth v. Fredericq*, 482 Mass. 70, 91-92 (2019) (Cypher, J., concurring in part and dissenting in part) (stating view that "it is time [that the Court] adopt the good faith exception to the exclusionary rule in circumstances . . . where the police had an objectively reasonable good faith belief that their conduct was lawful . . . ."); *id.* at 85-86 (Lowy, J., in concurrence, recognizing "the potential benefits to adopting a good faith exception to the exclusionary rule").

[16] The issue is again pending before the First Circuit in an appeal from the district judge's decision in *Moore-Bush* declining to follow the First Circuit's *Bucci* precedent. *See United States v. Moore-Bush*, Docket Nos. 19-1582, 19-1583, 19-1625, 19-1626.

would promote neither of the central purposes of the exclusionary rule, the decision below should be affirmed.[17]

CONCLUSION

For the foregoing reasons, the Court should affirm the denial of appellants' motion to suppress.

Respectfully submitted,

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[17] If the Court holds that installation of a pole camera requires a warrant, that holding should be considered a new rule that does not apply retroactively, because the result is not dictated by existing precedent, as described in this brief, and because neither of the two narrow *Teague* exceptions apply. *See Augustine*, 467 Mass. at 256-57.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with all rules of court that pertain to the filing of briefs, including, but not limited to, Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it is in 14-point Times New Roman font and the number of non-excluded words in the brief is 9762.

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2020, I caused true and accurate copies of this brief to be served via e-mail upon the individuals listed below.

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ADDENDUM

RELEVANT CONSTITUTIONAL PROVISIONS

APPEALED JUDGMENT

UNPUBLISHED DECISIONS

Relevant Constitutional Provisions

Massachusetts Declaration of Rights, Article XIV

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Fourth Amendment to the United States Constitution

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.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2018-00540
2018-00542
2018-00543
2018-00544
2018-00592
2018-00593
2018-00594

COMMONWEALTH

vs.

NELSON MORA, ET AL.,

MEMORANDUM AND DECISION ON DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE DERIVED FROM POLE CAMERAS

PROCEDURAL AND FACTUAL BACKGROUND

Defendant Nelson Mora ("Mora") is alleged in this case to be an organizer/leader of a large-scale illegal drug distribution operation based in Essex County. It is alleged that Mora was engaged in the illegal distribution of oxycodone, fentanyl, and cocaine. Defendants Gregory Inuyama ("Inuyama"), Frantz Adolphe ("Adolphe"), Randy Suarez, and Aggeliki Iliopoulos ("Iliopoulos") are alleged to have been associated with Mora and involved to varying degrees in his drug distribution operation. Four other alleged participants have already pled guilty to

various drug offenses. [2018-00545, 00546, 00547, and 00548]. Defendant Erick Delrosario ("Delrosario") is alleged to have been an oxycodone supplier for Mora. Lymbel Guerrero ("Guerrero") and Richard Grullon-Santos ("Grullon-Santos") are alleged to have been fentanyl suppliers for Mora.

This case arose out of a long-term investigation by the Office of the Attorney General of the Commonwealth of Massachusetts. The investigation spanned approximately seven months. State police investigators were assisted by investigators from DEA, Lynn Drug Task Force, and Beverly Police Department. In November 2017, the investigation was initiated with the assistance of a confidential informant ("CI") who identified Mora as a large-scale drug distributor. At the time the CI did not know Mora's true name or residential address, but was willing to introduce an undercover officer ("UCO") for purposes of arranging controlled buys from Mora. Over time, the UCO made ten controlled buys of oxycodone and fentanyl from Mora.

On March 19, 2018, the court (Feeley, J.) issued the first of a series of wiretap warrants for a cell phone identified as used by Mora.[1] The intercepted calls assisted investigators in identifying associates/customers of Mora and their cell phone numbers. Continued warrants to intercept communications on the Mora phone, as

[1]All warrants in this case were authorized and issued by the undersigned associate justice. This court (Feeley, J.) has not and will not adjudicate challenges to the validity of the various warrants in this case.

well as new intercept warrants for phones associated with Delrosario and Guerrero, were soon issued by the court, with continued authorization through the middle of May 2018.[2] Telephone ("ping") and GPS warrants were also issued by the court during the active part of the investigation. On May 21, 2018, in conjunction with the arrests of defendants, the court issued search warrants for eight or nine different locations. Those locations included the residences of Mora, Adolphe, Inuyama, Grullon-Santos, Suarez, Guerrero, and Iliopoulos. Thirteen individuals were arrested. Execution of the various residential search warrants yielded almost 2,400 pills, more than a kilogram of heroin/fentanyl, seventy-five (75) grams of cocaine, and approximately $415,000 in U.S. currency.

Before (and after) the issuance of the initial wiretap warrant, investigators installed "pole cameras" on various telephone/electrical poles in public locations near but not on the property of a number of defendants. The purpose was to conduct surveillance of residences, or in one instance a street that the investigation had disclosed was associated with one of more of the defendants and their unlawful activities. The pole cameras were installed without notice to any defendant, without trespassing on any defendants' property, and without prior judicial authorization by

[2]Defendants' motions to suppress wiretap evidence were denied by the court (Lang, J.) on August 9, 2019.

means of a search warrant. The following stipulations were filed with the court:

2. The pole cameras were installed in fixed locations in the area of the following addresses:

   a. 68 Hillside Avenue, Lynn, MA, which is the residence of defendant Nelson Mora. The Hillside Avenue camera afforded a view of a portion of the front of the house, as well as the street on which the house is situated and the sidewalk that run in front of it. The pole camera footage for this location runs from December 6, 2017 at 11:43 a.m. through May 23, 2018, at 3:19 p.m. Mora was regularly seen on the footage from the Hillside Avenue camera. On a few occasions, defendants Inuyama, Adolphe, Guerrero, and Suarez and /or vehicles investigators knew to be operated by them were also seen on the footage from this location.

   b. 8-10 Swampscott Avenue, Peabody, Ma, which is the residence of defendant Randy Suarez. The Swampscott Avenue camera afforded a view of the front of the residence, as well as a driveway in front of the house (partially obscured by a neighboring Dunkin' Donuts), part of a second driveway on the side of the house, and the street on which the house is situated. The pole camera footage for this location runs from March 23, 2018 at 12 p.m. thorough May 23, 2018 at 3:19. Suarez was

regularly seen on the footage from the Swampscott Avenue camera. On a few occasions, Guerrero was also seen on the footage from this location.

c. Shepard Street, Lynn, MA. Defendant Frantz Adolphe resides at 9 Shepard Street, though the Shepard Street camera was not focused on his residence or any other particular residence.[3] The camera afforded a view down the length of Shepard Street, which included a partial view of the top of the driveway to Adolphe's residence. The pole camera footage for this location runs from April 4, 2018 at 8:48 a.m. through May 23, 2018 at 3:20 p.m.. Mora and Adolphe were regularly seen on the footage from the Shepard Street camera. On at least one occasion, defendant Grullon-Santos was seen on the footage from this location.

d. 7 Ruthven Terrace, Lynn, MA, which is the residence of defendant Richard Grullon-Santos. The Ruthven Terrace camera afforded a partial view of the front of the house, which was largely obscured by a tree in a neighboring yard. The pole camera footage for this location runs from May 18, 2018 at 8:13 a.m. through May 23, 2018 at 3:20 p.m. On at

[3]Information from the CI at the beginning of the investigation included a report that Mora (identity then unknown) would use different meet locations in Lynn to conduct his business, but used Shepard Street in Lynn as one of his primary meet locations.

least one occasion, Grullon-Santos was seen on the footage from the Ruthven Terrace camera.

e. 9 South Elm Street, Lynn, MA, which is the residence of Carlos Perez. Perez is not a charged defendant in this case.. The pole camera footage for this location funs from may 9, 2018 at 7:35 a.m. through May 23, 2018 at 3:20 p.m.

3. Each of the cameras captured video but not audio.

4. While the cameras were operating, investigators could remotely view the video from a web-based browser in real time, as well as search and review previously recorded footage.

5. The cameras had zoom and angle movement capabilities, which could be operated remotely by investigators (in real time only). In some instances, the zoom function enabled investigators to read the license plate on a car. None of the pole cameras enabled investigators to see inside any residence. The cameras captured only publicly viewable areas and activity.

6. The cameras did not have any infrared or enhanced night vision capabilities.

7. All cameras recorded without limitation persons coming and going from the above-listed locations.

8. While the investigation was ongoing, the data from each pole camera was

stored on a State Police server. After the cameras were turned off, the data was removed from the server and transferred onto hard drives for storage.

DISCUSSION

1. The Other Defendants

In total, five pole cameras were used, but only three cameras covered the fronts of residences occupied by named defendants. Those three defendants are Mora, Suarez, and Grullon-Santos. Mora and Suarez (and Guerrero) filed motions to suppress.[4] The remaining defendants were permitted by the court to join in those motions. However, the remaining defendants (including Guerrero) are in a different position than those defendants whose residences were subject to continuous pole camera coverage periods ranging from six days to five and one-half months. The camera outside Mora's residence was in place for five and one-half months. The camera outside Suarez's residence was in place for two months. The camera outside Grullon-Santos' residence was in place for six days. The camera on Shepard Street, which focused on the street and only covered the very top of Adolphe's driveway, was in place for one month and three weeks.

The defendants other than Mora, Suarez, and Grullon-Santos (the "other

[4]The motions seek to exclude pole camera evidence at trial. They also seek to excise any pole camera references, or evidence derived therefrom, from search warrant affidavits and to thereafter challenge the warrants as lacking probable cause.

defendants"), concede that they stand on a different footing than Mora, Suarez, and Grullon-Santos, as their residences were never subject to continuous pole camera surveillance. The invasion of their privacy, and their expectation of privacy for those occasions when they were depicted on pole camera footage, was in this court's view, de minimus.[5] Even if an occasional depiction on one of the residential pole cameras at one of the covered residences, or in the middle of Shepard Street, is sufficient to establish standing to contest the constitutionality of the pole cameras, an occasional depiction on pole camera footage at another's residence or street is a far cry from continuous video surveillance coverage of one's residence. The arguments advanced by Mora, Suarez, and Grullon-Santos focus primarily on the continuous and lengthy video surveillance of their residences and the information about the residents' lives that may be reflected on the pole camera footage. The arguments advanced by Mora, Suarez, and Grullon-Santos also gain strength, as opposed to the other defendants, because the pole cameras focused on their homes, and homes are a protection at the heart of the fourth amendment and art.14.[6] The other defendants do not have the

[5]In fact, two defendants joining in the suppression motions, Delrosario and Iliopoulos, are not depicted on any pole camera footage. Constitutional rights are personal, and Delrosario's and Iliopoulos' motions to suppress pole camera evidence are denied for lack of standing.

[6]The fourth amendment provides in part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Art. 14 of the Declaration of Rights provides in part, "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his

same invasion of privacy and expectation of privacy arguments as are advanced by Mora, Suarez, and Grullon-Santos. An occasional depiction in footage from pole cameras focused on residences of others (or a public street) does not provide a basis to raise the search issued raised by Mora, Suarez, and Grullon-Santos, who can at least argue that their subjective and objective expectations of privacy were infringed by the continuous, long-term pole camera surveillance of the front's of their residences. The motions to suppress filed or joined in by the other defendants will be denied without further discussion.

2. *United States v. Moore-Bush*, 381 F. Supp. 3d 139 (D. Mass. 2019)

On June 4, 2019, the Honorable William G. Young of the United States District Court for the District of Massachusetts issued his amended decision in *United States* v. *Moore-Bush*, 381 F. Supp. 3d 139 (D. Mass. 2019) ("*Moore-Bush*"). It was *Moore-Bush* that prompted the defendants' challenges to the use of fixed, long-term surveillance pole cameras in this case.[7] Prior to *Moore-Bush*, federal case law had pretty much uniformly rejected challenges to pole camera surveillance of residences

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possessions."

[7]The motions to suppress pole camera footage were all filed after *Moore-Bush*, and all referenced the recent decision from the United States District Court for the District of Massachusetts. Prior to *Moore-Bush*, defendants had challenged the wiretap warrants issued in this case, but had not challenged the use of surveillance pole cameras. Thus, it is helpful to start this court's analysis with *Moore-Bush*, a non-binding decision with which this court disagrees.

for lack of a objectively reasonable expectation of privacy. [See multiple case cites in Commonwealth's opposition memorandum, D. 25]. Rejecting First Circuit precedent in light of subsequent Supreme Court precedent undermining it, the *Moore-Bush* court considered the pole camera issue before it as a matter of first impression. *Id.* at 144.

The facts in *Moore-Bush* are remarkably similar to those before this court in that a long-term fixed surveillance pole camera was focused on a defendants' driveway and part of the front of her house for eight months. The camera captured video, but not audio. The camera could zoom and angle to read license plates but could not peer inside windows. The camera recorded and produced a digitized searchable database. Over the government's objection and arguments, *Moore-Bush* found the long-term pole camera surveillance of the defendant's house and property to be a warrantless search, implicating the Fourth Amendment of the United States Constitution. *Id.* at 143. The exclusionary rule was applied because no exceptions to the warrant requirement were present, or argued to be present.

Moore-Bush recognized that the First Circuit previously approved the use of a pole camera in *United States* v. *Bucci*, 582 F. 3d 108, 116-117 (1st Cir. 2009), which reasoned that the legal principle that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public" disposed of the matter. *Id.* at

144, quoting *Bucci*, 582 F.3d at 116-117. The *Moore-Bush* court felt free to decide the pole camera issue differently based on a change in federal law it derived from *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2006 (2018).[8] *Moore-Bush* read *Carpenter* "to cabin" – if not repudiate – that principle (from *Bucci*) with the following: "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'"[9] *Id.* at 144, quoting *Carpenter*, 138 S. Ct. at 2217, quoting *Katz* v. *United States*, 389 U.S. 347, 351-351 (1967). Although *Moore-Bush* acknowledged that *Carpenter* does not discuss pole cameras, it found that *Carpenter's* logic contradicted the First Circuit's holding in *Bucci* regarding a lack of an objectively reasonable expectation of privacy. *Moore-Bush* found both a subjective expectation of privacy in their and their guests' comings and goings from their house and an objectively reasonable expectation of privacy in their and their guests' activities around the front of the

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[8]Defendants in *Moore-Bush* argued that the *Bucci* holding was limited to the camera used at that time, which had fewer capabilities than the more modern pole camera at issue in their case. *Moore-Bush* rejected their argument, and instead distinguished the *Bucci* holding by finding that *Carpenter* changed the law and required a different result.

[9]This court has no problem with the general statement in *Carpenter*, but it means little if anything outside the context of CSLI. Just as what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected, it also **may not** be constitutionally protected. *Carpenter* found CSLI to be constitutionally protected. It did not find pole camera surveillance focused on the front of a residence to be constitutionally protected.

house for a continuous eight-month period.

3. Analysis

As an initial matter, there is no dispute as to the constitutional protection sought by defendants. It falls under the expectation of privacy prong of federal fourth amendment constitutional jurisprudence. See *Katz*, 389 U.S. at 351. "When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.'" *Carpenter*, 138 S. Ct. at 2213, quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotation marks and alterations omitted). See *Commonwealth* v. *Augustine*, 467 Mass. 230, 241-242 (2014), citing *Commonwealth v. Montanez*, 410 Mass. 290, 301 (1991) (same reasonable expectation of privacy standard under art. 14). However, "[t]he Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady* v. *North Carolina*, 135 S. Ct. 1368 (2015), citing e.g., *Samson* v. *California*, 547 U.S. 843 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes was

reasonable).

Although defendants rely on *Carpenter* and *Moore-Bush*, they also rely on a series of Supreme Judicial Court cases that deal with fourth amendment and art. 14 jurisprudence and constrained law enforcement's use of developing and evolving areas of surveillance technology. See e.g. *Commonwealth v. Connolly*, 454 Mass. 808 (2009) (GPS tracking device placed on automobile); *Commonwealth* v. *Rousseau*, 465 Mass. 372 (2013) (GPS tracking devise placed on automobile, passenger standing); *Commonwealth* v. *Augustine*, 467 Mass. 230 (2014) (CSLI); *Commonwealth* v. *Feliz*, 481 Mass. 689 (2019) (personal GPS devise as an automatic condition of probation in sex offender cases); *Commonwealth* v. *Johnson*, 481 Mass. 710 (2019) (personal GPS devise as a condition of probation in a non-sex offender case); *Commonwealth* v. *Almonor*, 482 Mass. 35 (2019) (cell phone providing police with real-time location of phone (i.e. "pinging"), and in essence, the real time location of its user); and *Commonwealth* v. *Fredericq*, 482 Mass. 70 (2019) (police real time tracking of a cellular telephone through which police obtained CSLI).

Carpenter itself involved law enforcement, without a warrant, obtaining historical CSLI records over a period of 127 days, specifically obtaining an average of 101 data points a day, that allegedly showed that defendant's phone was near four robbery locations at the time the robberies occurred. *Carpenter*, 138 S. Ct. at 2212-

2213. Defendants argue that based on *Carpenter*, *Moore-Bush*, and the above cited Supreme Judicial Court cases, among other cases, a trend has been established to extend constitutional protections against law enforcement surveillance techniques that have evolved through advancements in technology. The court does not disagree that recent jurisprudence shows such a trend. However, with the exception of *Moore-Bush*, the trend is limited to surveillance techniques that track a person's movements or location and is limited surveillance by or through cell phones (i.e. CSLI) and/or GPS devises. See *Carpenter*, 138 S. Ct. at 2216, 2219 (CSLI tracking partakes of many of the qualities of GPS monitoring – it is detailed, encyclopedic, and effortlessly compiled – accuracy of CSLI is rapidly approaching GPS-level precision); *United States* v. *Jones*, 565 U. S. 400, 430 (2012) (opinion of Alito, J.) (GPS monitoring of a vehicle tracks every movement a person makes in that vehicle); *Carpenter*, 138 S. Ct. at 2217 (CSLI over 127 days provides an all-encompassing record of the holder's whereabouts).

Other than *Moore-Bush*, which deviated from prior well-established federal law regarding pole cameras, no other "trend-establishing" cases cited by defendants involved use of pole cameras. The trend is not so much a function of any new technology, as it is a trend toward protecting against the use of new technology that tracks or is capable of tracking persons' movements and locations on a continuous

basis in and through public and non-public areas. There is a uniqueness that cell phones (i.e. CSLI) and GPS devises have brought to the forefront of law enforcement surveillance efforts that is lacking in pole camera surveillance. See *e.g.*, *Carpenter*, 138 S. Ct. at 2217 (noting unique nature of CSLI records) .

Carpenter begins by noting that there are 396 million cell phone service accounts in the United States, a nation of 326 million people. *Carpenter*, 138 S. Ct. at 2211. In *Carpenter*, the case involved "the Government's acquisition of wireless carrier cell-site records revealing the location of Carpenter's cell phone whenever it made or received calls." *Id.* at 2215. The Court acknowledged: "This sort of digital data — personal location information maintained by a third party — does not fit neatly under existing precedents."[10] *Id.* *Carpenter* required the Court "to confront a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals." *Id.* at 2216. Cell phones -- nearly a "feature of human anatomy" – tracks nearly exactly the movements of its owner. *Id.* at 2218, quoting *Riley*, 134 S. Ct. at 2484. "[T]his **newfound tracking capacity** runs against

[10]The uniqueness of cell phones in light of technological advancements was earlier recognized in a fourth amendment "search incident" case, *Riley* v. *California*, 573 U.S. ___, ___, 134 S. Ct. 2473, 2484 (2014). A "cell phone search would typically expose to the government far more than the most exhaustive search of a house." *Id.* at 2491. As the *Carpenter* Court later explained: "while the general rule allowing warrantless searches incident to arrest 'strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to' the vast store of sensitive information on a cell phone." *Carpenter*, 138 S. Ct. at 2214.

everyone." *Id.* at 2218 (emphasis added).

This court disagrees with defendants and *Moore-Bush*. *Carpenter* and other CSLI and/or GPS cases have not established a trend outside their subject matters of CSLI or GPS monitoring. It is only those two (although in the future there may be more) technological surveillance advancements that accurately and precisely track persons' movements and locations in areas accessible to and inaccessible to the public. This court concludes that *Carpenter, supra*, did not change the well-established case law rejecting challenges to pole camera surveillance based on the legal principle that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public." *Bucci*, 582 F.3d at 116-117. *Carpenter* specifically did not call into question "conventional surveillance techniques and tools, such as security cameras." *Carpenter*, 138 S. Ct. at 2220.[11]

Fixed, even long-term pole camera surveillance covers a discrete area. Zoom ability does not expand the video coverage area. It is unclear if angling abilities

[11] *Moore-Bush* focuses on the Supreme Court's use of the term "security camera[]" and concludes that the Court was referencing private security cameras. This court focuses on the words "conventional surveillance techniques" and concludes that the Court was referencing law enforcement surveillance tools, such as pole cameras. Private security cameras (residential or commercial) and non-law enforcement government (e.g., cities, schools, public buildings, parks, etc.) installed video cameras are not conventional law enforcement surveillance techniques. Pole cameras are a long-standing conventional surveillance technique.

expand the video coverage area, but if it does, it does so in a de minimus manner.[12] The pole camera does not move from its fixed location. It does not track every movement and every location a person makes during the course of any given day. Pole cameras were installed in public locations and record only areas and activity that were exposed to the public. Footage depict times when an occupant of a covered residence leaves and returns to the residence. It depicts guests who might occasionally stop by the residence, or leave or return to the residence of the subject. It may identify a limited number of associates/friends, but associations not depicted at the front of the residence are unknown to law enforcement. The information obtained from pole cameras as to a subject's associations, lawful or unlawful, is far less complete than associational information obtained from call detail records of a subject's cell phone that can be obtained without a warrant. Pole camera surveillance does not follow its subjects into private residences, doctor's offices, hospitals, political headquarters, houses of worship, known drug houses, locations of unlawful drug activity or residences of known drug dealers, methadone clinics, brothels, locations of sexual liaisons, firearms businesses, and other potentially revealing locales.

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[12]Even *Moore-Bush* rejected the argument that new technological advancements to pole camera justified disregarding First Circuit law as announced in *Bucci, supra.*

ORDER

Defendants' motions to suppress, filed or joined in, are **DENIED** for reasons discussed above, as well as for the reasons advanced in the Commonwealth's opposition memorandum.

Timothy Q. Feeley
Associate Justice of the Superior Court

November 4, 2019

2019 WL 6333762

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. A PETITION FOR REHEARING IN THE COURT OF APPEALS OR A PETITION FOR CERTIORARI IN THE SUPREME COURT MAY BE PENDING.

Colorado Court of Appeals, Division II.

The PEOPLE of the State of Colorado, Plaintiff-Appellee,

v.

Rafael Phillip TAFOYA, Defendant-Appellant.

Court of Appeals No. 17CA1243

|

Announced November 27, 2019

Synopsis

Background: Following denial of motion to suppress video surveillance of defendant's property from pole camera, defendant was convicted in the District Court, El Paso County, No. 15CR4102, Barbara L. Hughes, J., of possession with intent to distribute controlled substances and conspiracy to commit those offenses Defendant appealed.

Holdings: As matter of first impression, the Court of Appeals, Dailey, J., held that:

[1] three-month-long surveillance of curtilage of defendant's home through pole camera constituted search under Fourth Amendment, and

[2] trial court's error in not suppressing evidence recovered from search of defendant's property was not harmless.

Reversed and remanded.

West Headnotes (17)

[1] **Criminal Law** Review De Novo

Criminal Law Evidence wrongfully obtained

When reviewing a suppression order, Court of Appeals defers to the district court's factual findings as long as evidence supports them, but it reviews de novo the court's legal conclusions.

[2] **Searches and Seizures** Fourth Amendment and reasonableness in general

The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. U.S. Const. Amend. 4.

[3] **Searches and Seizures** Necessity of and preference for warrant, and exceptions in general

Warrantless searches are presumptively unreasonable. U.S. Const. Amend. 4.

[4] **Searches and Seizures** Necessity of and preference for warrant, and exceptions in general

A warrant is only required for police action that constitutes a search or seizure under the Fourth Amendment. U.S. Const. Amend. 4.

[5] **Searches and Seizures** Expectation of privacy

A search occurs when the government intrudes on an area where a person has a constitutionally protected reasonable expectation of privacy. U.S. Const. Amend. 4.

[6] **Searches and Seizures** Expectation of privacy

When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, official intrusion into that private sphere generally qualifies as a search under the Fourth Amendment, and requires a warrant supported by probable cause. U.S. Const. Amend. 4.

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[7] **Searches and Seizures** Persons, Places and Things Protected

When it comes to the Fourth Amendment, the home is first among equals. U.S. Const. Amend. 4.

[8] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

The curtilage of the home, the area immediately surrounding and associated with the home, is part of the home itself for Fourth Amendment purposes. U.S. Const. Amend. 4.

[9] **Searches and Seizures** Expectation of privacy

A person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public and such items are not subject to Fourth Amendment protection. U.S. Const. Amend. 4.

[10] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

The fact that a search occurs within the curtilage of a home is not dispositive if the area's public accessibility dispels any reasonable expectation of privacy. U.S. Const. Amend. 4.

[11] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

A police officer standing on a public sidewalk can see the curtilage of a home and that area under observation does not itself bar all police observation. U.S. Const. Amend. 4.

[12] **Searches and Seizures** Persons, Places and Things Protected

The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. U.S. Const. Amend. 4.

[13] **Searches and Seizures** Plain View from Lawful Vantage Point

Mere fact that individual has taken measures to restrict some views of his activities does not preclude police officer's observations from public vantage point where he has right to be and which renders activities clearly visible. U.S. Const. Amend. 4.

[14] **Searches and Seizures** Use of electronic devices; tracking devices or "beepers."

It would not be a search for a police officer to climb a utility pole and look over a privacy fence into a homeowner's backyard with equipment similar to the pole camera. U.S. Const. Amend. 4.

[15] **Telecommunications** Acts Constituting Interception or Disclosure

Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement, for purposes of Fourth Amendment searches. U.S. Const. Amend. 4.

[16] **Searches and Seizures** Use of electronic devices; tracking devices or "beepers."

Three-month-long surveillance of curtilage of defendant's home through pole camera constituted search under Fourth Amendment; pole camera continuously recorded video surveillance footage of defendant's property, detectives could watch video surveillance footage at police station, they reviewed already-recorded footage on regular basis, they sometimes watched live-streaming footage as things were occurring on defendant's property, from police station, detectives could pan camera left and right and up and down, and camera also had zoom feature. U.S. Const. Amend. 4.

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[17] **Criminal Law** Evidence wrongfully obtained

Trial court's error in not suppressing evidence recovered from search of defendant's property, which was conducted following three-month-long surveillance of curtilage of defendant's home through pole camera, was not harmless in prosecution for possession with intent to distribute controlled substances; fruits of police surveillance were critical to acquisition of warrant to search defendant's property, and evidence recovered from defendant's property was critical to prosecution's case. U.S. Const. Amend. 4.

El Paso County District Court No. 15CR4102, Honorable Barbara L. Hughes, Judge

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Opinion

Opinion by JUDGE DAILEY

***1** ¶1 Police, acting without a search warrant, installed a video camera near the top of a utility pole (the pole camera) to surveil the home of defendant, Rafael Phillip Tafoya. For more than three months, the elevated camera provided police with continuous, recorded video surveillance of the area surrounding Tafoya's home, including an area behind his privacy fence. Based on what police observed over that lengthy period, they obtained a search warrant, physically searched Tafoya's property, and found a large amount of controlled substances.

¶2 The issue in this case is whether the continuous, three-month-long use of the pole camera constituted a search under the Fourth Amendment to the United States Constitution. We conclude that it did.

¶3 Because the trial court concluded otherwise, we reverse Tafoya's two convictions for possession with intent to distribute a controlled substance and his two conspiracy convictions and remand for a new trial.

I. Background

¶4 A confidential informant told police about a possible drug "stash house" in Colorado Springs. Based on specific information provided by the informant, police identified Tafoya's home as the possible stash house.

¶5 Without applying for or obtaining a search warrant, police installed the pole camera near the top of a utility pole across the street from Tafoya's property. Because the utility pole was across the street, police did not have to enter Tafoya's property to install it.

¶6 The pole camera continuously recorded video surveillance footage of Tafoya's property for more than three months from May 16, 2015, to August 24, 2015. There is no indication that Tafoya knew his property was under surveillance. Detectives could watch the video surveillance footage at the police station. They reviewed already-recorded footage on a regular basis. They also sometimes watched live-streaming footage as things were occurring on Tafoya's property.

¶7 The pole camera had some useful technological capabilities. From the police station, the detectives could pan the camera left and right and up and down. The camera also had a zoom feature. With the live-streaming video surveillance, the zoom had buffering so, as explained at the suppression hearing, a detective could "see very close to things, faces, to be able to identify objects, things of that nature."

¶8 At Tafoya's property, a long driveway runs from the street, along the side of Tafoya's home, to a detached garage in the backyard. A chain-link fence at the front of the property separates it from the public sidewalk. Farther into the property, as the driveway begins running along the side of the home, is a wooden privacy fence, approximately six feet high and including a gate across the driveway. Behind the privacy fence is the remainder of the driveway, which is next to the residence and in front of the detached garage. The pole camera provided an elevated view of Tafoya's property, including the area of the driveway behind his privacy fence, which could not be seen from the public sidewalk or the street.

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***2** ¶9 On June 25, 2015 — when the pole camera had already been recording video surveillance footage for more than a month — police received a tip from an informant that a drug shipment would be delivered to Tafoya's house later that day. At the police station, a detective started watching live-streaming footage from the pole camera.

¶10 The detective saw a man named Gabriel Sanchez drive a car from the street up Tafoya's driveway. Tafoya opened the gate on the privacy fence. Sanchez drove the car past the privacy fence, and Tafoya closed the gate. From the elevated view of the pole camera, the parked car was partially visible over the privacy fence. With the camera zoomed in, the detective observed Tafoya bend down near the left front tire of the car. But because that view was blocked by the privacy fence, precisely what Tafoya was doing at the left front tire could not be seen. After many minutes of Tafoya bending down near the tire, the detective saw Tafoya and Sanchez carry two white plastic bags containing unknown items into the detached garage.

¶11 A pickup truck then drove from the street up Tafoya's driveway. Men got out of the truck and moved a spare tire from the truck into Tafoya's garage. Later, they moved the spare tire from the garage back to the truck and drove away. Police later stopped the truck and found $98,000 in the spare tire.

¶12 The police continued recording video surveillance footage of Tafoya's property for two more months. Then, on August 23, 2015, police received a tip from an informant that another drug shipment would arrive at Tafoya's property the next day. On August 24, a detective began viewing live-streaming footage of Tafoya's property, and ultimately observed similar activity. Sanchez drove the same car up Tafoya's driveway, Tafoya opened the gate, Sanchez drove the car past the privacy fence, and Tafoya closed the gate. Still, from the elevated view of the pole camera, the detective could see Tafoya again bend down near the left front tire of the car and then carry white plastic bags containing unknown items into the garage.

¶13 Police then obtained a search warrant and conducted a physical search of Tafoya's property. Inside the garage, they found two white garbage bags containing a total of approximately twenty pounds of methamphetamine and a half kilogram of cocaine.

¶14 The prosecution charged Tafoya with two counts of possession with intent to distribute controlled substances (methamphetamine and cocaine), and two counts of conspiracy to commit these offenses, and alleged that the crimes occurred during the date range of June 25, 2015, through August 24, 2015.

¶15 Tafoya filed a motion to suppress, arguing that the use of the pole camera constituted a warrantless search of his property in violation of the Fourth Amendment.

¶16 In the People's response, and at the suppression hearing, one of the People's arguments was that a person — hypothetically — could view the area of Tafoya's driveway behind the privacy fence from different vantage points. The People introduced photographs at the suppression hearing from those vantage points. For example, the privacy fence had very thin gaps between each of the wooden boards, so Tafoya's next-door neighbor hypothetically could have stood next to the privacy fence, peered through a thin gap, and seen what was occurring behind Tafoya's privacy fence on June 25, 2015, and August 24, 2015. Also, a two-story apartment building with an exterior stairway leading up to one of the second-story apartments abuts Tafoya's backyard. Again, hypothetically, the resident of that apartment, while standing at a particular spot on the stairway, could have seen what Tafoya was doing near the left front tire of the car on June 25, 2015, and August 24, 2015.

***3** ¶17 After considering evidence and argument presented at the suppression hearing, the trial court issued a written order denying the motion on the ground that Tafoya did not have a reasonable expectation of privacy in what was occurring behind his privacy fence because that area was exposed to the public, and therefore the use of the pole camera did not constitute a search under the Fourth Amendment. The court reasoned as follows:

- because the public could see into Tafoya's backyard from the apartment stairway behind Tafoya's home or from the top of the utility pole, "that ... enabled law enforcement agents to see the alleged illegal activities from being carried out in pursuance of [Tafoya's] alleged drug dealing operations"; [1]

- "[l]aw enforcement may use technology (including zoom, pan and tilt features of the pole camera) to 'augment[ ] the sensory faculties bestowed upon them at birth' without violating the Fourth [A]mendment" (quoting

United States v. Knotts, 460 U.S. 276, 282, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983));

- "the length of time" Tafoya's home "was placed under surveillance," and the impracticality of a utility worker perching on the pole during that time, did not convert the surveillance into a search because " 'it is only the possibility that a member of the public may observe activity from a public vantage point — not the actual practica[bi]lity of law enforcement[ ]' doing so without technology — that is relevant for Fourth Amendment purposes" (quoting *United States v. Houston*, 813 F.3d 282, 289 (6th Cir. 2016)); and

- the long-term surveillance here was not like the "GPS tracking prohibited by the United States Supreme Court in [*United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012),]" because "the privacy concerns implicated by a fixed point of surveillance are not so great as those implicated by GPS tracking" (quoting *Houston*, 813 F.3d at 290). [2]

1 The court noted that "[t]he fact that the pole cam[era] saw the activities from a different vantage point than the one that could be viewed by the public is no bar to the admissibility of the evidence."

2 "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *United States v. Jones*, 565 U.S. 400, 415, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (Sotomayor, J., concurring).

¶18 At trial, the jury found Tafoya guilty on all counts, and the trial court sentenced him to fifteen years in the custody of the Department of Corrections.

II. Did the Use of the Pole Camera Constitute a "Search"?

¶19 On appeal, Tafoya contends that the police violated the Fourth Amendment by using the pole camera to conduct a continuous, three-month-long surveillance of his backyard without first obtaining a search warrant. [3] We agree.

3 He also asserts that the police violated the state constitutional search and seizure provision, Colo. Const. art. II, § 7. Although Tafoya mentioned the state constitutional provision in his suppression motion, in the trial court he did not argue that it afforded him greater protections than the Fourth Amendment. Nor did the trial court base its ruling on state constitutional grounds. Under these circumstances, we limit our analysis to the federal constitutional issue. *See People v. Rodriguez*, 209 P.3d 1151, 1156 (Colo. App. 2008) ("Where, as here, a defendant does not make a specific objection, *with a separate argument*, under the state constitution, we must presume the defendant's objections are based on federal, not state, constitutional grounds, and limit our review accordingly.") (emphasis added), *aff'd*, 238 P.3d 1283 (Colo. 2010); *see also People v. Holmes*, 981 P.2d 168, 170 n.3 (Colo. 1999) ("In the absence of a statement indicating that the decision rests on state grounds, we will presume that the court relied on federal law." (quoting *People v. Hauseman*, 900 P.2d 74, 77 n.4 (Colo. 1995))).

A. Standard of Review

***4** **[1]** ¶20 When reviewing a suppression order, we defer to the district court's factual findings as long as evidence supports them, but we review de novo the court's legal conclusions. *People v. McKnight*, 2019 CO 36, ¶ 21, 446 P.3d 397.

B. First Things

[2] ¶21 The United States Constitution protects people from unreasonable governmental searches and seizures. *See* U.S. Const. amend. IV. The "basic purpose" of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 585 U.S. ——, ——, 138 S. Ct. 2206, 2213, 201 L.Ed.2d 507 (2018) (quoting *Camara v. Mun. Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)).

[3] **[4]** ¶22 "Warrantless searches are presumptively unreasonable[.]" *McKnight*, ¶ 22 (quoting *United States v. Karo*, 468 U.S. 705, 717, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984)). A warrant is only required, however, for police action that constitutes a "search" or "seizure" under the Fourth Amendment. *Henderson v. People*, 879 P.2d 383, 387 (Colo. 1994).

[5] **[6]** ¶23 "A search occurs when the government intrudes on an area where a person has a 'constitutionally protected reasonable expectation of privacy.' " *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)). The cases

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recognize two aspects to the expectation of privacy — one subjective and one objective. Said another way, "[w]hen an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' ... official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter*, 585 U.S. at ——, 138 S. Ct. at 2213 (quoting *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)).

[7] **[8]** ¶24 "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013); *see also McKnight*, ¶ 118 (Samour, J., dissenting) ("[T]he home is the most sacred of Fourth Amendment spaces ...."). The "curtilage" of the home — the area "immediately surrounding and associated with the home" — is also "part of the home itself for Fourth Amendment purposes." *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409 (quoting *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)); *see also People v. Tomaske*, 2019 CO 35, ¶ 9, 440 P.3d 444 (same). In the trial court, the People conceded, and the court found, that the area of Tafoya's driveway behind his privacy fence fell within the "curtilage" of his home.

[9] **[10]** ¶25 But a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public. *Katz*, 389 U.S. at 351, 88 S.Ct. 507. So "the fact that a search occurs within the curtilage [of a home] is not dispositive if the area's public accessibility dispels any reasonable expectation of privacy." *People v. Shorty*, 731 P.2d 679, 681 (Colo. 1987).

[11] **[12]** **[13]** ¶26 For example, if a police officer standing on a public sidewalk can see the curtilage of a home, the officer has not conducted a "search" under the Fourth Amendment. As the Supreme Court explained in *California v. Ciraolo*,

> [t]hat the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

***5** 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

¶27 Precedent makes clear that a police officer need not remain at ground level to conduct visual observations of the curtilage of a home. In *Ciraolo*, the Supreme Court, in a 5-4 decision, held that it was not a search where a police officer in an airplane at an altitude of 1,000 feet visually observed marijuana plants in a residential backyard enclosed by a privacy fence. *See id.* at 209-15, 106 S.Ct. 1809. And in *Florida v. Riley*, a plurality of the Supreme Court held that it was not a search where a police officer in a helicopter at an altitude of 400 feet observed marijuana plants in a nearly enclosed greenhouse in a residential backyard. *See* 488 U.S. 445, 448-55, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989); *see also Henderson*, 879 P.2d at 389-90 (same).

¶28 In *Ciraolo*, the Court explained that a homeowner cannot reasonably expect that activities in his or her enclosed backyard "will not be observed by a passing aircraft — or by a power company repair mechanic on a pole overlooking the yard." 476 U.S. at 214-15, 106 S.Ct. 1809. Thus, it would not be a "search" for a police officer to climb a utility pole and look over a privacy fence into a homeowner's backyard.

¶29 Nor, in our view, would it be a "search" for a police officer situated on a utility pole to look into a backyard with the aid of a camera with a zoom lens.

¶30 In support of this conclusion, we note that divisions of this court have held that a police officer's use of standard binoculars to look at a homeowner's property does not constitute a search. *See People v. Harris*, 2016 COA 159, ¶ 34 n.3, 405 P.3d 361 (concluding that it was not a search for officers to use binoculars to look at the defendant's pastures from a neighboring property); *People v. Oynes*, 920 P.2d 880, 882-83 (Colo. App. 1996) (concluding that it was not a search for a police officer to look into a window of a house with binoculars where there was no record evidence that the binoculars were "extraordinarily powerful").

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[14] ¶31 Our review of the surveillance video suggests that the magnification power of the zoom on the pole camera was similar to that of standard binoculars that any civilian can purchase. Thus, it would not be a search for a police officer to climb a utility pole and look over a privacy fence into a homeowner's backyard with equipment similar to the pole camera. *See Sundheim v. Bd. of Cty. Comm'rs*, 904 P.2d 1337, 1351 (Colo. App. 1995) (concluding that "the use of a camera with a telescopic lens" did not transform a lawful observation into an unreasonable search), *aff'd*, 926 P.2d 545 (Colo. 1996).

¶32 But of course, this case did not involve a police officer physically climbing to the top of a utility pole and looking over Tafoya's privacy fence with a standard pair of binoculars or with a telescopic camera. It involved the installation of a video camera that allowed police to conduct continuous visual surveillance — from the police station — of Tafoya's property — including the area behind his privacy fence — for more than three months.

C. Does the Continuity and Extended Duration of Video Surveillance Make a Difference to the "Search" Analysis?

***6** ¶33 Our research indicates that many of the courts to address the issue have concluded that continuous, long-term video surveillance of a private home via a non-trespassory pole camera does not constitute a "search" under the Fourth Amendment. These courts' primary, underlying rationale is that a pole camera only captures events that a police officer or utility worker situated on the pole could see. Significantly, the nature, continuity, and extended duration of police observation from a pole camera are (explicitly or implicitly) considered irrelevant to their "search" analyses. *See Houston*, 813 F.3d at 287-90 (holding that ten-week-long pole camera surveillance was not a Fourth Amendment search, and noting that the police had the same view as "passersby on public roads"); *United States v. Bucci*, 582 F.3d 108, 116-17 (1st Cir. 2009) (same holding regarding eight months of pole camera surveillance of an unfenced property); *United States v. Jackson*, 213 F.3d 1269, 1279-81 (10th Cir. 2000) (same general holding), *cert. granted, judgment vacated, and case remanded on other grounds*, 531 U.S. 1033, 121 S.Ct. 621, 148 L.Ed.2d 531 (2000); *United States v. Kay*, No. 17-CR-16, 2018 WL 3995902, at *1-3 (E.D. Wis. Aug. 21, 2018) (unpublished opinion) (same holding regarding three months of pole camera surveillance); *United States v. Tuggle*, No. 16-cr-20070-JES-JEH, 2018 WL 3631881, at *3 (C.D. Ill. July 31, 2018) (unpublished opinion) (same holding regarding eighteen months of pole camera surveillance of an unfenced property); *United States v. Mazzara*, No. 16 Cr. 576, 2017 WL 4862793, at *8-12 (S.D.N.Y. Oct. 27, 2017) (unpublished opinion) (same holding regarding twenty-one months of pole camera surveillance); *United States v. Pratt*, No. 16-cr-20677-06, 2017 WL 2403570, at *4-5 (E.D. Mich. June 2, 2017) (unpublished opinion) (same holding regarding fourteen months of pole camera surveillance); *United States v. Brooks*, 911 F. Supp. 2d 836, 841-43 (D. Ariz. 2012) (same holding regarding five months of pole camera surveillance); *State v. Torres*, No. 2 CA-CR 2010-0283, 2011 WL 4825640, at *1-4 (Ariz. Ct. App. Oct. 12, 2011) (unpublished opinion) (same holding regarding three months of pole camera surveillance); *State v. Rigel*, 97 N.E.3d 825, 830-31 (Ohio Ct. App. 2017) (same holding regarding 138 days of pole camera surveillance).

¶34 We are not, however, bound by these decisions. *See People v. Dunlap*, 975 P.2d 723, 748 (Colo. 1999) (Colorado courts are "not bound by a federal circuit court's interpretation of federal constitutional requirements."); *Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union*, 2016 COA 72, ¶ 17, 382 P.3d 1249 (The Colorado Court of Appeals is "not bound by the decisions of the courts of other states.").

¶35 And unlike the cases noted above, we (like some other courts) consider the nature, the continuity, and particularly the duration of pole camera surveillance to be extremely relevant to the issue of whether police have engaged in a "search." *See United States v. Cuevas-Sanchez*, 821 F.2d 248, 250-51 (5th Cir. 1987) (holding that two-month-long pole camera surveillance of fenced-in backyard constituted a search); *United States v. Moore-Bush*, 381 F. Supp. 3d 139, 143-50 (D. Mass. 2019) (same holding regarding eight months of pole camera surveillance); *United States v. Vargas*, No. CR-13-6025, 2014 U.S. Dist. LEXIS 184672-EFS, at *13-37 (E.D. Wash. Dec. 15, 2014) (same holding regarding one month of pole camera surveillance of mostly enclosed front yard); *Shafer v. City of Boulder*, 896 F. Supp. 2d 915, 929-32 (D. Nev. 2012) (same holding regarding two months of pole camera surveillance of fenced backyard); *State v. Jones*, 903 N.W.2d 101, 106-14 (S.D. 2017) (same holding regarding two months of pole camera surveillance).

[15] ¶36 "[U]nfettered use of surveillance technology could fundamentally alter the relationship between our government and its citizens[.]" *Jones*, 903 N.W.2d at 112 (citation omitted). "Hidden video surveillance is one of the

most intrusive investigative mechanisms available to law enforcement." *United States v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000). "[A] camera monitoring all of a person's backyard activities ... provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state." *Cuevas-Sanchez*, 821 F.2d at 251. The question we consider is whether this sort of continuous video surveillance is " 'inconsistent with the aims of a free and open society.' " *People v. Oates*, 698 P.2d 811, 816 (Colo. 1985) (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 348, 403 (1974)).

***7** ¶37 Although *Jones*, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911, involved a different type of surveillance, it is instructive. There, police attached a GPS tracking device to the defendant's car and tracked his location for over four weeks. *See id.* at 402-03, 132 S.Ct. 945. The majority opinion held that the use of the GPS tracker constituted a search because of the physical trespass of attaching the tracker to the car. *See id.* at 402-13, 132 S.Ct. 945. However, in a concurring opinion, Justice Alito, joined by three other currently sitting justices, warned about the use of technology to monitor civilians' activities for long periods of time. *See id.* at 418-31, 132 S.Ct. 945. He wrote:

> In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. ... Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap. ... [T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.

Id. at 429-30, 132 S.Ct. 945 (Alito, J., concurring in the judgment).

¶38 In a separate concurring opinion, Justice Sotomayor "agree[d] with Justice Alito that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.' " *Id.* at 415, 132 S.Ct. 945 (Sotomayor, J., concurring) (quoting *id.* at 430, 132 S.Ct. 945 (Alito, J., concurring)); *see also id.* at 416, 132 S.Ct. 945 ("Awareness that the Government may be watching chills associational and expressive freedoms.").

¶39 In *Carpenter*, 585 U.S. ——, 138 S. Ct. 2206, 201 L.Ed.2d 507, the United States Supreme Court incorporated the *Jones* concurrences in the course of deciding that the government's acquisition of an individual's cell-site location information (CSLI) from wireless carriers was a "search" under the Fourth Amendment. The Court, quoting with approval Justice Alito's and Justice Sotomayor's *Jones* concurrences, said that " 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy' — regardless whether those movements were disclosed to the public at large." *Id.* at ——, 138 S. Ct. at 2215 (quoting *Jones*, 565 U.S. at 415, 132 S.Ct. 945 (Sotomayor, J., concurring); 430 (Alito, J., concurring in the judgment)). It continued that "[p]rior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so 'for any extended period of time was difficult and costly and therefore rarely undertaken.' " *Id.* at ——, 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 429, 132 S.Ct. 945 (Alito, J., concurring in the judgment)). Therefore, the *Carpenter* Court stated that under *Jones*, a search occurs when the government subjects a vehicle to "pervasive tracking" on public roads. *Id.* at ——, 138 S. Ct. at 2220 (citing *Jones*, 565 U.S. at 415, 132 S.Ct. 945 (Sotomayor, J., concurring), 430 (Alito, J, concurring in the judgment)).

¶40 The (or, at least, a) lesson from the *Jones* concurrences and *Carpenter* is that not all governmental conduct escapes being a "search" simply because a citizen's actions were otherwise observable by the public at large.

¶41 We acknowledge that, by its own terms, the Court's decision in *Carpenter* "is a narrow one" and does not "call into question conventional surveillance techniques and tools, such as security cameras." *Id.* at ——, 138 S. Ct. at 2220; *see also Mazzara*, 2017 WL 4862793, at *11 ("The reality is that society has come to accept a significant level of video surveillance. Security cameras are routinely installed in public parks, restaurants, stores, government buildings, schools, banks, gas stations, elevators, and all manner of public spaces. Additionally, security cameras are increasingly being installed on public streets, highways, and utility poles.").

***8** ¶42 A pole camera, however,

> is not a security camera by any stretch of the imagination. ... Law enforcement officers did not install the [p]ole [c]amera here to 'guard against ... crime,' but to investigate suspects. Indeed, the prototypical security camera exists to monitor a heavily trafficked area or commercial establishment. Security camera operators often install their cameras in plain view or with warning signs to deter wrongdoers. The Government hid the [p]ole [c]amera out of sight of its targets and does not suggest that it did so to prevent criminal activity.

Moore-Bush, 381 F. Supp. 3d at 145-46 (citation omitted).

¶43 Several lower federal court decisions upholding the warrantless use of pole cameras have distinguished *Jones* (and would presumably distinguish *Carpenter*) on the ground that GPS or CSLI tracking of a person's location is more invasive than video surveillance of a person's home. *See, e.g.*, *Houston*, 813 F.3d at 290; *Kay*, 2018 WL 3995902, at *3. We wholeheartedly disagree. Visual video surveillance spying on what a person is doing in the curtilage of his home behind a privacy fence for months at a time is at least as intrusive as tracking a person's location — a dot on a map — if not more so. See *United States v. Garcia-Gonzalez*, No. CR 14-10296-LTS, 2015 WL 5145537, at *8 (D. Mass. Sept. 1, 2015) (unpublished opinion) ("GPS data provides only the 'where' and 'how long' of a person's public movements insofar as the person remains close to the monitored vehicle. Long-term around-the-clock monitoring of a residence chronicles and informs the 'who, what, when, why, where from, and how long' of a person's activities and associations unfolding at the threshold adjoining one's private and public lives.").

¶44 As the concurring opinion in *Houston* noted, "in most cases, ten weeks of video surveillance of one's house could reveal considerable knowledge of one's comings and goings for professional and religious reasons, not to mention possible receptions of others for these and possibly political purposes." *Houston*, 813 F.3d at 296 (Rose, J., concurring).

¶45 Indeed, as the Supreme Court of South Dakota recently explained,

> [t]he information gathered through the use of targeted, long-term video surveillance will necessarily include a mosaic of intimate details of the person's private life and associations. At a minimum, it could reveal who enters and exits the home, the time of their arrival and departure, the license plates of their cars, the activities of the occupant's children and friends entering the home, information gleaned from items brought into the home revealing where the occupant shops, how garbage is removed, what service providers are contracted, etc.

Jones, 903 N.W.2d at 110; *see also Garcia-Gonzalez*, 2015 WL 5145537, at *5 ("The [pole camera] surveillance captured all types of intimate details of life centered on [the defendant's] home. The agents saw when he came and went. They saw his visitors. They saw with whom he traveled. They identified both his frequent and infrequent visitors. They identified the cars each of them drove. They saw how he dressed every day. They saw what he carried in and out of his home, even when he carried out his trash. They knew when he stayed home and when he did not.").

***9** ¶46 In *Jones*, the South Dakota Supreme Court continued,

> [t]he pole camera captured [the defendant's] activities outside his home twenty-four hours a day, sent the recording to a distant location, and allowed the officer to view it at any time and to replay moments in time. ... [T]his type of surveillance does not grow weary, or blink, or have family, friends, or other duties to draw its attention. Much like the tracking of public movements through GPS monitoring, long-term video surveillance of the home will generate "a wealth of detail about [the home occupant's] familial, political, professional, religious, and sexual associations." The recordings could be stored indefinitely and used at will by the State to prosecute a criminal case or investigate an occupant or a visitor.

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Id. at 112 (quoting *Jones*, 565 U.S. at 415, 132 S.Ct. 945 (Sotomayor, J., concurring)); *see also Moore-Bush*, 381 F. Supp. 3d at 149 ("[T]he Government can go back on a whim and determine a home occupant's routines with to-the-second specificity.").

[16] ¶47 We are unpersuaded by the People's arguments that the area of Tafoya's driveway behind his privacy fence hypothetically could be seen by a next-door neighbor peering through a small gap in the privacy fence or by the adjacent apartment dweller on a second-story private outdoor stairway (or, for that matter, by someone in a helicopter, or by someone looking through the camera on a drone).

¶48 This argument ignores the improbability that a neighbor would peer through a gap in a privacy fence or stand on his or her outdoor stairway for three months at a time. And helicopters and publicly available drones do not remain in flight for three months at a time. Crediting the People's argument would mean there is no temporal cap on how many months or years the police could have continued the video surveillance of Tafoya's property. As the United States Court of Appeals for the District of Columbia has explained in the context of a GPS tracking device,

> the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.

United States v. Maynard, 615 F.3d 544, 560 (D.C. Cir. 2010), *aff'd in part sub nom. Jones*, 565 U.S. 400, 132 S.Ct. 945; *see also Moore-Bush*, 381 F. Supp. 3d at 149 ("[O]n a residential street, neighbors notice each other's peculiar habits. Yet they would not notice all of their neighbors' habits[.]"); *cf. Garcia-Gonzalez*, 2015 WL 5145537, at *3 ("Physical surveillance, in theory, could gather the same information as the pole cameras. However, physical surveillance is difficult to perform. ... Moreover, here, the officers ... could not have successfully conducted this surveillance in person. [The defendant] (and others) likely would have discovered the surveillance.").

***10** ¶49 It would be all too easy to overlook these issues based on the significant amount of controlled substances that police ultimately found on Tafoya's property. But as the Supreme Court explained long ago in *United States v. Di Re*,

> a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success. ... [T]he forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948) (footnote omitted); *see also Riley*, 488 U.S. at 463-66, 109 S.Ct. 693 (Brennan, J., dissenting) ("[W]e dismiss this as a 'drug case' only at the peril of our own liberties. ... The Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use.").

¶50 And as the Supreme Court explained in *Johnson v. United States*,

> [c]rime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but

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> to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

¶51 For these reasons, we conclude that the three-month-long surveillance of the curtilage of Tafoya's home through the pole camera constituted a search under the Fourth Amendment to the United States Constitution. [4]

4 We need not identify with precision the point at which the surveillance became a search, for the line was surely crossed long before the three-month mark. *See Jones*, 565 U.S. at 430, 132 S.Ct. 945 (Alito, J., concurring in the judgment) ("We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark."). We express no opinion here whether we would reach the same conclusion if (1) the duration of the surveillance had been much shorter (say, one or two weeks); or (2) the police had, after such period of time, sought a warrant based on what had been observed or discontinued its warrantless surveillance but later resumed it after a significant interval of time and upon acquiring further information.

[17] ¶52 Because the fruits of the police surveillance were used to obtain — and were critical to the acquisition of — the warrant to search Tafoya's property, the trial court should (in the absence of an applicable exception to the exclusionary rule) have suppressed the evidence recovered from the search of the property. [5] And because the evidence recovered from the property — the drugs — was critical to the prosecution's case, its admission into evidence cannot be considered harmless beyond a reasonable doubt. *See McKnight*, ¶ 60 (determining that an unconstitutional search was not harmless beyond a reasonable doubt where the search uncovered the drug evidence used to convict the defendant). Consequently, Tafoya's convictions must be reversed and the matter remanded for a new trial.

5 The People assert that the application of the good faith exception to the exclusionary rule would have supported the admission of the evidence at trial. But because the prosecution did not raise this assertion in the trial court, we need not consider it. *See People v. McKnight*, 2019 CO 36, ¶ 61, 446 P.3d 397.

III. Proceedings on Remand

***11** ¶53 The People argue that, in the event we conclude that the pole camera surveillance constituted a search, on remand the trial court should be allowed to consider whether the suppression motion should be denied on some other ground (for example, that the exclusionary rule should not apply). Tafoya disagrees, emphasizing that the People did not raise any such argument in the trial court.

¶54 During the pendency of this appeal, the supreme court issued its decision in *People v. Morehead*, 2019 CO 48, 442 P.3d 413. That binding precedent makes clear that it is not our place to direct the trial court whether to exercise its discretion on remand to consider any new arguments that the People might make in opposition to the suppression motion.

IV. Conclusion

¶55 The judgment of conviction is reversed, and the case is remanded for a new trial.

JUDGE RICHMAN and JUDGE BROWN concur.

All Citations

--- P.3d ----, 2019 WL 6333762, 2019 COA 176

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Court of Appeals of Arizona,
Division 2, Department B.

The STATE of Arizona, Appellee,
v.
Jaime Antonio TORRES, Appellant.

No. 2 CA–CR 2010–0283.
|
Oct. 12, 2011.

Appeal from the Superior Court of Pima County; Cause No. CR20084880; Honorable Richard S. Fields, Judge Honorable John S. Leonardo, Judge. AFFIRMED.

Attorneys and Law Firms

Thomas C. Horne, Arizona Attorney General By Kent E. Cattani and Amy M. Thorson, Tucson, Attorneys for Appellee.

David Lipartito, Tucson, Attorney for Appellant.

MEMORANDUM DECISION

KELLY, Judge.

***1** ¶ 1 Appellant Jaime Torres appeals his convictions and sentences for conspiracy to commit possession of marijuana for sale, possession of marijuana for sale, and possession of drug paraphernalia. He argues the trial court erred in 1) denying his motion to suppress evidence obtained through the camera surveillance of his residence, 2) denying his motion to dismiss on double jeopardy and prosecutorial misconduct grounds after a mistrial was granted during his first trial, 3) allowing a detective to present expert testimony on drug trafficking, 4) permitting a detective to state his opinion about the identity of people and objects in the surveillance videotape, and 5) denying his motion for mistrial based on that testimony. Finding no error, we affirm.

Background

¶ 2 We view the facts and all reasonable inferences in the light most favorable to upholding the convictions. *State v. Miles,* 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App.2005). In 2008, as part of a surveillance operation, law enforcement officers set up a video camera to observe Torres's residence. While monitoring the camera remotely, Pima County Sheriff's Department Detective Robert Fiore observed a Nissan Versa arrive at the residence and park next to a Nissan Sentra and a Chevrolet Cavalier. Shortly thereafter, the Versa backed up to the doorway of the residence, and Fiore observed Torres and another individual load objects wrapped in cellophane and an item that appeared to be a blanket into the vehicle's hatchback compartment. After the Versa left, the Sentra and Cavalier followed. Torres was riding in the front passenger seat of the Sentra when it left the property. Because Fiore believed the objects wrapped in cellophane were bales of marijuana, he advised officers to stop the vehicles.

¶ 3 After officers stopped the Sentra and the Versa, they found several bales of marijuana covered by a blanket in the back of the Versa. They also found five thousand dollars in an envelope in the Sentra. During a search of Torres's residence, officers located firearms, marijuana, a digital scale, and packing materials.

¶ 4 Torres was charged with conspiracy to commit possession of marijuana for sale, possession of marijuana for sale, possession of drug paraphernalia, sale of marijuana, possession of a deadly weapon by a prohibited possessor, possession of a deadly weapon during the commission of a felony drug offense, and money laundering. After Torres's first trial ended in a mistrial, a second jury found him guilty as outlined above. The trial court imposed concurrent, presumptive, enhanced sentences totaling 9.25 years. This appeal followed.

Discussion

Motion to suppress surveillance evidence

¶ 5 Torres argues "[t]he trial court erred by denying [his] motion to suppress evidence gathered by the surveillance of his home ." He maintains the "continual video surveillance

of [his] home over a three-month period," which led to the discovery of the evidence, "violat[ed] ... the Fourth Amendment to the United States Constitution." "In reviewing a denial of a motion to suppress, we review only the evidence submitted at the suppression hearing and we view the facts in the light most favorable to upholding the trial court's ruling." *State v. Box,* 205 Ariz. 492, 493, 73 P.3d 623, 624 (App.2003) (citation omitted). "We review the court's decision for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo.' " *State v. Gay,* 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App.2007), *quoting State v. Booker,* 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App.2006).

***2** ¶ 6 At the suppression hearing, Tucson Police Department Detective Lonnie Bynum testified that in 2008 police had begun surveillance of Torres's residence, based on "information that drugs had been recently seen at that address." Torres's residence was located on approximately five acres of land, set back from the main roadway and accessed by a gated driveway that connected to the rear of the residence. An elevated concrete parking area near the back door provided access to the residence. A six-foot-high wall was located on the west side of the back yard, and the rest of the yard was "at least partially enclose[d]" with chain link fencing. The yard abutted public land that included "hills and mountains" from which the back yard area and rear driveway were visible.

¶ 7 Without obtaining a search warrant, officers attached the surveillance camera to a utility pole next to a publically accessible road that, although unmaintained, was "open to the public." The pole was approximately 125 to 150 yards southwest of the residence and the ground below it was elevated above Torres's residence; the camera was approximately twelve to fifteen feet above the ground, [1] had a lens that permitted magnification, and was positioned towards "the back parking area of the residence." [2] It operated continuously over the course of approximately three months.

1 Bynum testified that from ground level on the road he "could clearly see the back of [Torres's] residence, the driveway where the vehicles were parked [and] the back door." But, Torres claimed it was not possible to see the area from ground level due to vegetation and "buildings in the way." We view the evidence in the light most favorable to upholding the trial court's ruling. *Box,* 205 Ariz. at 493, 73 P.3d at 624.

2 Torres asserts without support that "the camera also afforded ... a view of the interior of the house, at least at night when the lights were on and curtains open." But, as he acknowledges, the testimony at the hearing established that although there were "a couple of windows visible within the view of the camera" officers "could not see anything going on inside the residence itself." This was especially so at night because the "lights from inside the house [would] blind ... the camera."

¶ 8 Following the hearing, the trial court denied the motion to suppress, finding Torres "did not have a reasonable expectation of privacy" as the yard was "clearly visible from both public lands and the private property of nearby residents." The court also found "[n]o physical intrusion onto private property occurred" and "[t]he area in question clearly exceeds any notions of curtilage.' "

¶ 9 The Fourth Amendment prohibits unreasonable searches or seizures. *Katz v. United States,* 389 U.S. 347, 357 (1967). "[A]s a general rule, a warrant is required when the suspect has a reasonable expectation of privacy in the place or the item searched." *State v. Blakley,* 226 Ariz. 25, ¶ 6, 243 P.3d 628, 630 (App.2010). Torres argues the back yard area was "part of the curtilage' of the home and [thus] within the protection of the Fourth Amendment to the same extent as the home itself." *See State v. Olm,* 223 Ariz. 429, ¶¶ 5–10, 224 P.3d 245, 247–49 (App.2010) (protection of Fourth Amendment extends to curtilage, the area that is "intimately tied to the home itself" '), *quoting United States v. Dunn,* 480 U.S. 294, 301 (1987). He contends the trial court erred in finding "the area under surveillance was not the curtilage" and argues "visual intrusion into this area was tantamount to intrusion into the home itself." But, even assuming the back yard area is curtilage, this does not resolve the issue presented as "the home and its curtilage are not necessarily protected from inspection that involves no physical invasion." *Florida v. Riley,* 488 U.S. 445, 449 (1989); *California v. Ciraolo,* 476 U.S. 207, 213 (1986) ("That the area is within the curtilage does not itself bar all police observation."). Because officers observed activities remotely and did not physically intrude on the property during their surveillance, we first must decide whether Torres had a reasonable expectation of privacy in the area viewed by the camera. *See Blakley,* 226 Ariz. 25, ¶ 6, 243 P.3d at 630.

***3** ¶ 10 Torres testified the area was "just for family use," and he considered it "[v]ery private." [3] But, "an individual's subjective expectation of privacy alone is not enough to give rise to Fourth Amendment protection." *State v. Duran,* 183

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Ariz. 167, 169, 901 P.2d 1197, 1199 (App.1995). Torres also must demonstrate his expectation is objectively reasonable in that it is "one that society is prepared to recognize as reasonable.' " *Smith v. Maryland,* 442 U.S. 735, 735 (1979), *quoting Katz,* 389 U.S. at 361. Torres argues his expectation of privacy was reasonable under this standard because "[t]he back ... of the property was not ... in the view of the general public or ... neighbors." But the evidence undercuts this claim. As established at the suppression hearing, public land near the residence provided an unobstructed view of the back yard. There were "numerous trails in that area" and, as the trial court found, "[a]ny hiker with a pair of cheap binoculars could have easily watched activities" in the back yard.

3 Although Torres claims he believed this area to be private, he testified that the area was visible from the adjoining public land.

¶ 11 Nevertheless, Torres claims he had a reasonable expectation of privacy because he took some measures to make the area private, including "partially surround[ing it] by walls." But, "the mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." *Ciraolo,* 476 U.S. at 213. And, as Bynum testified, the back door and rear driveway of Torres's residence were clearly visible from the publically accessible road along which the pole was located . [4]

4 For this reason, we also reject Torres's assertion that *State v. Olm,* 223 Ariz. 429, 224 P.3d 245 (App.2010) is applicable. In *Olm* we held the defendant's Fourth Amendment rights were violated based on an officer's physical entry into the curtilage of the home. *Id.* ¶ 17. Our decision was not based on the viewing of evidence from outside the curtilage. *Id.* Indeed, we noted that even if an area is curtilage, no Fourth Amendment violation occurs "when the officer observes contraband in plain sight from a lawful vantage point." *Id.* ¶ 13.

¶ 12 Nor did the use of a camera, rather than in-person surveillance, violate Torres's Fourth Amendment rights. "[T]echnological enhancement of ordinary perception from ... a vantage point" may present Fourth Amendment concerns in cases where sense-enhancing technologies are not in general use and permit observations "that could not otherwise have been obtained without physical intrusion into a constitutionally protected area.' " *Kyllo v. United States,* 533 U.S. 27, 33–34 (2001), *quoting Silverman v. United States,* 365 U.S. 505, 512 (1961). But Torres has presented nothing to suggest that the technology used by police was not in general use. Rather, because the camera recorded activities on the property both with and without magnification, the views it afforded are similar to those a member of the public might see with or without binoculars.

¶ 13 Torres further claims that even if the area where the pole was located is accessible to the public, this "does not foreclose a reasonable expectation of privacy" because "[t]he severity of the governmental intrusion affects the legitimacy of a[n] ... expectation of privacy." He contends that here, the intrusion was "pervasive and constant" because the camera operated continuously over several months. In support of this argument, he relies primarily on *United States v. Cuevas–Sanchez,* 821 F.2d 248 (5th Cir.1987) and *United States v. Nerber,* 222 F.3d 597 (9th Cir.2000).

***4** ¶ 14 In *Cuevas–Sanchez,* officers installed a video camera on a utility pole that allowed them to see over the defendant's ten-foot-high back yard fence. 821 F.2d at 250. The court distinguished the Supreme Court's holding in *Ciraolo* that a warrant is not required for officers "traveling in the public airways ... to observe what is visible to the naked eye," *id., quoting Ciraolo,* 476 U.S. at 215, reasoning that the video surveillance, was "not a one-time overhead flight or a glance over the fence by a passer-by." *Id.* at 251. In concluding that "Cuevas's expectation to be free of this type of ... surveillance in his backyard is one that society is willing to recognize as reasonable" the court noted that Cuevas–Sanchez had "erected fences around his backyard, screening the activity within from [the] view[ ] of casual observers." *Id.*

¶ 15 Here, unlike the situation in *Cuevas–Sanchez,* Torres's back yard was open to public view from several locations and was visible from ground level in the area where the camera was placed. *Id.* And, although the camera was elevated, such positioning was not necessary to observe activities in the back yard. *See State v.. Holden,* 964 P.2d 318, 321–22 (Utah Ct.App.1998) (distinguishing *Cuevas–Sanchez* from case involving video surveillance of areas open to public view). And unlike Cuevas–Sanchez, Torres had not erected a ten-foot fence to screen his property from public view to establish a reasonable expectation of privacy. Indeed Torres testified he knew the area was open to public view. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Ciraolo,* 476 U.S. at 213, *quoting Katz,* 389 U.S. at 351.

¶ 16 We likewise find Torres's reliance on *Nerber* misplaced. There, the court found the defendants had a reasonable expectation to be free from video surveillance within a private hotel room. *Nerber,* 222 F.3d at 598–600. But, here the camera recorded activity in an area over which Torres had no reasonable expectation of privacy. *See Olm,* 223 Ariz. 429, ¶ 5, 224 P.3d at 247; *see also Ciraolo,* 476 U.S. at 214–15 (defendant not "entitled to assume' his unlawful conduct will not be observed ... by a power company repair mechanic on a pole overlooking the yard"). Therefore, Torres has not demonstrated that his Fourth Amendment rights were violated by the camera surveillance, [5] and the trial court did not abuse its discretion in denying Torres's motion to suppress the surveillance videotape. [6]

5 Torres also argues the surveillance violated article II, § 8 of the Arizona Constitution. Contrary to the state's contention, Torres did preserve this argument for appeal, but we find it without merit. The only additional protection recognized by our supreme court beyond that afforded by the Fourth Amendment involves unlawful physical entry into the home. *See State v. Bolt,* 142 Ariz. 260, 264–65, 689 P.2d 519, 523–24 (1984) (holding warrantless entry of home violated article II, § 8, and noting "Arizona's constitutional provisions generally were intended to incorporate the federal protections [but] are specific in preserving the sanctity of homes and in creating a right of privacy") (citation omitted). No such entry occurred here.

6 Torres claims the officers lacked reasonable suspicion to conduct surveillance of his property. Torres did not raise this ground below, and we therefore review for fundamental error only. *State v. Henderson,* 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Because Torres does not assert fundamental error on appeal, the argument is waived. *State v. Moreno–Medrano,* 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App.2008).

Double Jeopardy

¶ 17 Torres next claims "[t]he trial court erred by denying [his] motion to dismiss due to double jeopardy after the State's actions at his first jury trial resulted in a mistrial." On the second day of Torres's first trial, the prosecutor explained that although he had intended to present a digital video disc (DVD) recording of the surveillance videotape, technical problems had prevented him from doing so. The prosecutor indicated he would instead present a video home system (VHS) recording. Torres objected on the basis the VHS recording had not been disclosed, provided a better quality image than the DVD version, and contained material not present in the DVD. After viewing both the DVD and VHS recordings the court found the VHS was "qualitatively better" than the DVD and precluded the state from using it.

***5** ¶ 18 The state then asserted that if Torres cross-examined Fiore as to the quality of the DVD, it would open the door for the state to seek admission of the VHS recording. The trial court reaffirmed its ruling that the state was "restricted to using the [DVD]." The prosecutor expressed concern about how to handle Fiore's potential answers to questions regarding the quality of the DVD. Counsel for Torres's codefendant, who had also objected to the VHS recording, then stated:

> [I]f the State thinks it's untenable to move forward ... I'll move for a mistrial. I don't know if they're going to object to it. I'll move for a mistrial at that time. They don't have to. It saves them the double jeopardy issue.
>
> Quite frankly, I think that puts my client back in the position he desired to be all along. And so, I'll make that motion to the Court. I don't know what the State's position is going to be. At least then they can re-disclose it for the second trial if that's what they decide they want to do.

Torres joined the motion for mistrial, stating:

> I have to join that motion, Judge, even though it's reluctantly, because, we're not going to be able to effectively crossexamine Detective Fiore. And based on the fact that the DVDs, the images do not show what he says he believes he sees, then we're hamstrung. We have no effective right of confronting this evidence.
>
> And [the prosecutor] is right in a way. If ... [the witness is] permitted to answer, then, again, the damage is done to our case.

After the court had granted the motion for mistrial, Torres filed a motion to dismiss in which he argued the "mistrial result[ed] from the misconduct of the State" and retrial "would violate his rights against double jeopardy." The court denied the motion finding "[t]here was no disclosure violation; there was no prosecutorial misconduct. And, ... [the] ruling was to ... ensure ... the defense had a fair trial."

¶ 19 On appeal, Torres claims the trial court erred in denying the motion to dismiss. We review a trial court's decision whether to dismiss an indictment on double jeopardy grounds for abuse of discretion. *Miller v. Superior Court,* 189 Ariz. 127, 129, 938 P .2d 1128, 1130 (App.1997); *State v.*

Covington, 136 Ariz. 393, 396, 666 P.2d 493, 496 (App.1983). The Double Jeopardy Clause protects a criminal defendant's "right to be free from multiple trials." *State v. Jorgenson,* 198 Ariz. 390, ¶ 6, 10 P.3d 1177, 1178 (2000). Although a "defendant ordinarily waives that right when he seeks a new trial because of error in the original trial, the clause applies when the need for a second trial is brought about by the state's egregiously intentional, improper conduct." *Id.* Prosecutorial misconduct sufficient to implicate double jeopardy "[can] not merely [be] the result of legal error, negligence, mistake, or insignificant impropriety," however, and must instead amount to "intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose." *Pool v. Superior Court,* 139 Ariz. 98, 108–09, 677 P.2d 261, 271–72 (1984).

***6** ¶ 20 Torres claims the prosecutor committed misconduct by "disclos[ing] inferior DVD copies of the surveillance video, [and] never indicating that a much clearer version existed or that [he] intended to use the version at trial." But the state disclosed the existence of the VHS recording and, from the record, it appears neither the prosecutor nor defense counsel were aware of a qualitative difference in the recordings until technical difficulties prevented playing the DVD. As the trial court noted "[counsel] simply hadn't looked at the quality issue." We therefore cannot say the prosecutor engaged in "intentional conduct which [he knew] to be improper and prejudicial." *Id.*

¶ 21 Torres also claims that "[i]nstead of accepting the court's ruling" that the VHS recording could not be used, the prosecutor insisted on using the evidence by stating that if Torres cross-examined Fiore about the tape "the State would argue that the door had been opened and the tape should be introduced." He further asserts "the trial court ... never told the prosecutor he could not do what he was proposing to do." Torres concludes he had "no other option" but to move for a mistrial." [7]

7 Although Torres claims the "grant of the mistrial ... was tantamount to a sua sponte ruling by the trial court and should be evaluated under [a different] standard," he concedes the court granted the mistrial at his request. He argues he made the request "only because the state forced his hand and the court gave him no other option," but this argument lacks merit. And, in any event, Torres has provided no authority that a grant of a mistrial at a defendant's request may be considered "tantamount to a sua sponte ruling" under these circumstances.

¶ 22 Torres's argument is not supported by the record. Contrary to his claim, the prosecutor did not insist on the use of the evidence following the trial court's ruling, but only stated his belief that it might become admissible should defense counsel open the door. The court disagreed and twice affirmed its ruling that the evidence was not admissible, explaining "[t]he State is going to be restricted to the exhibits that were disclosed. It's that simple." The prosecutor did not continue to seek admission of the tapes, but instead expressed concern with Fiore's potential answers and explained he was "trying to figure out how to prevent a mistrial." Further, counsel for Torres's codefendent acknowledged in the motion for mistrial in which Torres joined that granting the motion would avoid "the double jeopardy issue" and the state could "re-disclose [the evidence] for the second trial."

¶ 23 Torres has not demonstrated that the prosecutor's actions placed him in an untenable position or that the state engaged in "egregiously intentional, improper conduct" implicating the double jeopardy clause. *Jorgenson,* 198 Ariz. 390, ¶ 6, 10 P.3d at 1178. We therefore conclude the trial court did not err in denying Torres's motion to dismiss.

Drug trafficking testimony

¶ 24 Torres contends the trial court erred "by allowing police officers to testify ... as to the usual practices of drug dealers" ' during his second trial. Torres filed a motion in limine in which he argued that any testimony by officers "about how drug dealers move or conceal drugs" should be precluded as irrelevant, unfairly prejudicial, and improper opinion testimony. The court ruled that "officers may testify about the practices of drug traffickers, so long as they do not attempt to fit the defendant into a profile." Thereafter, over Torres's objection, the state asked Bynum questions regarding drug trafficking.

***7** ¶ 25 Torres maintains the trial court erred in allowing Bynum's testimony about drug trafficking because it was irrelevant, unfairly prejudicial, and conflicted with our supreme court's holding in *State v. Lee,* 191 Ariz. 542, 959 P.2d 799 (1998). We review the court's evidentiary rulings for abuse of discretion. *State v. Abdi,* 226 Ariz. 361, ¶ 21, 248 P.3d 209, 214 (App.2011). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Torres was charged with conspiracy to commit possession of marijuana for sale and sale of marijuana. As the prosecutor correctly explained, Bynum's testimony was

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relevant to modus operandi in a conspiracy and sale case and "would aid the trier of fact in understanding ... something that's beyond the realm of [ordinary] experience."

¶ 26 Rule 403, Ariz. R. Evid., provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Relying on *Lee,* Torres claims Bynum's testimony was unfairly prejudicial as it "impl[ied] that he fit [into] a profile' and was a typical drug dealer.' " [8] In *Lee,* an officer's testimony regarding the typical profile of a drug courier was compared to the defendant to prove that he had known that the suitcase he carried contained marijuana. 191 Ariz. 542, ¶¶ 13–18, 959 P.2d at 802–03. The court found "the use of drug courier profile evidence as substantive proof of guilt" improper and concluded the "evidence ... should not have been admitted ... since its only purpose was to suggest that because the accuseds' behavior was consistent with that of known drug couriers, they likewise must have been couriers." *Id.* ¶¶ 12, 18.

8 Torres also appears to argue that the trial court should have excluded the evidence under Rule 404(a) and (b), Ariz. R. Evid. Neither rule is applicable here. Rule 404(a) applies to "[e]vidence of a person's character." Bynum did not testify about Torres's character. Rather, he explained generally how marijuana is transported, packaged and sold. Rule 404(b) likewise is inapplicable as Bynum did not testify as to Torres's "other crimes, wrongs or acts."

¶ 27 Torres argues that here, as in *Lee,* "[t]he only purpose for which the evidence could have been presented was to fit [him] into a profile and suggest that he was therefore guilty." We disagree. As the court noted in *Lee,* "there may be situations in which drug courier profile evidence has significance beyond the mere suggestion that because an accused's conduct is similar to that of other proven violators, he too must be guilty." *Id.* ¶ 19. One such situation is the "use of drug courier profile testimony to assist the jury in understanding modus operandi in a complex criminal case.' " *Id.* ¶ 11, *quoting United States v. Cordoba,* 104 F.3d 225, 230 (9th Cir.1996). The testimony here was offered for just that purpose. [9]

9 Bynum testified about the purpose of the symbols on bales of marijuana, the use of weapons to protect the bales, and that drug trafficking is a "cash and carry business." He also testified about the process by which the marijuana is unwrapped and weighed once it reaches a "stash house."

¶ 28 Torres next challenges the foundation for Bynum's testimony under Rule 702, Ariz. R. Evid., and *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923). [10] "We will not disturb a trial court's ruling on the foundation for expert testimony absent a clear abuse of discretion." *State v. Roscoe,* 184 Ariz. 484, 493, 910 P.2d 635, 644 (1996). Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." [11] Bynum testified at length regarding his qualifications and specialized knowledge gained through thirty-one years of law enforcement experience including supervision of investigations involving the importation, transportation, and sale of large amounts of marijuana and work as an undercover narcotics officer. Bynum's testimony established that he had specialized knowledge and that this knowledge would assist the jury in understanding the evidence. [12] *See* Ariz. R. Evid. 702.

10 Torres further argues the testimony "was insufficient under A .R.S. § 12–2203." Torres acknowledges that we recently found § 12–2203 unconstitutional, but urges us to reconsider our decision. *See Lear v. Fields,* 226 Ariz. 226, ¶ 1, 245 P.3d 911, 913 (A pp.2011) (finding § 12–2203 unconstitutionally usurps supreme court's rule-making authority and violates separation of powers doctrine). But § 12–2203 was not in effect when Torres committed the offenses or when the jury returned its verdicts. *See* 2010 Ariz. Sess. Laws, ch. 302, § 1. "No statute is retroactive unless expressly declared therein." A.R.S. § 1–244. And, "[u]nless a statute is expressly declared to be retroactive, it will not govern events that occurred before its effective date." *State v. Coconino Cnty. Superior Court,* 139 Ariz. 422, 427, 678 P.2d 1386, 1391 (1984). Nothing in § 12–2203 indicates a legislative intent that the statute have retroactive effect. We therefore conclude § 12–2203 is inapplicable and decline to revisit our decision in *Lear.*

11 Our supreme court recently amended Rule 702 to "adopt [ ] Federal Rule of Evidence 702, as restyled." Ariz. R. Evid. 702 2012 court cmt. That amendment does not impact our decision in this matter because, as discussed below, the expert testimony here was based on experience, and the amendment was not "intended to ... preclude the testimony of experience-based experts." *Id.*

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12 Although Torres challenges the extent of Bynum's qualifications, Rule 702 requires only that the expert have "knowledge superior to people in general through actual experience or careful study." *State v. Superior Court,* 152 Ariz. 327, 330, 732 P.2d 218, 221 (App.1986). The degree of the expert's qualification goes to the weight of the testimony rather than its admissibility. *State v. Davolt,* 207 Ariz. 191, ¶ 70, 84 P.3d 456, 475 (2004).

***8** ¶ 29 Torres also claims Bynum's testimony was inadmissible because it did not comply with the requirements of *Frye.* Torres did not raise this argument below, and we therefore review for fundamental error only. *State v. Henderson,* 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). We find no error, fundamental or otherwise. Bynum's testimony was based on his personal experience and observations. And, *Frye* is "inapplicable when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation, or research." *Logerquist v. McVey,* 196 Ariz. 470, ¶ 62, 1 P.3d 113, 133 (2000). Accordingly, the trial court did not abuse its discretion in admitting the testimony.

Observations testimony

¶ 30 Torres next asserts the trial court "abused its discretion by allowing police officers to testify, over objection, to what objects seen on the [surveillance] video were and to characterize those aspects of the video." Torres filed a motion in limine in which he asked the court to preclude any testimony by officers identifying the objects in the surveillance video. He argued such testimony "would be ... speculation ... improper opinion and ... unfairly ... prejudicial." The court ruled that the officers would not be permitted to "testify/identify objects in the video as it is being shown to the jury. [But][s]hortly thereafter, the officers can testify as to photographs or the actual objects ... that were seized and explain to the jury what they are."

¶ 31 During trial, the state argued that the testimony should be permitted under Rules 702 and 703, Ariz. R. Evid., and asked the court to reconsider its ruling. The court ruled that after the state played the tape, officers could testify as to their observations and impressions based on the videotape, but only in the context of explaining why they had provided a "reason ... for continuing their investigation." The state then called Fiore who identified the people and objects in the videotape. [13] Fiore explained he had notified officers to stop the vehicles because he believed he had seen people loading bales of marijuana into the Versa.

13 Fiore testified he had seen the people in the videotape in "real life" on the date of the offense, had looked at them closely, and had observed their clothing.

¶ 32 Torres claims "[a]llowing [Fiore] to identify people and objects in the video, even if expressed as an opinion, lacked foundation and was not proper opinion evidence under Ariz. R. Evid .... 701 and 702." [14] He also argues "[t]he jury was in a position equal to [Fiore] to determine what they were seeing" in the video. We conclude the state provided ample foundation to admit Fiore's testimony under Rule 702. Fiore testified he had worked in law enforcement for over nineteen years, and had experience as a narcotics detective, primarily in conducting surveillance. He controlled the camera and monitored the video feed at the time the events about which he testified had occurred. Contrary to Torres's suggestion, Fiore's broad experience in law enforcement and his perspective as the camera operator gave him knowledge of events "superior to people in general." *State v. Superior Court,* 152 Ariz. at 330, 732 P.2d at 221.

14 Although the trial court found Fiore's testimony admissible, the basis for its ruling is not clear from its minute entry. Torres has not provided the transcript of the proceeding on appeal. But, we will affirm the court's decision if it is legally correct for any reason. *See State v. Canez,* 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002). And, as discussed, we conclude the testimony was admissible under Rule 702.

Motion for mistrial

***9** ¶ 33 At trial, Torres objected specifically to two parts of Fiore's testimony. Referring to the part of the videotape that showed objects being loaded into the Versa, the prosecutor asked "do you have an opinion about what is occurring here as it relates to how you informed other officers" ' Fiore answered, "I advised surveillance that they were loading bales in the Versa, to standby, looked like they were getting ready to go." Torres made an objection "based on the pretrial ruling," which was overruled. Referring to the same part of the video, the prosecutor asked "[n]ow you said what's occurring right now ... has significance to your investigation in terms of what you had instructed or advised other officers in the field, is that correct" ' Fiore responded, "[y]eah, I advised to stop that vehicle ... [b]ecause I believed in my training and experience that those are bales of marijuana being loaded into that vehicle." Torres objected and moved to strike the response, and the court sustained the objection.

¶ 34 Torres later moved for a mistrial claiming Fiore's testimony had violated the court's order. The trial court denied the motion, and Torres asserts it erred in doing so. We review the denial of a motion for mistrial for abuse of discretion. *See State v. Hoskins,* 199 Ariz. 127, ¶ 52, 14 P.3d 997, 1012 (2000). "This deferential standard of review applies because the trial judge is in the best position to evaluate the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial." ' *State v.. Bible,* 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993), *quoting State v. Koch,* 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983). In determining whether to grant a motion for mistrial based on a witness's testimony, the trial court must consider "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar,* 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003).

¶ 35 We find no error, much less error requiring the grant of a mistrial. *See State v. Nordstrom,* 200 Ariz. 229, ¶ 68, 25 P.3d 717, 738 (2001). We agree with the trial court that the testimony was "consistent entirely with the ... pretrial ruling ... [t]he officer stated [w]hat he observed ... he described what he perceived it to be and the actions he took as a result of his perception." [15] The testimony did not "contraven[e] ... the court's pre-trial order" as Torres claims and did not provide grounds for the court to grant his motion for mistrial. [16] *See Lamar,* 205 Ariz. 431, ¶ 40, 72 P.3d at 839. Accordingly, the court did not abuse its discretion in denying the motion.

15 The trial court sustained Torres's objection to the second statement. Although this ruling appears to conflict with the court's later finding that the testimony was consistent with its pretrial ruling, it does not affect our analysis on the motion for mistrial.

16 Although Torres argues on appeal that the trial court erred in denying his motion for mistrial because the statements were "irrelevant, [and] lacked foundation" he did not raise these grounds below. We therefore review for fundamental error only. *Henderson,* 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Because Torres does not argue fundamental error on appeal, the issues are waived. *Moreno–Medrano,* 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

Disposition

¶ 36 We affirm the convictions and sentences imposed.

CONCURRING: GARYE L. VÁSQUEZ, Presiding Judge and PHILIP G. ESPINOSA, Judge.

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UNITED STATES of America, Plaintiff,
v.
Barton Joseph ADAMS, and Josephine Artillaga Adams, Defendants.

CRIMINAL NO. 3:08-CR-77 (BAILEY)
|
Signed 02/23/2011

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ORDER ON MOTIONS

JOHN PRESTON BAILEY, CHIEF UNITED STATES DISTRICT JUDGE

***1** The above styled case is presently before the Court on a number of motions filed by defendant Barton Adams. The Court will address each motion in turn.

I. Motion to Suppress Financial Records [Doc. 583]

In the Motion to Suppress Financial Records, defendant argues that the financial records disclosed in the Government's discovery were obtained in violation of 12 U.S.C. § 3401 et seq. Defendant requests that to remedy the alleged statutory violation this Court suppress all the records allegedly obtained in violation of the statute. In response, the Government notes that should the records have been obtained under Grand Jury subpoena that the Government would be unable to disclose the subpoena used to obtain the records. Additionally, the Government argues that even if the records were obtained in violation of the statute, the Court is not authorized to remedy violations of the Right to Financial Privacy Act ("the Act") by suppressing evidence.

After reviewing the relevant law, this Court finds that even if the records were obtained in violation of the Act, the records should not be suppressed as the Act provides for exclusive civil penalties. *See United States v. Frazin*, 780 F.2d 1461 (9th Cir. 1986); *see also United States v. Miller*, 425 U.S. 435, 440 (1976).

As the Court in ***Frazin*** has discussed, "[t]he Right to Financial Privacy Act of 1978 prohibits financial institutions from providing the government with information concerning their customers' financial records, unless either the customer authorizes the disclosure of such information or the government obtains a valid subpoena or warrant. 12 U.S.C. § 3402." *Id.* at 1164. The purpose of the Act is to provide citizens with statutory protection against unrestricted access to third-party records. *Id.* "Congress passed the Act in part as a response to *United States v. Miller*, 425 U.S. 435 (1976). [citations omitted]. In *United States v. Miller*, the Supreme Court affirmed a denial of a motion to suppress bank records obtained by an allegedly defective subpoena, on the ground that a bank customer has no constitutionally-protected privacy interest in such records. *Miller*, 425 U.S. at 440, 96 S.Ct. at 1622-23." *Id.*

Here, the Court is presented with much the same situation that confronted the Court in ***Frazin*** and ***Miller***; defendant argues the bank records provided to him by the Government were obtained in violation of the statute as he did not receive notices required by statute when the Government acquired the information. The question before the Court, therefore, is whether the proper remedy is to suppress such documents. Based on a review of the legislative history of the statute, the Court finds that such remedy is inappropriate.

> Both Congress and the Executive regarded the Act as a compromise between a bank customer's right of financial privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations. *See* H.R.Rep. No. 1383 at 34, reprinted in 1978 U.S.Code Cong. & Ad.News 9273, 9306; *Donovan v. National Bank*, 696 F.2d 678, 683 (9th Cir. 1983). Earlier versions of the Act did not provide for penalties, but instead required the Justice Department to give a bank customer 18 days advance notice of a government subpoena, within which period the

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customer could move to quash the subpoena. The Justice Department opposed the advance notice provision on the ground that it would impede the Department's investigative functions. *See* Letter from Attorney General Griffin Bell to Representative Fernand J. St. Germain (Sept. 20, 1977) (discussing Justice Department response to H.R. 9086) in House Hearings at 1527-28; House Hearings at 1531-32 (statement of Deputy Assistant Attorney General Baker). Deputy Assistant Attorney General Baker recommended civil penalties as an "accommodation" between privacy and law enforcement interests. House Hearings at 1550 (statement of Mr. Baker). In the final version of the Act, Congress reduced the notice requirement to 10 days, 12 U.S.C. § 3405, and provided for civil penalties against the government and financial institutions for obtaining or disclosing a customer's financial information without the requisite authorization, 12 U.S.C. § 3417. [1]

2** *Frazin*, 780 F.2d at 1465. Thus, civil penalties were added to the Act in order to facilitate law enforcement activities. The penalties added, however, did not include suppression of evidence. (*See* n.1, *supra*). Instead, Congress legislated *exclusive remedies* including fines and disciplinary action against employees who violate the act. 12 U.S.C. § 3417(d)("The remedies and sanctions described in this chapter shall be the only authorized judicial remedies and sanctions for violations of this chapter.") Moreover, the statute was a partial response to the United States Supreme Court holding in ***Miller which affirmed the denial of a suppression motion. *Miller*, 425 U.S. at 437. The Act was a legislative response to "both the substantive and the procedural aspects of ***Miller***, by providing not only a right to financial privacy, but remedies for the violation of that right as well. Had Congress intended to authorize a suppression remedy, it surely would have included it among the remedies it expressly authorized." *Frazin*, 780 F.2d at 1466.

1 FN2. The aggrieved customer may sue for (1) a statutory penalty of $100; (2) actual damages; (3) punitive damages for willful violations of the Act; and (4) attorney's fees. 12 U.S.C. § 3417(a). The Act authorizes the Director of the Office of Personnel Management to recommend disciplinary action against federal officers and employees who willfully violate its provisions. Id. § 3417(b). It immunizes financial institutions and their agents for the disclosure of financial information in good faith reliance on a government certificate of authorization. Id. § 3417(c).

Accordingly, "[a]lthough Congress did not explicitly address the availability of a suppression remedy during its consideration of the Act, [this Court] find[s] that remedy to be excluded under section 3417(d)." And "[b]ecause the statute, when properly construed, excludes a suppression remedy, it would not be appropriate for [the Court] to provide one in [its] exercise of [its] supervisory powers over the administration of justice. Where Congress has both established a right and provided exclusive remedies for its violation, we would 'encroach upon the prerogatives' of Congress were we to authorize a remedy not provided for by statute. *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977)." *Frazin*, 780 F.2d at 1466. Defendant's Motion to Suppress is, therefore, **DENIED**.

II. Motion to Transfer Case Under Rule 21(b) [Doc. 600]

In his motion, defendant moves pursuant to Federal Rule of Criminal Procedure 21(b) to have the above-styled case transferred to the Southern District of West Virginia as defendant's practice was in Parkersburg, and most of the witnesses live in and around the Parkersburg area. This Court finds that a transfer at this point would be inappropriate.

"When an offense is begun in one district and completed in another, venue is proper in any district in which the offense was 'begun, continued, or completed.' " *United States v. Fells*, 78 F.3d 168, 170 (5th Cir. 1996) (quoting 18 U.S.C. § 3237(a)). "The trial court is entitled to broad discretion in ruling on motions to transfer venue, and its decision will be upheld absent an abuse of that discretion." *United States v. Asibor*, 109 F.3d 1023, 1037 (5th Cir. 1997). The question of a transfer under Rule 21(b) of the Federal Rules of Criminal Procedure for the convenience of the parties, the convenience of the witnesses, and the interests of justice lies within the sound discretion of the trial court. *United States v. Espinoza*, 641 F.2d 153 at 162.

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Several factors that have been recognized as appropriate factors to be considered by a trial court in exercising its discretion to grant or deny a transfer request are the following: (1) location of the defendant's offices; (2) location of possible witnesses; (3) location of events likely to be at issue; (4) location of documents and records likely to be involved; (5) disruption of the defendant's business if transfer denied; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of the place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer. *Platt v. Minnesota Mining and Manufacturing Company*, 376 U.S. 240 at 243-244 (1964); *United States v. Ubak-Offiong*, 364 Fed. Appx.859, 2010 WL 444408 (5th Cir. 2010).

***3** Defendant argues essentially that because defendant Barton Adams' office was in Vienna, West Virginia, and because most of the witnesses live in and around the Parkersburg area that the case should be transferred to the Southern District of West Virginia. The Court finds these arguments, in light of some of the other factors, unpersuasive.

Here, the above-styled case has been pending in this Court for over two years. This Court has handled the civil contempt motion, as well as overseen the change of counsel for defendant Barton Adams many times over. Further, the offices of both defendant Barton Adams' counsel and one of Josephine Adams' counsel are in Wheeling. Weighted against those factors are the fact that most of the patients which may testify are in and around Parkersburg. Defendant argues that it will be difficult for the witnesses to travel given their history of pain disorders, and expensive to house the witnesses once they are in Wheeling. While true, that conducting the trial in Parkersburg might allow for less travel for the patient witnesses, travel from the Parkersburg to Wheeling (100 miles) is not unduly burdensome. Further, it is unclear how many listed witnesses may testify as the Court has previously noted that should their testimony become cumulative the Court will stop the examinations.

Accordingly, the Court finds defendant's Motion to Transfer Venue [Doc. 600] should be, and hereby is, **DENIED**.

III. Motion to Dismiss Counts 2-10 [Doc. 587]

Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that an indictment or information must be a plain, concise and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. An indictment is insufficient if it does not allege a material element of the offense charged. Here, defendant argues in his Motion that Counts 2-10 must be dismissed as they fail to include a material element of the offense charges since they fail to include the term "affecting commerce." The Government argues that because the Counts allege that the defendant fraudulently obtained "... money or property owned by, or under the custody or control of, any health care benefit program," and "health care benefit program" is defined as "any public or private plan or contract affecting commerce ..." that Counts 2-10 include all the material elements.

In pertinent part, 18 U.S.C. § 1347 makes it unlawful to fraudulently obtain "any of the money or property owned by, or under the custody or control of, any *health care benefit program.*" (emphasis added.) The phrase "health care benefit program" is separately defined in 18 U.S.C. § 24(b) to mean "any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract." Accordingly, to convict the defendant, the Government will have to prove during the trial that Medicare and Medicaid are benefit programs "affecting commerce."

Counts 2-10 allege the defendant obtained amounts of money ranging from $5,973.98 to $34,314.86 "that included a payment for a fraudulent claim [from] money under the custody and control of a health care benefit program." The subject Counts also allege, by incorporating Count 1, paragraph 5, that:

> ***4** [D]efendant BARTON JOSEPH ADAMS devised a scheme to defraud and to obtain money totaling approximately three million, seven hundred twenty-five thousand ($3,725,000) dollars from health care benefit programs administered by the Department of Health and Human Services and private insurance companies by means of material false and fraudulent pretenses and representations.

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Taken together, the allegations included in 18 U.S.C. § 1347 "fairly inform" the defendant that an affect on commerce has to proven before the case is submitted to the jury. *See Hamling v. United States*, 418 U.S. 87, 117 (1974). Thus, Counts 2-10 charging a violation of 18 U.S.C. § 1347 need not be dismissed because they do not precisely lift the words "affecting commerce" from Section 24(b). Contrary to the defendant's contention, Counts 2-10 are constitutionally sufficient because they track elements of the offense language included in 18 U.S.C. § 1347, and inform the defendant of the charge against him which he must defend. *United States v. Wicks*, 187 F.3d 426, 427 (4th Cir. 1999).

The offense charged in ***Wicks*** included an interstate commerce nexus among its essential elements. The ***Wicks*** indictment did not include the phrase "interstate commerce;" instead, it charged that Wicks possessed a forged security of "an organization." The Fourth Circuit rejected the defendant's attack on the sufficiency of the indictment. The Court held the indictment was sufficient because the statutory "definition of the term 'organization' ... includes the interstate commerce requirement, and the component parts of the term 'organization' therefore need not be alleged." 187 F.3d at 428.

Additionally, in *United States v. Comite*, 2006 WL 3360282 *1, *8 (E.D. Pa. 2006) the court addressed the precise issue before this Court. In *Comite*, the 18 U.S.C. § 1347 health care fraud count did not include the phrase "affecting commerce." The court held the indictment to be sufficient because it "tracked the statutory language of 18 U.S.C. § 1347 .... [and otherwise informed the defendant] of the charges against her." *Id.* Likewise here, this Court finds that Counts 2-10 are sufficient as the indictment it "track[s] the statutory language of 18 U.S.C. § 1347 .... [and otherwise informs the defendant] of the charges against [him]." *Comite*, 2006 WL 3360282 at *8; see also *Wicks*, 187 F.3d at 427. Accordingly, defendant's Motion [Doc. 587] is **DENIED**.

IV. Motion to Suppress Video Surveillance Camera Evidence [Doc. 588]

In his motion, defendant seeks to suppress video recordings of patients entering and exiting the defendant's examination room. In support of his motion, defendant argues that the video recordings were taken in violation of his Fourth Amendment right to privacy, and failed to comply with the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520. In response, the Government argues that the video recorder was placed on a utility pole with the permission of the utility company, and that the camera's view, was limited to the public reception/waiting room and portions of the office that could be seen from that public area, and was narrower than the field of vision of anyone standing in the parking lot. Accordingly, the Government argues the placement of the camera–and thus the recordings–did not violate the defendant's Fourth Amendment Right to privacy, nor Title III. This Court agrees.

***5** First, the Court would note that Title III does not regulate the use of video surveillance. As defendant concedes ([Doc. 588] at 3) "Title III does not address the installation and monitoring of video-only cameras." *See United States v. Williams*, 124 F.3d 411 (3d Cir. 1997), *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990), *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986), *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (all holding that Title III does not apply to installation and monitoring of video-only cameras). Thus, any right defendant may have to suppress video only surveillance has to be based on a Fourth Amendment "reasonable expectation of privacy" analysis. *See United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009) (discussing video surveillance and reasonable expectation of privacy).

To challenge a search successfully under the Fourth Amendment, a defendant must have "a reasonable expectation of privacy" in the place that was searched. *Rakas v. Illinois*, 439 U.S.128, 143 (1978). In determining whether a defendant has a reasonable expectation of privacy, the court must answer two questions: "First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy.... Second, we inquire whether the individual's expectation of privacy is 'one that society is prepared to recognize as reasonable.' " *Bond v. United States*, 529 U.S. 334, 338 (2000) (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).

In ***Vankesteren***, agents set up video surveillance on defendant's property without a warrant and the Court found that the evidence was properly admitted because defendant had no reasonable expectation of privacy in an open field located a mile or more from his home. 553 F.3d at 291. While here, the video surveillance is not subject to the "open fields" doctrine, the Fourth Circuit's discussion in ***Vankesteren*** of *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987), is nonetheless helpful to this Court's analysis. The ***Vankesteren*** court stated:

> The Fifth Circuit considered a closer case in *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987). There, the police placed a camera on top of a power pole overlooking the defendant's ten-foot-high fence surrounding his back yard. The court found that the defendant had a reasonable expectation of privacy that would have been violated because the fence surrounded his curtilage. However, because the police properly obtained a court order for the surveillance, the court affirmed his conviction. *Id.* at 251-52. This case also does not help Vankesteren because VDGIF's camera was not placed within or even near the curtilage of his home.

553 F.3d at 291 (emphasis added).

Likewise, here, the pole camera was not placed in an area where the defendant had a reasonable expectation of privacy. Defendant had no reasonable expectancy of privacy relative to the comings and goings of people through his open-to-the-public reception/waiting room, which could have been routinely observed by law enforcement officers through the defendant's outer-office window. *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *see Maryland v. Macon*, 472 U.S. 463, 469 (1985) ("respondent did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and to transact business"); *United States v. Taylor*, 90 F.3d 903, 909 (4th Cir. 1996) ("Trooper Lane could properly seize the items he observed through the window"); *see also Florida v. Riley*, 488 U.S. 455, 461-62 (1989) (plurality holding helicopter surveillance at altitude of 400 feet did not violate reasonable expectation of privacy), *California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("aerial surveillance at altitude of 1000 feet did not violate reasonable expectation of privacy because it took place within public navigable airspace in a physically nonintrusive manner").

***6** Defendant takes issue with the zoom feature on the video camera. The Court finds that this feature is of no consequence to the above analysis. Defendant has made no allegation that the zoom feature allowed the agents to see anything they would have been unable to see if standing in the parking lot monitoring defendant's reception/waiting room. *See Dow Chemical Co. v. United States*, 476 U.S. 227, 238-239 (1986) ("The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems"); *United States v. Vankesteren*, 553 F.3d 286, 291 (4th Cir. 2009) (footnote omitted) ("Essentially, the camera did little more than the agents themselves could have physically done, and its use was therefore not unconstitutional.")

Defendant also takes issue with the fact that the office windows have been tinted. He argues that the tinting shows defendant had an expectation of privacy with regard to his reception/waiting room. This Court disagrees. The fact that the defendant tinted the windows of his office–even if assumed that he did so to hide the activities taking place in the reception/waiting room–is of no consequence in a Fourth Amendment analysis. *See California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.")

As the pole camera was not placed in an area where the defendant had a reasonable expectation of privacy, the Court finds that defendant's Motion to Suppress [Doc. 588] should be, and hereby is, **DENIED**.

V. Motion to Amend Correct [Doc. 589] Motion to Dismiss Count 11 [Doc. 593]

The Court has reviewed the motion and finds, for good cause shown, that defendant's Motion to Amend Correct Document 589 [Doc. 593] should be **GRANTED**.

VI. Motion to Dismiss Count 11 [Doc. 589] (as amended by [Doc. 593])

In his motion, defendant argues that Count 11 of the Second Superseding Indictment should be dismissed as "if Dr. Adams committed the offense of wire fraud, all the essential

elements were committed in the southern district of West Virginia." ([Doc. 593] at 2). The Government in response, argues that when a defendant is charged with wire fraud, venue is proper "in the district where a wire communication was in furtherance of the defendant's fraud scheme, regardless of whether the defendant was the actual sender or receiver of the wire transmission." ([Doc. 649] at 12) (citing *United States v. Ebersole*, 411 F.3d 517, 527 (4th Cir. 2005)). This Court finds that Count 11 need not be dismissed for improper venue.

In considering a pretrial motion to dismiss, the court must consider only the allegations contained in the Indictment, and the court must take those allegations as true. *United States v. Smith*, 452 F.3d 323, 334-335 (4th Cir. 2006), *cert. denied*, 549 U.S. 1065 (2006); *United States v. Thomas*, 367 F.3d 194, 197 (4th Cir. 2004); *United States v. Forrest*, 182 F.3d 910, 1999 WL 436743 (4th Cir. 1999) ("When a motion to dismiss for improper venue is a pretrial motion, only the indictment may be considered. Evidence beyond the face of the indictment should not be considered."). In considering a pretrial motion to dismiss a criminal matter for improper venue when the statute allegedly violated does not specify the venue, the court must determine from the allegations contained in the Indictment (1) the criminal conduct constituting the offense and (2) where the conduct was committed with respect to each count charged. *United States v. Smith*, 452 F.3d at 334-335.

7** Here, the Second Superceding Indictment alleges that the defendant committed wire fraud in violation of 18 U.S.C. §§ 1343 and 2. In *United States v. Ebersole*, the Fourth Circuit held that wire fraud is a continuing offense and "properly tried in any district where a payment-related wire communication was transmitted in furtherance of [the] fraud scheme." *Id.* 411 F.3d at 527 (citing *United States v. Kim*, 246 F.3d 186, 192 (2d Cir. 2001), *United States v. Stewart*, 256 F.3d 231, 243 (4th Cir. 2001)). The court further held that each transmittal occurred "both where it was sent and where it was received." *Ebersole*, 411 F.3d at 527. Accordingly, in ***Ebersole, the court found that "[v]enue was therefore proper on the wire fraud charges against [the defendant] if, as the district court instructed and the jury found, he caused any payment-related wire communication to be transmitted to or from the Eastern District of Virginia." *Id.*

Here, defendant is charged with wire fraud, and venue is in the Northern District of West Virginia. Accordingly, venue is proper if the Government shows that defendant, for the purpose of executing the fraud scheme "caused any payment-related wire communication to be transmitted to or from" the Northern District of West Virginia. *Ebersole*, 411 F.3d at 527. Count 11 of the Second Superceding Indictment properly alleges that the defendant, for the purpose of executing the charged fraud scheme, caused a wire transfer payment to be transmitted to Shepherdstown, West Virginia, which is in the Northern District of West Virginia. Accordingly, venue in this district is proper and defendant's Motion to Dismiss Count 11 [Doc. 589] is hereby **DENIED**.

VII. Motion for Severance of Count Twelve of the Second Superseding Indictment [Doc. 590]

In his motion, defendant argues that Count 12 of the Second Superseding Indictment should be severed "because there is absolutely no relationship between the proceeds involved in Count Twelve to the other proceeds involved in the remaining counts." ([Doc. 590] at 2). In response, the Government notes that the Court previously addressed the arguments raised in defendant's motion and found that Count 12 was properly joined. ([Doc. 649] at 10). This Court agrees.

On June 15, 2009, this Court entered an Order denying defendant's Motion to Sever Counts 12 and 13. [Doc. 168]. In the Order the Court found that as "Count 13 is properly joined, and ... Count 12 is of the same or similar character to Count 13," that "Count 12 is also properly joined." ([Doc. 168] at 5). Nothing in defendant's motion has cause this Court to alter its analysis. As such, defendant's motion [Doc. 590] should be, and hereby is, **DENIED.**

VIII. Motion to Dismiss Count 13 [Doc. 591]

In his Motion to Dismiss Count 13 [Doc. 591], defendant argues that Count 13 should be dismissed for improper venue. In support of his motion, defendant states "[a]ny mes rea to commit this alleged offense and any alleged acts to constitute the element of this offense were committed by Dr. Adams in the Southern District of West Virginia, especially considering the fact that the alleged acts involved electronic transactions that occurred from his residence in the Southern District of West Virginia." ([Doc. 591] at 2). In response, the Government states that venue is proper because Count 13 alleges the defendant committed an affirmative act in attempting to evade taxes by "willfully caus[ing] a wire transfer of $5,000 from an account under his control at a bank in Berkeley County, West Virginia, to an HSBC account opened via the internet." ([Doc. 649] at 11).

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In considering a pretrial motion to dismiss, the court must consider only the allegations contained in the Indictment, and the court must take those allegations as true. *United States v. Smith*, 452 F.3d 323, 334-335 (4th Cir. 2006), *cert. denied*, 549 U.S. 1065 (2006); *United States v. Thomas*, 367 F.3d 194, 197 (4th Cir. 2004); *United States v. Forrest*, 182 F.3d 910, 1999 WL 436743 (4th Cir. 1999) ("When a motion to dismiss for improper venue is a pretrial motion, only the indictment may be considered. Evidence beyond the face of the indictment should not be considered."). In considering a pretrial motion to dismiss a criminal matter for improper venue when the statute allegedly violated does not specify the venue, the court must determine from the allegations contained in the Indictment (1) the criminal conduct constituting the offense and (2) where the conduct was committed with respect to each Count charged. *United States v. Smith*, 452 F.3d at 334-335.

***8** Here, in Count 13, defendant is charged with tax evasion in violation of 26 U.S.C. § 7201. Tax evasion is a continuing offense, and venue is therefore proper, "in any district where the defendant committed an affirmative act in attempting to evade taxes. An affirmative act in attempting to evade taxes has been regarded as 'any conduct, the likely effect of which would be to mislead or conceal.' " *United States v. Kritt*, 2009 WL 6567103, *1, *3 (S.D.W. Va. 2009). Here the face of the Indictment states that defendant "did willfully attempt to evade and defeat a tax ... by committing and willfully causing the commission of affirmative acts of evasion, such as concealing and attempting to conceal from the Internal Revenue Service the nature and extent of his assets and the location thereof ... by committing other acts of evasion, such as ... willfully caus[ing] a wire transfer of $5,000 from an account under his control at a bank in Berkeley County, West Virginia, to an HSBC account opened via the internet." ([Doc. 409] at Count 13). Accordingly, defendant's motion should be, and hereby is **DENIED**.

IX. Motion to Dismiss Counts 159 and 160 of the Second Superseding Indictment [Docs. 592, 598]

In his motion, defendant argues that the Court should dismiss Counts 159 and 160 of the Second Superseding Indictment for lack of venue. Defendant argues that he was in the district of Maryland when the alleged money laundering transaction occurred and, therefore, the counts should be dismissed for lack of venue. ([Doc. 592] at 2). In response, the Government argues that venue is proper as the Indictment alleges that defendant conducted a financial transaction involving "proceeds of said specified unlawful activity" that was "initiated in the Northern District of West Virginia" and "concluded in the District of Maryland." ([Doc. 409] at Counts 159, and 160).

In considering a pretrial motion to dismiss, the court must consider only the allegations contained in the Indictment, and the court must take those allegations as true. *United States v. Smith*, 452 F.3d 323, 334-335 (4th Cir. 2006), *cert. denied*, 549 U.S. 1065 (2006); *United States v. Thomas*, 367 F.3d 194, 197 (4th Cir. 2004); *United States v. Forrest*, 182 F.3d 910, 1999 WL 436743 (4th Cir. 1999) ("When a motion to dismiss for improper venue is a pretrial motion, only the indictment may be considered. Evidence beyond the face of the indictment should not be considered."). Venue is only proper in a district where an essential conduct element of the offense took place. *Smith*, 452 F.3d at 334-35.

The money laundering statute authorizes the initiation of a money laundering prosecution in "any district in which the financial or monetary transaction is conducted." 18 U.S.C. § 1956(i)(1)(A). An essential element of the offense is 'conducting the financial or monetary transaction'. *See Smith*, 452 F.3d at 334-35. Thus, venue is proper if defendant "conducted" the "financial or monetary transaction" in the Northern District of West Virginia.

In the statute, the term "conducts" is defined as: "initiating, concluding, or participating in initiating, or concluding a transaction." 18 U.S.C. § 1956(c)(2). The term "transaction" is defined as: "purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected." 18 U.S.C. § 1956(c)(3). The term "financial transaction" is defined as: "(A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)(4).

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***9** Here, Count 159 of the Second Superseding Indictment states: "On or about December 11, 2008, in furtherance of the conspiracy alleged in Count One Hundred Sixty-Two of this Second Superseding Indictment, defendants BARTON JOSEPH ADAMS and JOSEPHINE ARTILLAGA ADAMS did knowingly conduct a financial transaction .... that was initiated in the Northern District of West Virginia and concluded in the District of Maryland, that is defendant BARTON JOSEPH ADAMS deposited into a third-party account, twenty-five thousand ($25,000) dollars in United States currency, ... which currency constituted proceeds of said specified unlawful activity ..." ([Doc. 409] at Count 159). Likewise, Count 160 of the Second Superseding Indictment states: "On or about December 11, 2008, in furtherance of the conspiracy alleged in Count One Hundred Sixty-Two of this Second Superseding Indictment, defendants BARTON JOSEPH ADAMS and JOSEPHINE ARTILLAGA ADAMS did knowingly conduct a financial transaction .... that was initiated in the Northern District of West Virginia and concluded in the District of Maryland, that is defendant BARTON JOSEPH ADAMS deposited into a third-party account, twenty-eight thousand ($28,000) dollars in United States currency, which currency constituted proceeds of said specified unlawful activity ..." ([Doc. 409] at Count 160).

Thus, on the face of the indictment, the Government has properly alleged venue in Counts 159 and 160 because the Indictment alleges that the defendant conducted an essential element of the offense—a financial or monetary transaction—in the Northern District of West Virginia. The Indictment alleges the defendant "initiated" the transaction in the Northern District of West Virginia, thus, it alleges he "conducted" the transaction in the Northern District of West Virginia. 18 U.S.C. § 1956(i)(1)(A) (defining venue), and 18 U.S.C. § 1956(c)(2) (defining "conducted" as "initiating").

Further, the Government has properly alleged venue in Counts 159 and 160 because the Indictment alleges that the defendant conducted a "transaction" and/or "financial transaction" in alleging in Count 159 that the defendant "deposited a third-party account [in Maryland], twenty-five thousand ($25,000) dollars in United States currency"; and in Count 160 alleging that the defendant "deposited a third-party account [in Maryland], twenty-eight thousand ($28,000) dollars in United States currency." The term "transaction" is defined as: "... with respect to a financial institution ... a deposit, withdrawal, transfer between accounts ... or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected." The term "financial transaction" is defined as: "... a transaction ... involving the movement of funds by wire or other means ... or involving the use of a financial institution ..." Thus, the defendant's initiation in the Northern District of West Virginia of the "deposit, withdrawal, transfer between accounts ... or any other payment, transfer, or delivery by, through, or to a financial institution" which concluded in Maryland is sufficient to support venue. *See Smith*, 452 F.3d at 334-35; 18 U.S.C. § 1956(i)(1)(A) (defining venue), 18 U.S.C. § 1956(c)(3) (defining "transaction"), and 18 U.S.C. § 1956(c)(4) (defining "financial transaction")

Additionally, the Court would note that in defendant's second Motion to Dismiss Counts 159 and 160 he states, "Although these counts allege, in general terms, that the transaction commenced in the Northern District of West Virginia, *there is nothing factual alleged* in either count to support that allegation." ([Doc. 598] at 5) (emphasis added). "[I]f an indictment properly alleges venue, but the proof at trial fails to support the venue allegation, an objection to venue can be raised at the close of the evidence." *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004) (citing *United States v. Melia*, 741 F.2d 70, 71 (4th Cir. 1984) (per curiam)). This Court will not entertain a challenge to the factual sufficiency of the Indictment at this point in the proceedings.

As stated by the Eleventh Circuit, "[t]here is no summary judgment procedure in criminal cases. Nor do the rules provide for a pretrial determination of sufficiency of the evidence ... The sufficiency of a criminal indictment is determined from its face. The indictment is sufficient if it charges in the language of the statute." *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) (per curiam). When the defendant is properly indicted, "the government is entitled to present its evidence at trial and have its sufficiency tested by a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29." *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004) (per curiam). "A motion for acquittal under Rule 29 is the proper avenue for contesting the sufficiency of the evidence in criminal cases because there is no explicit authority to grant a pre-trial judgment as a matter of law on the merits under the Federal Rules of Criminal Procedure." *Id. See also United States v. Ndiaye*, 434 F.3d 1270, 1299 (11th Cir. 2006) (holding the indictment was sufficient where it tracked the language of the statute and set forth the essential elements of the offense), *United States v. Todd*, 446 F.3d 1062, 1067-68 (10th Cir. 2006) (reversing trial court's dismissal of indictment for factual insufficiency, and stating that the proper inquiry is "whether

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the allegations of the indictment, if true, are sufficient to establish a violation of the charged offense" but noting pretrial dismissal of an indictment could be proper where the parties agree on undisputed facts and the court finds as a matter of law that the government cannot prove its case).

***10** Accordingly, based on the authority cited above, defendant's Motion to Dismiss Counts 159 and 160 [Doc. 592] should be, and hereby is, **DENIED**, and defendant's Motion to Dismiss Counts 17-157 and 159-160 [Doc. 598] should be, and hereby is, **DENIED in part** as to Counts 159 and 160.

X. Motion to Dismiss Counts 17-157 and Counts 159-160 [Doc. 598]

The above-styled case is presently before the Court on defendant's Motion to Dismiss Counts 17-157 [Doc. 598] [2]. In his motion, defendant argues that Counts 17-157 of the Second Superseding Indictment should be dismissed for lack of venue. Specifically, defendant alleges that venue fails because all the transfers alleged in Counts 17-157 are to accounts outside the Northern District of West Virginia, and "[n]othing in the individual counts of the indictment identify the location from which the transfers were made or the location of the bank or banks on which the checks were drawn." ([Doc. 598] at 5). In response, the Government argues, that as 18 U.S.C. § 1956(i)(1)(A) authorizes the initiation of a prosecution in any district in which the charged financial transaction was conducted, and as the Indictment charges the money laundering transaction was "conducted" in the Northern District of West Virginia, that venue is proper.

2 As noted above, defendant's Motion to Dismiss Counts 159 and 160 [Doc. 598] is **DENIED**.

In considering a pretrial motion to dismiss, the court must consider only the allegations contained in the Indictment, and the court must take those allegations as true. *United States v. Smith*, 452 F.3d 323, 334-335 (4th Cir. 2006), *cert. denied*, 549 U.S. 1065 (2006); *United States v. Thomas*, 367 F.3d 194, 197 (4th Cir. 2004); *United States v. Forrest*, 182 F.3d 910, 1999 WL 436743 (4th Cir. 1999) ("When a motion to dismiss for improper venue is a pretrial motion, only the indictment may be considered. Evidence beyond the face of the indictment should not be considered."). Venue is only proper in a district where an essential conduct element of the offense took place. *Smith*, 452 F.3d at 334-35. When an indictment contains multiple counts of indictment, venue must be proper on each count. *Id.*

The money laundering statute authorizes the initiation of a money laundering prosecution in "any district in which the financial or monetary transaction is conducted." 18 U.S.C. § 1956(i)(1)(A). An essential element of the offense is conducting the financial or monetary transaction. *See Smith*, 452 F.3d at 334-35. Thus, venue is proper if defendant "conducted" the "financial or monetary transaction[s]" in the Northern District of West Virginia.

In the statute, the term "conducts" is defined as: "initiating, concluding, or participating in initiating, or concluding a transaction." 18 U.S.C. § 1956(c)(2). The term "transaction" is defined as: "purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected." 18 U.S.C. § 1956(c)(3). The term "financial transaction" is defined as: "(A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)(4)

***11** Here, Counts 17-157 of the Second Superseding Indictment states: "On or about each date alleged in the following chart, in the Northern District of West Virginia, defendant BARTON JOSEPH ADAMS, did knowingly conduct a financial transaction .... that is BARTON JOSEPH ADAMS did willfully cause the transfer of funds between BARTON JOSEPH ADAMS's account at the Jefferson Security Bank and other accounts ..." ([Doc. 409] at Count 17-157).

Thus, on the face of the indictment, the Government has properly alleged venue in Counts 15-157 because the Indictment alleges that the defendant conducted an essential element of the offense—a financial transaction—in the Northern District of West Virginia. The Indictment alleges the defendant "initiat[ed], conclud[ed], or participat[ed] in initiating, or concluding a transaction" in the Northern

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District of West Virginia. 18 U.S.C. § 1956(i)(1)(A) (defining venue), and 18 U.S.C. § 1956(c)(2) (defining "conducted").

Further, the Government has properly alleged venue in Counts 17-157 because the Indictment alleges that the defendant conducted a "financial transaction" in alleging in Counts 17-157 that the defendant "did willfully cause the transfer of funds between BARTON JOSEPH ADAMS's account at the Jefferson Security Bank and other accounts ..." ([Doc. 409] at Counts 17-157). The term "financial transaction" is defined as: "... a transaction ... involving the movement of funds by wire or other means ... or involving the use of a financial institution ..." 18 U.S.C. § 1956(c)(4). Thus, the allegation in the Indictment that the defendant "initiat[ed], conclud[ed], or participat[ed] in initiating, or concluding a" "movement of funds by wire or other means ... or involving the use of a financial institution ..." in the Northern District of West Virginia is sufficient to support venue. *See Smith*, 452 F.3d at 334-35.

Additionally, the Court would note that in defendant's Motion to Dismiss he states, "Counts 17 through 157 ... merely *generically identify* transfer of funds and checks with the identified transfers taking place outside the Northern District of West Virginia." ([Doc. 598] at 6) (emphasis added). "[I]f an indictment properly alleges venue, but the proof at trial fails to support the venue allegation, an objection to venue can be raised at the close of the evidence." *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004) (citing *United States v. Melia*, 741 F.2d 70, 71 (4th Cir. 1984) (per curiam)). This Court will not entertain a challenge to the factual sufficiency of the Indictment at this point in the proceedings.

As stated by the Eleventh Circuit, "[t]here is no summary judgment procedure in criminal cases. Nor do the rules provide for a pretrial determination of sufficiency of the evidence ... The sufficiency of a criminal indictment is determined from its face. The indictment is sufficient if it charges in the language of the statute." *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) (per curiam). When the defendant is properly indicted, "the government is entitled to present its evidence at trial and have its sufficiency tested by a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29." *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004) (per curiam). "A motion for acquittal under Rule 29 is the proper avenue for contesting the sufficiency of the evidence in criminal cases because there is no explicit authority to grant a pre-trial judgment as a matter of law on the merits under the Federal Rules of Criminal Procedure." *Id. See also United States v. Ndiaye*, 434 F.3d 1270, 1299 (11th Cir. 2006) (holding the indictment was sufficient where it tracked the language of the statute and set forth the essential elements of the offense), *United States v. Todd*, 446 F.3d 1062, 1067-68 (10th Cir. 2006) (reversing trial court's dismissal of indictment for factual insufficiency, and stating that the proper inquiry is "whether the allegations of the indictment, if true, are sufficient to establish a violation of the charged offense" but noting pretrial dismissal of an indictment could be proper where the parties agree on undisputed facts and the court finds as a matter of law that the government cannot prove its case).

***12** Accordingly, based on the authority cited above, defendant's Motion to Dismiss Counts 17-157 and 159-160 [Doc. 598] should be, and hereby is, **DENIED**.

XI. Motion to Sever Defendant [Doc. 608]

The above-styled case is presently before the Court on defendant's Motion to Sever [Doc. 608]. In the motion, defendant argues that the trial of the co-defendants must be severed as Ms. Adams has indicated that she will present a defense that is "antagonistic to a determination by the trial jury that Barton Joseph Adams is innocent of the charged offenses" and further argues that failure to sever "will compromise either the Sixth Amendment and Confrontation Clause rights of Josephine Artillaga Adams or specific trial and constitutional rights of Dr. Adams' established by the Fifth and Sixth Amendments, statutory trial rights established by 18 U.S.C. § 4241(f) and specific trial rights established by Rule 12.2(c)(4) of the Federal Rules of Evidence" as Mrs. Adams seeks to use the psychiatric report of Dr. Adams. ([Doc. 608] at 1). In response, the Government argues that the purported prejudice is speculative and the defendants' defenses are not so antagonistic to one another as to mandate severance. Further, the Government argues that defendant has failed to show why limiting instructions would not cure any alleged prejudice. ([Doc. 649] at 13). This Court finds that Mrs. Adams is not entitled to the psychiatric report and that any other prejudice is either too speculative to merit severance, or could be cured by limiting instructions.

Severance is only required under Rule 14 when "there is serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993). To require severance, a defendant must "establish that actual prejudice would result from a joint trial ... not merely that a separate trial would offer

a better chance of acquittal." *United States v. Reavis*, 48 F.3d 763, 767 (4th Cir. 1995). Further, "[s]peculative allegations as to possible prejudice do not meet the burden of showing an abuse of discretion in denying a motion for severance." *United States v. Becker*, 585 F.2d 703, 707 (4th Cir. 1978).

The presence of conflicting or antagonistic defenses, standing alone, has also been held insufficient to require severance. *See, e.g. Zafiro*, 506 U.S. at 538; *United States v. Najjar*, 300 F.3d 466, 474 (4th Cir.), *cert. denied*, 537 U.S. 1094 (2002) (noting that the right to severance requires more than fact of "finger pointing," that is, more than a showing that a co-defendant intends to exculpate himself by inculpating a co-defendant). Severance is, however, required where there is "such a stark contrast presented by the defenses that the jury is presented with the proposition that to believe the core of one defense it must disbelieve the core of the other." *Najjar*, 300 F.3d at 474.

Here, defendant argues that there is possible prejudice in two ways: (1) through use of the psychiatric report of Dr. Adams, written in accordance with this Court's Order pursuant to 18 U.S.C. § 4241; and (2) by creating a scenario in which if the jury believes Ms. Adams' defense they might convict Dr. Adams on the basis that he is a "deceptive, manipulative, and domineering husband." (See [Doc. 608] at 1, 5). This Court finds that the first possibility is moot as this Court has denied Mrs. Adams access to the report in a separate Order. Thus, the only issue for the Court to address is whether based on the pleadings thus far, there is "such a stark contrast presented by the defenses that the jury is presented with the proposition that to believe the core of one defense it must disbelieve the core of the other." [3] *Najjar*, 300 F.3d at 474. This Court finds that this is not the case.

3 The Court has interpreted defendant's arguments with regard to the statement that joint trial "will compromise either the Sixth Amendment and Confrontation Clause rights of Josephine Artillaga Adams or specific trial and constitutional rights of Dr. Adams' established by the Fifth and Sixth Amendments, statutory trial rights established by 18 U.S.C. § 4241(f) and specific trial rights established by Rule 12.2(c)(4) of the Federal Rules of Evidence" as relating to Mrs. Adams' motion to compel production of the psychiatric report of Dr. Adams. As the Court finds that the report should not be produced, all these arguments are moot.

***13** Mrs. Adams, through counsel, has proffered to this Court in various pleadings that she plans to present a defense that she suffers from a dependent personality disorder and that she has no knowledge of the transactions at issue in the Indictment, nor knowledge of the accounts to which they relate. (See e.g. [Docs. 570, 595]). Defendant argues that this defense will paint him as a "deceptive, manipulative, and domineering" husband. ([Doc. 608] at 5) and that such a trial strategy could result in the jury convicting the defendant merely based on a perception that he is deceptive, manipulative, and domineering husband. The Court finds that this possibility is too speculative to mandate severance.

Defendant has failed to show that to believe the core of Mrs. Adams' defense (that she had no knowledge of the transactions, nor the accounts and was controlled by her husband) that the jury must disbelieve the core of Dr. Adams' defense. See *Najjar*, 300 F.3d at 474. In fact, in his motion, defendant fails to proffer to the Court what his defense will be. Based on the pleadings thus far, however, the Court is presuming the defendant's defense will be that the Government failed to prove he intended to defraud anyone or committed any crimes. Defendant's defense is, therefore, not irreconcilable with the defense of Mrs. Adams– that she relied on the representations of the defendant. *See United States v. Lewis*, 557 F.3d 601, 610 (8th Cir. 2009) (holding no error in failure to sever due to irreconcilable defenses where defendants were charged with mail fraud, wire fraud, bank fraud, money laundering, and conspiracy, and one defendant claimed ignorance of his co-defendant's wrongdoing, where other co-defendant's defense was that no fraud was committed); *see also United States v. Johnson*, 297 F.2d 845, 859 (9th Cir. 2002) (holding no error in failure to sever due to irreconcilable defenses where one group of co-defendants claimed the fraud occurred at the 'top' and that they were unaware of the fraud, and another group of co-defendants claimed the fraud occurred among the lower employees and that they were unaware of the fraud, finding that because there were more employees at both the top and bottom that were not indicted the jury could have believed both defenses without necessarily inferring the guilt of any defendant); *United States v. Allen*, 491 F.3d 178, 190 (4th Cir. 2007) (finding no error in failure to sever due to irreconcilable defenses where both defendants claimed to be ignorant of the fraud and claimed that others were the wrongdoers).

At most defendant has raised the specter that the jury could convict the defendant because he is a 'bad guy' as Mrs. Adams' arguments as to the defendant's personality *might* cause the jury to make an unreliable judgment about his guilt or innocence. *See Zafiro*, 506 U.S. at 534. The Court

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is unconvinced that this speculative claim is sufficient to justify severance. Defendant has cited to no case, nor has this Court found relevant authority, where a claim that a husband is "deceptive, manipulative, and domineering" would cause such prejudice as to deny that defendant a fair trial. Accordingly, defendant's Motion to Sever [Doc. 608] should be, and hereby is, **DENIED**.

XII. Motion to Dismiss Counts 12 and 13 [Doc. 646]

In defendant's motion, he argues that Counts 12 and 13 of the Second Superseding Indictment should be dismissed for lack of venue. [Doc. 646]. As this Court already addressed venue with regard to Count 13 in it's Order on Defendant's Motion to Dismiss Count 13 [Doc. 591] the Court will not readdress those arguments. (See IX, *supra*).

As to Count 12, defendant argues that Count 12 should be dismissed for improper venue. In support of his motion, defendant states that as the income tax returns were not prepared, signed, mailed, or filed in the Northern District of West Virginia, venue is improper. ([Doc. 646] at 1). In response, the Government states that venue is proper because at trial the Government will prove that the charged false return was prepared and signed in the Northern District of West Virginia. ([Doc. 722] at 3).

***14** In considering a pretrial motion to dismiss, the court must consider only the allegations contained in the Indictment, and the court must take those allegations as true. *United States v. Smith*, 452 F.3d 323, 334-335 (4th Cir. 2006), *cert. denied*, 549 U.S. 1065 (2006); *United States v. Thomas*, 367 F.3d 194, 197 (4th Cir. 2004); *United States v. Forrest*, 182 F.3d 910, 1999 WL 436743 (4th Cir. 1999) ("When a motion to dismiss for improper venue is a pretrial motion, only the indictment may be considered. Evidence beyond the face of the indictment should not be considered."). In considering a pretrial motion to dismiss a criminal matter for improper venue when the statute allegedly violated does not specify the venue, the court must determine from the allegations contained in the Indictment (1) the criminal conduct constituting the offense and (2) where the conduct was committed with respect to each Count charged. *United States v. Smith*, 452 F.3d at 334-335.

Here, in Count 12, defendant is charged with filing a false tax return in violation of 26 U.S.C. § 7206(1). Venue for the prosecution of the subject offense properly lies in the District where the charged false return was prepared and signed. *United States v. Slutsky*, 487 F.2d 832, 839 (2d Cir. 1973); *United States v. Hagan*, 306 F.Supp. 620, 621-22 (D. Md. 1969); *see also Newton v. United States*, 162 F.2d 795, 796-97 (4th Cir. 1947). Here, the face of the Indictment states that "[i]n the Northern District of West Virginia, defendant BARTON JOSEPH ADAMS, a resident of Martinsburg, West Virginia, did willfully make and subscribe a 1040A, United States Individual Income Tax Return, which was verified by a written and electronic declaration that it was made under penalties of perjury and which BARTON JOSEPH ADAMS did not believe to be true and correct as to every material matter." ([Doc. 409] at Count 12). Accordingly, as the Indictment charges that defendant prepared and signed the 1040A in the Northern District of West Virginia, defendant's motion should be, and hereby is **DENIED**.

XIII. Motion for Separate Trial on Counts [Doc. 647]

In defendant's Motion he argues that Count 12 should be tried separately as there is no 'clear connection or logical relationship' between Count 12 and the other Counts charged in the Indictment. The Court has previously addressed defendant's severance arguments and finds no reason to reconsider those arguments. (*See* discussion VIII, *supra*).

XIV. Request for Disclosure [Doc. 645]

In his motion, defendant asks that this Court "order the government to provide the defendant with copies of the subpoenas for other process that was utilized to secure access to the defendant's financial records and to the records of defendant's patients." ([Doc. 645] at 1). The defendant further requests that if any of the subpoenas are grand jury subpoenas, that this Court authorize their disclosure pursuant to Rule 6(e)(I). ([Doc. 645] at 1). In response, the Government argues that defendant has failed to show the "particularized need" required for disclosure of grand jury materials. ([Doc. 722] at 2). Further, the Government notes that any discovery of the subpoenas would not give the defendant grounds on which to suppress the records. ([Doc. 722] at 3 n.2).

"According to the Supreme Court, the burden is on the applicant for disclosure of confidential grand jury materials to establish 'a strong showing of particularized need ... before any disclosure will be permitted' *United States v. Sells Eng'g Inc.*, 463 U.S. 418, 443 (1983). In demonstrating particularized need, the party must establish that (1) the material 'is needed to avoid possible injustice in another judicial proceeding,' (2) 'the need for disclosure is greater than the need for continued secrecy,' and (3) the 'request is structured to cover only material so needed.' *Douglas Oil Co.*,

441 U.S. at 222." *Gilbert v. United States*, 2000 WL 20581 *1, *2 (4th Cir. Jan, 13, 2000) (unpublished). "Relevance alone is not sufficient; secrecy will not be broken absent a compelling necessity for the material. Further, the request must amount to more than a request for authorization to engage in a fishing expedition." *United States v. Riley*, 2008 WL 3019438 *1, *5 (10th Cir. Aug. 5, 2008) (internal citations and quotations omitted). The Court in ***Gilbert*** went on to note that Courts, when evaluating the factors allowing for disclosure, "must be cognizant of the rationale behind grand jury confidentiality." Id. at *2.

***15** "We start with a long-established policy that maintains the secrecy of the grand jury proceedings in federal courts. *See United States v. Johnson*, 319 U.S. 503, 513; *Costello v. United States*, 350 U.S. 359, 362. The reasons are varied." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 (1958). As summarized by the Supreme Court, those reasons include:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to the indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures be persons to have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Procter & Gamble Co., 356 U.S. at 682 n.6. "This indispensable secrecy of grand jury proceedings ... must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity." *Id.* at 682 (internal citations omitted).

Here, the Court finds defendant failed to show particularized need for either the subpoenas used to secure defendant's financial records, or the subpoenas used to secure defendant's patients' records. In his motion, defendant argues that he must have access to the subpoenas in order to be able to "meaningfully assess grounds for challenging the collection of his financial records and his patients' records." ([Doc. 645] at 2). Disclosure pursuant to this type of request is specifically the type of request the "particularized need" rule seeks to prevent. Defendant is merely hoping for authorization to engage in a "fishing expedition" *Riley*, 2008 WL 3019438 at *5, to determine whether the records were obtained properly. This Court finds no relevant law, nor has the defendant disclosed any to the Court, which would allow for disclosure of grand jury materials based on such a speculative claim.

CONCLUSION

Additionally, the Court **ORDERS** that the following motions be **DENIED** as **MOOT**: Motion for Extension of Time to File Motions [Doc. 599], Motion for Extension of Time to File Motions [Doc. 616], Sealed Document [687], Motion to Quash Subpoena [Doc. 693]

It is so **ORDERED**.

The Clerk is directed to transmit a copy of this order to all counsel of record herein.

All Citations

Not Reported in Fed. Supp., 2011 WL 13161193

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KeyCite Yellow Flag - Negative Treatment
Called into Doubt by State v. Jones, S.D., September 20, 2017

2008 WL 375210
Only the Westlaw citation is currently available.

United States District Court,
E.D. Wisconsin.

UNITED STATES of America, Plaintiff,
v.
Brijido AGUILERA, Defendant.

No. 06-CR-336.
|
Feb. 11, 2008.

Attorneys and Law Firms

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Gail J. Hoffman, United States Department of Justice (ED-WI), Office of the US Attorney, Milwaukee, WI, for Plaintiff.

DECISION AND ORDER

LYNN ADELMAN, District Judge.

I.

***1** As part of its investigation of an alleged cocaine distribution ring, government agents installed a video camera on a utility pole outside of defendant Brijido Aguilera's property, which they used to monitor the traffic into and out of his driveway. They obtained no warrant authorizing the video surveillance. Defendant moved to suppress the evidence obtained via the camera, asserting a violation of his Fourth Amendment rights. The magistrate judge handling pre-trial proceedings in the case recommended that the motion be denied. Defendant objects, so I must review the matter de novo. Fed.R.Crim.P. 59(b)(3). [1]

1 Defendant does not request an evidentiary hearing, and the parties agree on the basic facts as set forth above.

II.

The Fourth Amendment protects individuals from unreasonable "searches" and "seizures." *See United States v. Garcia,* 474 F.3d 994, 996 (7th Cir.), *cert. denied,* --- U.S. ----, 128 S.Ct. 291, 169 L.Ed.2d 140 (2007). "A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A seizure of property occurs where there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook County,* 506 U.S. 56, 63, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). In the present case, agents installed the video camera on a utility pole outside defendant's property and did not effect a trespass during the installation. Thus, there was no physical intrusion or interference with defendant's possessory interest in his property. *See Garcia,* 474 F.3d at 996. The issue is whether the use of the camera to monitor defendant's driveway constituted a search. [2]

2 Defendant complains that the government did not obtain permission from the utility company before installing the camera. However, defendant lacks standing to assert any rights on behalf of the utility company. *See, e.g., United States v. Mendoza,* 438 F.3d 792, 795 (7th Cir.2006) (stating that a defendant cannot assert the Fourth Amendment rights of others). Defendant does not own the utility pole upon which the camera was installed, and the pole is not located on defendant's property.

A defendant objecting to a search bears the burden of demonstrating a legitimate expectation of privacy in the area searched. *United States v. Villegas,* 495 F.3d 761, 767 (7th Cir .2007), *cert. denied,* 76 U.S.L.W. 3289 (U.S. Jan. 7, 2008). A legitimate "expectation of privacy is present when (1) the defendant exhibits an actual or subjective expectation of privacy, and (2) the expectation is one that society is prepared to recognize as reasonable." *United States v. Amaral-Estrada,* 509 F.3d 820, 827 (7th Cir.2007). Courts typically extend the greatest protection to the home, which includes both the residence structure and the home's curtilage, i.e. the area outside the home itself but so close to and intimately connected with the home and the activities that normally go on there that it can reasonably be considered part of the home. *Bleavins v. Bartels,* 422 F.3d 445, 450-41 (7th Cir.2005).

However, a person does not have a reasonable expectation of privacy in what he knowingly exposes to the public, even in his own home or office. *California v. Greenwood,* 486 U.S. 35, 41, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). For example, courts have held that there is no legitimate expectation of privacy in driveways and porches visible from a public street. *United States v. Evans,* 27 F.3d 1219, 1228-29 (7th Cir.1994)

(collecting cases); *see also California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) ("That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."). Further, courts have held that police may use technology to enhance or substitute for surveillance they could lawfully conduct themselves. *See, e.g., United States v. Knotts,* 460 U.S. 276, 282, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."); *Garcia,* 474 F.3d at 998 ("Of course the amendment cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth.").

***2** These cases lead to the result here. The police could have stood on the street outside defendant's house and observed the comings and goings from his driveway; substitution of a camera for in-person surveillance does not offend the Fourth Amendment; and the camera did not record activities within defendant's home or its curtilage obscured from public view. [3] *See, e.g., United States v. Jackson,* 213 F.3d 1269, 1281 (10th Cir.), *vacated and remanded on other grounds,* 531 U.S. 1033, 121 S.Ct. 621, 148 L.Ed.2d 531 (2000) (holding that the defendant's Fourth Amendment rights were not implicated by installation of video cameras on telephone poles, which were incapable of viewing inside houses and were capable of observing only what any passerby would easily have been able to observe); *see also Allender v. Huesman,* No. IP01-1718, 2003 WL 23142184, at *6 (S.D.Ind. Apr.14, 2003) (holding that video surveillance of a driveway did not amount to a search). Therefore, for these reasons and those stated by the magistrate judge, the motion must be denied.

3 This is not a case, like *United States v. Cuevas-Sanchez,* 821 F.2d 248 (5th Cir.1987), where agents used a camera to observe activity that would otherwise be obscured by a fence. Nor is it like *United States v. Torres,* 751 F.2d 875 (7th Cir.1984), where agents recorded activity inside a private building, or *United States v. Nerber,* 222 F.3d 597 (9th Cir.2000), where agents installed a camera inside a hotel room. Because the camera at issue in the present case recorded an area over which defendant had no legitimate expectation of privacy, his reliance on these cases, which held that the warrant requirement applied, is misplaced. *See State v. Holden,* 964 P.2d 318, 321-22 (Utah Ct.App.1998) (distinguishing *Cuevas-Sanchez* where the camera recorded activities open to public view).

III.

THEREFORE, IT IS ORDERED that the magistrate judge's recommendation is **ADOPTED,** and defendant's motion to suppress (R. 278) is **DENIED.**

All Citations

Not Reported in F.Supp.2d, 2008 WL 375210

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by State v. Jones, S.D., September 20, 2017

2016 WL 6995067
Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

UNITED STATES of America, Plaintiff,
v.
Ricardo BAILEY, Defendant.

15-CR-6082G
|
Signed 11/29/2016

Attorneys and Law Firms

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Gary Muldoon, Muldoon and Getz, Rochester, NY, for Defendant.

DECISION & ORDER and
REPORT & RECOMMENDATION

MARIAN W. PAYSON, United States Magistrate Judge

PRELIMINARY STATEMENT

***1** By Order of Hon. Frank P. Geraci, Jr., Chief United States District Judge, dated June 5, 2015, all pretrial matters in the above captioned case have been referred to this Court pursuant to 28 U.S.C. §§ 636(b)(1)(A)-(B). (Docket # 98).

On June 4, 2015, the grand jury returned an indictment against defendant Ricardo Bailey ("Bailey"). (Docket # 97). Count One of the indictment charges Bailey with conspiring with Edward Mighty, Seymour Brown, Andre Taylor, Robert Wilson, Kenneth Harper, Christopher Samuels, and others between October 2014 and February 10, 2015, to possess with the intent to distribute and to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 846. (*Id.*). The second count of the indictment charges Bailey with using and maintaining the premises at 54 Strong Street, Rochester, New York, for the purpose of manufacturing and distributing cocaine, in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2. (*Id.*). Count Three charges Bailey with possessing a firearm in furtherance of the drug trafficking crimes charged in Counts One and Two, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2. (*Id.*). Count Four charges Bailey with possessing with intent to distribute 500 grams or more of cocaine on or about February 10, 2015. (*Id.*).

On October 17, 2016, and November 1, 2016, this Court issued decisions recommending that the district court deny Bailey's motions to suppress wiretap evidence and to dismiss the indictment on speedy trial grounds, respectively. (Docket ## 164, 168). Familiarity with those decisions is assumed. Currently pending before the Court are motions for disclosure of grand jury minutes (Docket ## 111-1 at 25-30; 119 at 58-59; 140 at 7-8), discovery and inspection (Docket # 140 at 20), dismissal of the indictment (Docket ## 111-1 at 46-56; 119 at 65-66; 140 at 4-6), a *Franks* hearing (Docket ## 111 at 67-70; 111-1 at 1-19; 119 at 27-58; 128 at 4-6; 156 at 3-8), suppression of tangible evidence (Docket ## 111-1 at 36-43; 112; 119 at 61-65; 140 at 9-12; 156 at 3-4), suppression of statements (Docket ## 111-1 at 33-34; 119 at 59-60; 145), and suppression of electronic surveillance evidence (Docket ## 111 at 63-66; 119 at 24-27; 128 at 2-3; 156 at 4-12). Bailey also seeks relief based upon the government's alleged failure to preserve GPS data.[1] (Docket # 140). For the reasons discussed below, I deny Bailey's motions for disclosure of grand jury minutes and for discovery and inspection, and recommend that the district court deny the remaining motions.

1 Bailey filed omnibus motions seeking other forms of relief including, *inter alia*, an audibility hearing, a bill of particulars, *Brady* material, discovery and inspection, Rule 404(b), 608 and 609 evidence, *Jencks* material, preservation of rough notes, suppression of identification testimony, leave to file additional motions, disclosure of expert reports, and a ruling pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence. (Docket ## 111, 112, 119). Each of the above-referenced motions was decided by the undersigned or resolved by the parties in open court on April 7, 2016. (Docket ## 130, 131).

FACTUAL BACKGROUND

I. Warrants for 54 Strong Street, Nissan Maxima and Bailey's Person

***2** On February 9, 2015, Monroe County Court Judge Vincent M. Dinolfo signed four warrants authorizing searches of the upstairs and downstairs apartments at 54 Strong Street, Rochester, New York, a 2001 black Nissan Maxima, and Bailey's person. (Docket ## 115-19, 115-20, 115-21, 115-22). Edmond Bernabei ("Bernabei"), an investigator employed

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by the Rochester Police Department ("RPD"), submitted an affidavit in support of the application for the warrants. (Docket # 115-18).

Bernabei indicated that he had been involved in an ongoing investigation of narcotics trafficking, and his supporting affidavit incorporated by reference thirty-two wiretap applications or extension requests and the accompanying orders that had been prepared and issued in connection with the investigation. (Docket # 115-18 at 6-12, ¶¶ 1-32). Included among those applications was an affidavit authored by Myron Moses ("Moses"), an investigator employed by the RPD. (Docket # 115-18 at ¶ 30). The relevant content of both of these affidavits is summarized below.

A. Moses's February 4, 2015 Affidavit

On February 4, 2015, Judge Dinolfo issued a warrant authorizing the interception of communications over mobile telephone number 347-753-6469 believed to be used by Garfield Bourne ("Bourne"). (Docket # 115-10). In support of the warrant application, Moses summarized the pending investigation into a drug trafficking ring operated by Edward Mighty ("Mighty") that supplied cocaine to drug trafficking partners Kenneth Harper ("Harper") and Robert Wilson ("Wilson"). (Docket # 115-12 at ¶ 31). Moses stated that the investigation revealed that individuals named "Stamma" and Seymour Brown ("Brown") participated in Mighty's drug organization. (*Id.*). According to Moses, the investigation demonstrated that the drug ring obtained narcotics from an individual believed to be Bourne who used telephone number 347-968-3130. (*Id.*). (The caption of the affidavit identifies Bourne by the alias "Chin.") Moses believed that either Bourne or an unknown male also used the target number 347-753-6469 to further the organization's drug trafficking. (*Id.*).

According to Moses, on January 30, 2015, at approximately 2:01 p.m., Brown participated in a conversation with an unknown male. (*Id.* at ¶ 33). During the course of that phone call, Brown received another call through call waiting from the target number. (*Id.*). The call included the following exchange:

Brown: Yo.

Unknown Male: What happened?

Brown: Yeah, I ah, I'm a have to move, I'll just check you tomorrow. I'm telling you man I'm doing too much right now.

Unknown Male: Why's that?

Brown: Nah, cause I gotta go at two. And it's two now so and I ain't even fucking I'm still fucking with um with my cousin and shit.

Unknown Male: Oh come on man, these I'm just told them people that you coming through now.

Brown: Damn, you got the rest of that?

Unknown Male: Yeah I got like three or four hundred.

Brown: Oh that's cool, I wanna do, I wanna do it, alright I'll just bring it to you then, damn.

Unknown Male: Alright.

Brown: I'm trying to get this niggas, fucking (pause) alright I'll be.

Unknown Male: Just bring the shit.

Brown: Alright, alright.

CALL WAITING from 347-753-6469

Brown: Hello?

CHIN: Yo.

Brown: Hey, I was just on the phone with them right. They was saying either I could add them, add whatever it, its, registered to now or I gotta register to me.

CHIN: Ah.

Brown: And then that ain't gonna happen today for I gotta register to me cause it's too late.

CHIN: Ah.

***3** Brown: And they aren't open on Saturdays.

CHIN: Ah. Huh?

Brown: You want me to add?

CHIN: You could add ...

Brown: I could add her, I could add whoever this is.

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CHIN: Yeah but they gotta return the shit, the plates first right?

Brown: Oh yeah, yeah, yeah, yeah, yeah.

CHIN: I gotta return the plates first then.

Brown: Right and then I can put it in my name.

CHIN: Yeah.

Brown: Yeah, I'll do that Mon, I'd rather do that in the week.

CHIN: Huh?

Brown: I gotta do, I can't do that today, it ain't open.

CHIN: Huh?

Brown: I gotta do that like in the week and it's not open today.

CHIN: (Unintelligible)

Brown: Alright, we trapping up now

CHIN: Ok

Brown: Alright

(*Id.*).

Based upon his training, experience, and knowledge of the case, Moses opined that Brown was discussing retrieving money from a cocaine customer to take with him on a trip to New York City to purchase more cocaine from his source. (*Id.* at ¶ 34). Brown received an incoming call through call waiting from the target number, which Moses believed was being used by the cocaine source. (*Id.*). The source questioned Brown about the registration of a trap car—a vehicle with hidden compartments to secrete money and narcotics. (*Id.*). Brown told the source that the vehicle would not be registered that day, but that the money had been hidden in the trap for the trip to New York City. (*Id.*). Brown told the source that he would be leaving soon. (*Id.*).

Approximately one hour later, Brown received another call from the target number. (*Id.* at ¶ 35). The contents of the call included the following:

Brown: What's up boss?

Unknown Male: What going on?

Brown: Hey how's, how the weather look down there?

Unknown Male: It's good.

Brown: It's good, ya'll ain't get no storm or nothing?

Unknown Male: No.

Brown: Still waiting.

Unknown Male: Huh?

Brown: I'm we gonna be pushing out in a minute, I'm still waiting.

Unknown Male: You still waiting?

Brown: Yea, I don't want to get caught up in no storm so that's why I'm asking how it look.

Unknown Male: Ain't no storm out there.

Brown: We ready.

Unknown Male: It snowed this morning that was it.

Brown: You said Sunday morning it's gonna be a storm?

Unknown Male: No, snowed this morning that's was it.

Brown: Oh oh ok alright, alright just keep an eye on the weather, I'm on my way now, I'm about to leave now.

Unknown Male: Alright.

Brown: Alright

(*Id.*).

Moses interpreted the call as a conversation between Brown and the cocaine source, believed to be Bourne. (*Id.* at ¶ 36). According to Moses, Bourne called to find out what time Brown would be leaving Rochester to travel to New York City to purchase cocaine. (*Id.*). Brown inquired about the weather because he was concerned about driving through a snow storm. (*Id.*).

The following day, at approximately 9:31 a.m. [2], another call between Brown and the target number was intercepted:

Brown: What up boss?

Unknown Male: What's going on?

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Brown: Hey whats going on, you ready?

Unknown Male: Ready.

Brown: Are you ready?

Unknown Male: [u/i] What time is it?

Brown: ummm ...

Unknown Male: Eleven.

Brown: Eleven, alright.

Unknown Male: Eleven.

(*Id.* at ¶ 37). According to Moses, Brown was asking Bourne, the source, whether he was ready to meet in New York City in order to exchange the money for cocaine. (*Id.* at ¶ 38).

2 In the affidavit, Moses indicated that this call took place at 9:30 p.m.; the call log recited in the affidavit suggests that the call occurred in the morning. (*Id.* at ¶ 37).

***4** At approximately 11:00 a.m. that same day, Brown received another call from the source:

Brown: Yo.

Unknown Male: Yo, change of plan, you need to get here, hurry your ass up.

Brown: Alright I'm right around, I'm right around the corner.

Unknown Male: I thought you was, [u/i] car.

Brown: Alright, that's cool, alright.

(*Id.* at ¶ 39). According to Moses, the source told Brown to accelerate his arrival at the meeting location in order to conduct the exchange. (*Id.* at ¶¶ 39-40).

Later that day, at approximately 6:39 p.m., another call between Brown and the source was intercepted:

Unknown Male: Hello?

Brown: Yea I'm right here.

Unknown Male: What?

Brown: I'm here everything good, I'm here back up.

Unknown Male: Ok.

Brown: Alright.

Unknown Male: Ok.

(*Id.* at ¶ 41). Moses interpreted the call as a message from Brown to the supplier that he had returned to the Rochester area with the cocaine. (*Id.* at ¶ 42).

B. Bernabei's February 9, 2015 Affidavit

Bernabei stated that he had been involved in "numerous" narcotics investigations and that he had participated in successful investigations of drug distribution networks. (Docket # 115-18 at 5, ¶ 4). As a result of these experiences, Bernabei stated that he was familiar with the "jargon" that narcotics traffickers use and the tactics they employ to disguise drug-related activities. (*Id.*). Throughout his affidavit, Bernabei summarized the substance of numerous intercepted conversations. According to Bernabei, many of the conversations were also "coded," which he was able to interpret based upon his training, experience, and knowledge of the investigation. (*See*, *e.g.*, *id.* at ¶¶ 34-38, 40, 42-45, 47-52, 54, 56-58, 60, 62-73, 75, 77).

According to Bernabei, the execution of the wiretap warrants had revealed that Mighty operated a drug trafficking ring with the assistance of others, including Andre Taylor a/k/a "Stamma" ("Taylor"), and Brown. (*Id.* at ¶ 33). According to Bernabei, the investigation suggested that Mighty's drug ring obtained narcotics from an unknown male with the nickname "Chin," who operated out of Brooklyn, New York. (*Id.*).

Bernabei stated that on January 9, 2015, a call from Jamal Beachum to Taylor was intercepted. (*Id.* at ¶ 34). Beachum indicated that he was in the downstairs apartment at 54 Strong Street, Rochester, New York, and needed a key to enter the upstairs apartment. (*Id.*). Taylor told Beachum to ask Bailey for the key, but Bailey was apparently unable to find the key to the upstairs apartment. (*Id.*).

According to Bernabei, on January 12, 2015, a series of calls were intercepted between Taylor and an unknown female who worked as a cocaine courier for Mighty and Taylor. (*Id.* at ¶¶ 35, 37). At approximately 10:37 a.m., Taylor called the female and informed her that a package containing narcotics would be arriving at her address, 114 Myrtle Street, Rochester, New York. (*Id.*). At approximately 4:52 p.m. that same day, surveillance officers observed a postal vehicle parked in the

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vicinity of 114 Myrtle Street and saw a male exit 114 Myrtle Street, approach the postal truck, talk to the carrier, and retrieve a box from the rear of the truck. (*Id.* at ¶ 36). The male took the package inside 114 Myrtle Street. (*Id.*).

***5** At about the same time, Taylor called the unknown female and directed her to contact a third person to determine whether the package had been delivered so that Taylor could retrieve the package. (*Id.* at ¶ 37). The female called back Taylor and indicated that the package had been delivered. (*Id.*). At approximately 5:39 p.m., surveillance officers observed a blue Ford vehicle arrive at 114 Myrtle Street. (*Id.*). Brown exited the vehicle and entered 114 Myrtle Street. (*Id.*). Brown exited the apartment a short while later carrying a backpack that he placed in the vehicle. (*Id.*).

Brown drove to 160 Blakeslee Street and spoke with an unknown male in the driveway. (*Id.*). Brown retrieved the backpack from the vehicle and entered 160 Blakeslee Street with the male. (*Id.*). Brown was observed exiting the address at approximately 6:18 p.m. carrying the backpack. (*Id.*). He drove the vehicle to 319 Alfonso Drive where he picked up an unknown male and then drove to 54 Strong Street. (*Id.*). He parked the car in the rear of 54 Strong Street, beyond the view of surveillance officers. (*Id.*).

According to Bernabei, a phone call between Taylor and Bailey was intercepted on January 13, 2015. (*Id.* at ¶ 42). Bernabei indicated that the investigation had revealed that Bailey was a "cocaine and marijuana associate" of Mighty and Taylor. (*Id.*). During the phone call, Taylor instructed Bailey to pay the gas and electric bill for both the upstairs and downstairs apartments at 54 Strong Street. (*Id.*). Bernabei indicated that 54 Strong Street was being used by Mighty, Brown, and Taylor as a cocaine and marijuana distribution location. (*Id.*).

In his affidavit, Bernabei described a series of calls between Taylor, Harper, and Wilson that were intercepted on January 30, 2015, at approximately 8:46 a.m. (*Id.* at ¶¶ 44-45). According to Bernabei, Harper called Taylor and asked whether he had any cocaine for sale. (*Id.* at ¶ 46). Taylor told Harper that a shipment of good quality cocaine had come in and would be ready in approximately one hour. (*Id.*). Harper then called Wilson, a drug trafficking partner of Harper, and told him that Taylor had indicated that the cocaine shipment was available for pickup. (*Id.*).

Approximately one hour later, Wilson was observed leaving a residence in a 2003 Infiniti. (*Id.*). According to Bernabei, Wilson traveled to 295 Smith Street to pick up Harper and drove to 54 Strong Street. (*Id.*). According to Bernabei, video surveillance depicted Harper approach the rear door of 54 Strong Street and, a short while later, walk from the rear of 54 Strong Street and get in the 2003 Infiniti. (*Id.*). The 2003 Infiniti returned to 295 Smith Street. (*Id.*). Video surveillance of 295 Smith Street captured Wilson and Harper enter that location at approximately 10:31 a.m. (*Id.*). Bernabei indicated that the investigation had revealed that Wilson and Harper were drug trafficking partners and that 295 Smith Street was a "stash house" that they used. (*Id.*).

Bernabei's affidavit recounted several additional calls intercepted on January 30, 2015. (*Id.* at ¶¶ 47-52, 54). According to Bernabei, at approximately 12:29 p.m., Mighty called Chin, one of his cocaine sources, and told him that he would be selling the remaining cocaine and would be sending the proceeds to Chin in New York City that day in order to obtain a new shipment of cocaine. (*Id.*). Approximately ten minutes later, Brown called Darrell Overton ("Overton") to tell him that him that the cocaine had been sold and that Brown would be traveling to New York City to pick up another shipment. (*Id.*). Overton thereafter called Brown and told him that he had drug customers waiting for the new cocaine shipment; Brown indicated that he had to go get it. (*Id.*).

***6** Later that same afternoon, Chin called Brown and asked him whether he would be getting a trap car registered in his name. (*Id.*). Brown told Chin that the trap car was not registered, but the money was secreted in the car for the trip to New York City. (*Id.*). Brown indicated that he would be leaving soon to travel to New York City. (*Id.*). Chin called Brown again to ask what time he would be leaving Rochester, and Brown inquired about the weather in the New York City area. (*Id.*).

At approximately 6:59 p.m., Mighty called Chin to tell him that the money to pay for the cocaine would soon be leaving Rochester. (*Id.*). Approximately two hours later, surveillance officers observed a black 2001 Nissan Maxima leave the driveway of 54 Strong Street and travel to a gas station, where Brown was observed pumping gas into the car. (*Id.* at ¶ 53). An unknown male was observed in the passenger seat of the vehicle. (*Id.*). Surveillance observed Brown and the unknown male drive to Brooklyn, New York. (*Id.*). During the same time, Chin called Mighty to ask whether the money was being

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transported to New York City, and Mighty replied that the money was on its way and that he was gathering additional funds for another drug transaction. (*Id.* at ¶ 54).

At approximately 4:45 a.m. on January 31, 2015, the Nissan arrived at a diner in Brooklyn, New York. (*Id.* at ¶ 55). Brown and the unknown male exited the vehicle and entered the restaurant. (*Id.*). Shortly thereafter, they traveled to and entered a nearby hotel. (*Id.*). At approximately 9:31 a.m., Brown called Chin to ask whether he was ready to meet at 126 New Jersey Avenue[3], Brooklyn, New York, in order to exchange the money for the cocaine. (*Id.* at ¶ 56). Approximately one hour later, Brown was observed leaving the hotel and driving the Nissan across the street to a gas station. (*Id.*). A few minutes later, the unknown male exited the hotel, crossed the street, and entered the vehicle. (*Id.*). The vehicle drove to another location in Brooklyn, New York. (*Id.*).

3 In his affidavit, Bernabei sometimes refers to this location as "126 New Jersey Street" and at other times refers to it as "126 New Jersey Avenue." (*Id.* at ¶¶ 56, 60, 61, 71, 76). The Complaint refers to 126 New Jersey Avenue. (*See*, *e.g.*, Docket # 1 at ¶¶ 25-27). To avoid confusion, the Court has used the address 126 New Jersey Avenue throughout this decision.

At approximately 10:51 a.m., Brown called Chin and told him his location. (*Id.* at ¶ 57). Chin told Brown to meet him at 11:30 a.m. to conduct the transaction. (*Id.*). A short while later, Chin called Brown to inform him of a change in plans and that Brown should meet him at Chin's location. (*Id.* at ¶ 58). A few minutes later, surveillance officers observed the Nissan enter a car wash. (*Id.* at ¶ 59). The unknown male and Brown exited the vehicle and, after the car was washed, Brown alone got back into the vehicle. (*Id.*). He drove to 126 New Jersey Avenue, Brooklyn, New York and entered a gated driveway. (*Id.*).

Approximately twenty minutes later, Chin called Mighty to confirm the amount of money in the vehicle. (*Id.* at ¶ 60). Shortly thereafter, the Nissan Maxima left 126 New Jersey Avenue and returned to the car wash to pick up the unknown male passenger. (*Id.* at ¶ 61). At that point, surveillance was terminated. (*Id.*).

Several phone calls between and Brown and his narcotics customers were also intercepted on January 31, 2015. (*Id.* at ¶¶ 62-65). During those conversations, Brown informed his customers that he was transporting a shipment of cocaine from New York City to Rochester. (*Id.*). Brown also called Taylor at approximately 4:03 p.m. and informed him that he was transporting the cocaine to Rochester. (*Id.* at ¶ 66). During intercepted calls between Brown and Chin, Brown informed Chin of his progress and that he had returned to Rochester with the cocaine. (*Id.* at ¶¶ 67-68).

***7** In his affidavit, Bernabei described a series of phone calls, some of which included coded communications, that were intercepted on February 3, 2015. (*Id.* at ¶¶ 69-73). According to Bernabei, at approximately 10:43 p.m., Mighty called Taylor and indicated that Chin wanted "drug money" to be transported immediately to New York City. (*Id.*). Mighty asked to speak with Bailey and, when he was on the phone, asked him if he could transport the money to New York City. (*Id.*). Bailey agreed, and Mighty reminded him to bring a money counting machine, plastic wrap for the money, tape, and the key for the plug to the hidden trap in the car. (*Id.*). Mighty instructed Bailey to arrive at his residence at 144 Oakland Street by midnight. (*Id.*).

At approximately 11:00 p.m., Mighty called Taylor and instructed him to include money from a third party with the rest of the money that was being placed in the vehicle to be driven to Brooklyn. (*Id.*). A few minutes later, Beachum called Mighty to inform him that he would give his drug money to Bailey to take to New York City to obtain a new cocaine shipment. (*Id.*). Mighty complained to Beachum about the short notice that Chin had provided. (*Id.*). Mighty also called Taylor to inform him that Bailey would be taking the car with the hidden compartment to Mighty's residence so that Mighty could load the car with the money needed to purchase the next shipment of drugs. (*Id.*). Mighty asked Taylor to check the hidden compartment before Bailey left to verify the amount of money that was in the compartment and to have Bailey call Mighty. (*Id.*). A few minutes later, Bailey called Mighty, and Mighty asked him whether he knew how to use the hidden compartment in the vehicle. (*Id.*). Bailey indicated that he did not. (*Id.*). Mighty instructed Bailey to drive the vehicle to Mighty's residence so that Mighty could place the money into the car. (*Id.*).

At approximately 11:45 p.m., the Nissan Maxima was observed pulling out of the driveway of 54 Strong Street; GPS tracking device data indicated that the Nissan traveled directly to 144 Oakland Street, where Mighty resided. (*Id.* at ¶ 74). According to GPS data, the Nissan left 144 Oakland Street at approximately 1:52 a.m. (*Id.*).

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The following morning, at approximately 9:58 a.m., Mighty called Bailey and told him that Chin, the cocaine source, was waiting for Bailey to call him. (*Id.* at ¶ 75). Bailey indicated that he was in New Jersey and would call Chin when he arrived. (*Id.*). GPS tracker data revealed that the vehicle arrived at 126 New Jersey Avenue at approximately 11:14 a.m. (*Id.* at ¶ 76). Approximately forty-five minutes later, the vehicle left that location and returned to Rochester arriving at 54 Strong Street at approximately 6:40 p.m. (*Id.*). The surveillance camera at 54 Strong Street depicted the arrival of the Nissan at that location. (*Id.*).

On February 7, 2015, at approximately 2:04 p.m., Mighty called Taylor to inform him that Mighty had gone to the upstairs apartment at 54 Strong Street to look for drug money. (*Id.* at ¶ 77). Mighty stated that a quantity of cocaine was missing and that he was trying to find out who had stolen the cocaine. (*Id.*).

II. 2703(d) Authorization

On February 10, 2015, Monroe County Court Judge Vincent M. Dinolfo[4] issued an order directing AT&T Wireless to provide cell site and global positioning data for all calls made to and from telephone number 347-549-0774, "as needed in respect to 'pinging' " the phone beginning on February 10, 2015, and continuing for thirty days. (Docket # 115-16 at 2-3). Moses submitted an affidavit in support of his application for the order. (*Id.* at 8-19).

4 Although the order contains a handwritten signature, the name of the issuing judge is not typewritten on the document. The signature on the order is virtually identical to the signatures contained on several of the warrants and wiretaps issued by Judge Dinolfo in connection with this investigation. Further, the government stated that the order was issued by Judge Dinolfo. (Docket # 115 at 32-33).

***8** Moses indicated that he had been involved in an ongoing investigation of narcotics trafficking, and his supporting affidavit incorporated by reference approximately thirty-two wiretap applications or extension requests and the accompanying orders that had been prepared and issued in connection with that investigation. (*Id.* at 9-16).

According to Moses, the execution of the wiretap warrants had revealed that Mighty operated a drug trafficking ring with the assistance of others, including Taylor, Brown, and Bailey. (*Id.* at 17). According to Moses, the investigation demonstrated that Bailey utilized cellular number 347-549-0774 ("Bailey's number") to conduct drug business with Mighty, Taylor, and Brown. (*Id.*).

Moses stated that on February 10, 2015, at approximately 1:47 a.m., Mighty called Bailey and instructed him to leave Rochester at approximately 5:00 a.m. in order to meet with a cocaine source in New York City to pick up a supply of cocaine to bring back to Rochester. (*Id.* at 18). According to Moses, at approximately 4:22 a.m., Bailey called Mighty, who asked whether Bailey needed more sleep before making the trip to New York City. (*Id.*). Bailey responded affirmatively and stated that he would set his alarm for 5:00 a.m. (*Id.*). At approximately 5:33 a.m., Mighty called Bailey, who reported that he was traveling to Mighty's residence. (*Id.* at 18-19).

Moses affirmed, based upon his review of these phone conversations and his knowledge of the case, that Bailey was utilizing the target number and was planning to travel out of town to meet a narcotics supplier. (*Id.* at 19).

III. GPS Tracking Device Warrant

On January 30, 2015, Monroe County Court Judge Vincent M. Dinolfo issued a warrant authorizing the seizure of a black Nissan vehicle with an unknown vehicle identification number for the purpose of installing a GPS tracking device on the vehicle. (Docket # 115-17 at 2-3). The warrant authorized the seizure and transport of the vehicle to the RPD for installation of the tracking device and permitted officers to seize the vehicle as necessary to make repairs or adjustments to the device. (*Id.*). The warrant specified that it needed to be executed within ten days and would be effective for ninety days from the date of the installation of the device. (*Id.*).

Moses submitted an affidavit in support of his application for the warrant. (*Id.* at 4-13). He indicated that he had been involved in an ongoing investigation of narcotics trafficking, and his supporting affidavit incorporated by reference twenty-six wiretap applications or extension requests and the accompanying orders that had been prepared and issued in connection with that investigation. (*Id.* at 5-11). According to Moses, the execution of the wiretap warrants had revealed that Mighty operated a cocaine trafficking ring in Rochester, New York and that he was using the black Nissan in connection with his cocaine trafficking activities. (*Id.* at 11).

Moses stated that he had been involved in "numerous" narcotics investigations and had participated in successful investigations of drug distribution networks. (*Id.* at 4).

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As a result of this experience, Moses stated that he was familiar with the "jargon" narcotics traffickers use and the tactics they use to disguise drug trafficking-related activities. (*Id.*). Throughout the affidavit, Moses summarized and interpreted the substance of numerous intercepted conversations. According to Moses, he was able to interpret them based upon his training, experience, and knowledge of the investigation.

***9** Moses stated that on January 29, 2015, at approximately 11:46 p.m., Bailey called an individual referred to as "Stamma" and instructed him to have a third party move his vehicle so that Bailey could park a vehicle containing a supply of cocaine behind the stash house. (*Id.* at ¶ 33). At approximately 11:50 p.m., video surveillance at 54 Strong Street captured a black Nissan arrive. (*Id.* at ¶ 34). According to Moses, the investigation had revealed that 54 Strong Street was used by Mighty as a drug distribution location. (*Id.*). Video surveillance captured vehicles pulling out of the driveway at 54 Strong Street and then pulling into the rear of 54 Strong Street. (*Id.*).

The following day, at approximately 12:44 a.m., Mighty called a number believed to be used by his cocaine source in New York City. (*Id.* at ¶ 35). Mighty informed his source that he was in possession of the cocaine and would be sending money back to New York City later in the day. (*Id.*). At approximately 2:01 p.m., Brown called the cocaine source and discussed getting a vehicle registered through the DMV. (*Id.* at ¶ 36). Brown also told the source that they were placing his money in a hidden trap in the car and that the car would be driven to New York City in order to purchase additional cocaine. (*Id.*). Moses indicated that surveillance officers were unable to obtain the license plate number of the vehicle because it was hidden behind 54 Strong Street. (*Id.*).

IV. February 10, 2015 Search of 54 Strong Street

William Spath ("Spath"), a Sergeant with RPD, and D. Matthew Allen ("Allen"), a Special Agent with the Federal Bureau of Investigation ("FBI"), submitted affidavits concerning their involvement in the execution of a search warrant at 54 Strong Street on February 10, 2015. (Docket ## 133-1, 133-2). According to Spath, during the search, he located twelve rounds of .357 caliber ammunition in a Newport cigarette box in the closet of the upstairs southeast bedroom. (Docket # 133-2 at ¶ 4). Upon discovering the ammunition, Spath notified Bernabei, who collected the ammunition. (*Id.*).

Allen affirmed that during the search he located a .40 caliber Glock 27 semi-automatic handgun loaded with eleven rounds of ammunition in a blue sock in the ceiling of the basement of 54 Strong Street. (Docket # 133-1 at ¶ 4). He also located one round of .357 caliber ammunition in the closet of the northeast bedroom in the upstairs at 54 Strong Street. (*Id.*). According to Allen, he notified Bernabei, who collected the evidence. (*Id.*).

Both Spath and Allen stated that they had been aware, before participating in the execution of the search warrant, that Mighty and other targets of the investigation who resided in or occupied 54 Strong Street had felony convictions and thus were prohibited from possessing firearms or ammunition. (Docket ## 133-1 at ¶ 5; 133-2 at ¶ 5). Both Spath and Allen affirmed that they also knew, based upon their training and experience, that firearms and ammunition were common tools of the drug trafficking trade. (*Id.*).

V. February 10, 2015 Arrest of Bailey

This Court conducted an evidentiary hearing on Bailey's motion to suppress statements at which the government called Allen to testify. (Docket # 141). Allen testified that he has been employed by the FBI for approximately thirteen years and was assigned to the Rochester Violent Crime Task Force. (Tr. 9).[5] In February 2015 Allen was involved in a wiretap investigation concerning cocaine trafficking in Rochester. (*Id.*). According to Allen, in connection with that investigation, several search warrants were executed on February 10, 2015, which resulted in the arrests of several individuals, including Bailey. (Tr. 9-10).

5 The transcript of the evidentiary hearing shall be referred to as "Tr." (Docket # 141).

***10** Allen testified that Bailey was arrested at approximately 10:00 p.m. at 54 Strong Street, Rochester, New York. (Tr. 10). Bailey was transported to the third floor of the Public Safety Building. (Tr. 11). Allen did not personally arrest Bailey, although he was involved in the execution of the search warrant at that location. (Tr. 11, 23). Moses was also at 54 Strong Street. (Tr. 23-24). Allen was unable to recall the time that he left 54 Strong Street or the time that he arrived at the Public Safety Building. (*Id.*).

Allen testified that he and Moses interviewed Bailey at approximately 2:26 a.m. on February 11, 2015, at the Public Safety Building. (Tr. 11). Allen testified that he is Caucasian and Moses is African American. (Tr. 12). When they entered

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the interview room, one of Bailey's hands was handcuffed to a bar. (Tr. 12-13). According to Allen, they identified themselves, removed the handcuff from Bailey's hand, and told him that they wanted to talk to him but needed to read him his rights. (*Id.*).

Allen testified that Moses verified Bailey's name and education level. (Tr. 13). According to Allen, Bailey stated that he had completed two years of college. (*Id.*). Moses then read Bailey his rights from a standard RPD waiver card. (Tr. 14-15, 17; Government's Exhibit ("G. Ex.") 1). [6] (*Id.*). According to Allen, Moses read the rights verbatim as they appeared on the card. [7] (*Id.*). After reading the rights, Moses asked the two waiver questions printed on the waiver card. (Tr. 17; G. Ex. 1). In response to the question whether he understood his rights, Bailey responded, "Yes." (Tr. 17-18; G. Ex. 1). In response to the question whether Bailey was willing to speak to Moses and Allen, Bailey responded, "Yes, I want to know what[']s going on." (*Id.*). Allen testified that Bailey refused to initial the waiver card, which occurred at approximately 2:27 a.m. (Tr. 39, 44-45).

6 The government is apparently unable to locate the original waiver card; a copy of the card was admitted at the hearing.

7 The Notification and Waiver Card provided:

1. You have a right to remain silent—you do not have to say anything if you don't want to.
2. That anything you do say can be used against you in a court of law.
3. You have a right to talk to a lawyer before answering any questions and have him here with you.
4. If you can't pay for a lawyer, one will be given to you before any questioning if you wish.
5. If you do wish to talk with me, you can stop at any time.

(G. Ex. 1).

According to Allen, the agents spoke to Bailey for approximately ten minutes. (Tr. 18-19). At the conclusion of the brief interview, they asked Bailey whether he was willing to make a written statement. (*Id.*). Bailey declined, and the agents left the interview room. (Tr. 19).

Allen testified that, during his interaction with Bailey, no one made any threats or promises, or used physical force, to induce him to speak. (Tr. 20). Bailey did not ask for the questioning to cease or for an attorney, appeared to understand the questions, and did not appear to be under the influence of alcohol or drugs. (Tr. 21). According to Allen, Bailey never told him that he had been threatened by Moses or any other officer. (Tr. 21-22).

Allen testified that an interview form is kept outside each interview room and the names of the law enforcement officers who enter and exit the room are typically recorded on the form. (Tr. 25). Allen reviewed the interview form related to Bailey and noted that his name did not appear on the form, although Moses's name did appear on the form at 2:26 a.m. (Tr. 25-26; Defendant's Exhibit ("D. Ex.") 1).

***11** On cross-examination, Allen stated he was unable to remember what he was doing at approximately 1:19 a.m. the morning after the execution of the search warrants. (Tr. 24). After reviewing the interview form for Seymour Brown, another individual arrested that morning, Allen recalled that he and Moses had interviewed Brown at approximately 1:35 a.m. that morning. (Tr. 27; D. Ex. 2). Allen testified that he could not recall whether he was in the room with Moses when the *Miranda* warnings were issued, although the interview form suggested that only Moses was in the room. (Tr. 28-30; D. Ex. 2). Allen testified that it was possible that he was in the interview room even though the interview form did not reflect his name. (*Id.*).

Allen reviewed a *Miranda* waiver card that was completed at approximately 1:12 a.m. that indicated that he was in the room with Moses and Brown when the *Miranda* warnings were administered to Brown. (Tr. 30-31; D. Ex. 3). According to Allen, his handwriting did not appear on the card, but the card "somewhat" refreshed his recollection that he "had to have been there." (Tr. 31).

Allen also reviewed the interview forms for Rodney Wimes and Andre Taylor that were completed the same morning. (Tr. 34-35; D. Exs. 4-5). Allen acknowledged that the interview forms for Wimes, Taylor, and Brown all contained the word *Miranda* in the activity column, but that the interview form for Bailey did not contain the word *Miranda*. (Tr. 36-37; D. Exs. 1, 2, 4, 5).

VI. February 13, 2015 Complaint

On February 13, 2015, Malcolm D. Van Alstyne, Jr. ("Van Alstyne"), an agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), executed a thirty-three page affidavit in support of a criminal complaint charging Mighty, Brown, Taylor, Bailey, Wilson, Harper, Desmond Bice, and Christopher Samuels with various

federal offenses. (Docket # 1 at ¶¶ 1-2). Specifically, the Complaint charged all of the defendants with conspiracy to distribute and distribution of cocaine and cocaine base and with the use of a telephone to facilitate drug trafficking; some of the defendants, but not Bailey, were also charged with conspiracy to possess and possession of firearms in furtherance of drug trafficking. (*Id.*). Van Alstyne stated that the facts in the affidavit were based upon his participation in the investigation, conversations with other law enforcement officers, and his review of intercepted wiretap communications. (*Id.* at ¶ 3). The pertinent portions of the complaint are summarized below.

Van Alstyne stated that the investigation had revealed that Mighty was a leader of a Rochester-based drug trafficking organization and that he obtained quantities of cocaine from Winfredo Gonzales ("Gonzales"), in Brooklyn, New York. (*Id.* at ¶ 8). According to Van Alstyne, the cocaine was transported from Brooklyn to Rochester, where it was processed and repackaged for distribution as both powder and crack cocaine. (*Id.*). The investigation revealed that Taylor, Brown, and Bailey worked for Mighty and that his organization supplied cocaine to Wilson and Harper. (*Id.*).

Van Alstyne included excerpts of several wiretapped conversations, along with his interpretation of those conversations based upon his training, experience, and knowledge of the case. For example, on February 6, 2015, at 9:34 p.m., Taylor received a call from Bailey (also known as Diji). (*Id.* at ¶ 47). During the call, Bailey and Taylor discussed an incident in which the police had gone to Taylor's residence. (*Id.*). Bailey stated, "He and Tony broke up and bagged up and ... you see?" (*Id.*). Taylor responded, "He took out the two of them?"; Bailey replied, "No he didn't, he said it was 11/2." (*Id.*). Taylor responded, "I thought he had told me two." According to Van Alstyne, "Bailey [replied] the other one must have been broken up so [Mighty] took up the half one first, because 'that other one is the problem and is fucked up.' " (*Id.*). Bailey said, "I am going to ... I am going to run a trip Monday." (*Id.*).

***12** Van Alstyne stated that he believed that Taylor was expressing concern that the police had talked to him at his residence. (*Id.* at ¶ 48). Bailey stated that Mighty and another individual had broken down a kilogram of cocaine into smaller quantities for sale. (*Id.*). Taylor indicated his belief that Mighty had two kilograms of cocaine; Bailey responded that Mighty had taken one half of one of the kilograms because the other one contained lesser quality cocaine. (*Id.*). Bailey also discussed traveling to Brooklyn on Monday, February 9, 2015, to see the cocaine source, Gonzales. (*Id.*).

According to Van Alstyne, on February 7, 2015, at approximately 1:57 p.m., a phone call between Mighty and Taylor was intercepted. (*Id.* at ¶ 17). According to Van Alstyne, excerpts of the call included:

> Mighty: I just put one of them down into the thing and the thing is $31. There ain't no way. I was looking at the thing. The thing is dust, dust, dust, dust, dust, dust, mad.
>
> Taylor: [Something in Patois]
>
> Mighty: Diji had left though. Diji left during the day and it was only us here. And I end up leaving with the thing, and he was here by itself. That shit ain't supposed to do that. You know that. $31. That can never be.

(*Id.*). According to Van Alstyne, as the conversation continued, Mighty stated to an unidentified person in the background, "As soon as you get to the crib, I want you to put that thing together real quick and call me right back." (*Id.*).

According to Van Alstyne, during this phone call, Mighty was complaining to Taylor that Brown needed to get out of the hospital because there was an issue with the quality of the cocaine. (*Id.* at ¶ 18). Mighty indicated that he had cooked sixty-two grams of cocaine which had yielded only thirty-one grams of crack cocaine. (*Id.*). Mighty reported that Bailey had left Mighty and another individual with the cocaine at 54 Strong Street. (*Id.*). Mighty told someone in the background to let him know how much crack cocaine the individual was able to produce from the cocaine. (*Id.*).

Van Alstyne stated that a series of phone calls and surveillance observations demonstrated that Bailey, at Mighty's direction, drove the 2001 Nissan Maxima to Brooklyn to obtain two kilograms of cocaine from Gonzales and transported the cocaine back to Rochester "where it was distributed from 54 Strong Street." (*Id.* at ¶ 20). During an intercepted call between Mighty and Taylor on February 9, 2015, at 12:29 a.m., Mighty said to Taylor, "Before he moves, uh, take the equalizer out of there ... But tell him he can come back *two*." (*Id.*). Taylor agreed, and Mighty reminded Taylor to "use the butter knife ... [to] kind of push it in there and prop it up or prop it down." (*Id.*).

According to Van Alstyne, he believed that Mighty was telling Taylor to make sure that Bailey removed a firearm from the

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hidden compartment in the vehicle before Bailey drove the vehicle from Rochester to Brooklyn. (*Id.*). Mighty was also telling Taylor to advise Bailey to obtain two kilograms of cocaine from Gonzales and instructing Taylor how to activate the compartment's electric powered hydraulic piston by using a butter knife to open and close the compartment. (*Id.*).

At approximately 4:22 a.m., according to Van Alstyne, Mighty called Bailey and told him, "Just take the next hour. Set your alarm. Be here by 5:00 then." (*Id.* at ¶ 23). Van Alstyne believed that Mighty was telling Bailey that he could sleep a little longer, but to arrive at Mighty's residence by 5:00 a.m. in order to obtain the money to be transported to Gonzales in exchange for two kilograms of cocaine. (*Id.*). At 5:33 a.m., Bailey called Mighty and told him, "I'm on my way." (*Id.*).

***13** Van Alstyne stated that a phone call between Mighty and Taylor was intercepted at approximately 10:30 a.m. (*Id.* at ¶ 24). During the phone call, Taylor asked, "What time did he leave? Wasn't it 2:00 [a.m.]?" Mighty responded, "Nah, about 5:30 [a.m.]." (*Id.*). According to Van Alstyne, he believed that Taylor was asking what time Bailey had left Rochester to travel to Brooklyn to purchase cocaine from Gonzales. (*Id.*). Van Alstyne stated that Deputy U.S. Marshal Jeorge Betancur observed the Nissan Maxima arrive at 126 New Jersey Avenue in Brooklyn, New York at approximately 2:30 p.m. and another officer observed it leave approximately five minutes later. (*Id.* at ¶ 25).

At approximately 2:45 p.m., members of law enforcement executed a search warrant at 126 New Jersey Avenue, Gonzales's residence. (*Id.* at ¶ 26). During the search, officers discovered seventeen kilograms of cocaine, two firearms, and approximately $70,000 in currency wrapped in black tape and plastic wrap. (*Id.*). According to Van Alstyne, Gonzales, who was at 126 New Jersey Avenue, waived his *Miranda* rights and stated that he had met a black male known as "Young One" at a McDonald's restaurant near his residence. (*Id.* at ¶ 27). Gonzales stated that Young One was alone and was driving a black Nissan Maxima that had a hidden compartment containing approximately $70,000 in currency wrapped in black electrical tape and plastic wrap. (*Id.*).

Gonzales reported that Young One waited at the McDonald's while he drove the Nissan to 126 New Jersey Avenue. (*Id.*). There, he removed the currency and loaded the compartment with two kilograms of cocaine. (*Id.*). Gonzales reported that he then returned to McDonald's and gave the vehicle to Young One to travel back to Rochester with the cocaine. (*Id.*). According to Gonzales, Young One and other unnamed associates had traveled from Rochester to Brooklyn approximately twice each week for the past several weeks in order to purchase cocaine from Gonzales. (*Id.* at ¶ 28). Gonzales stated that they usually purchased approximately three or four kilograms of cocaine. (*Id.*).

Van Alstyne affirmed that data from Bailey's cell phone evidenced his return trip to Rochester. (*Id.* at ¶ 29). At approximately 9:33 p.m., Bailey texted Mighty to "[c]lear the run way," and Mighty replied, "[o]k." (*Id.* at ¶ 30). At approximately 10:01 p.m., Bailey again texted Mighty to "[c]lear the runway." (*Id.*). According to Van Alstyne, a few minutes later video surveillance captured a 2015 Infiniti back out of the rear of the driveway at 54 Strong Street and pull over on the side of the street. (*Id.*). At approximately 10:07 p.m., Moses observed Bailey arrive at 54 Strong Street in the Nissan Maxima and pull into the rear of the driveway. (*Id.*). The 2015 Infiniti immediately drove into the driveway and pulled into the rear. (*Id.*).

According to Van Alstyne, members of law enforcement arrived at 54 Strong Street at 10:12 p.m. to execute warrants for that location and for the Nissan Maxima. (*Id.* at ¶ 32). When they arrived, Rodney Wymes was sitting in the driver's seat of the 2015 Infiniti, and Bailey was standing in the driveway in front of the 2015 Infiniti and next to the rear of the Nissan Maxima. (*Id.*). Taylor, who apparently was also outside, fled on foot, and three individuals were encountered inside the premises. (*Id.*). According to Van Alstyne, the following evidence was seized from inside the premises: a firearm, ammunition, Western Union receipts for Bailey, paperwork relating to Bailey, Bailey's passport, a GPS, multiple cell phones, an RG&E bill for Brown, paraphernalia for processing and packaging cocaine and crack cocaine, including digital scales, latex gloves, boxes of sandwich bags, bottles of Inositol and acetone, a commercial scale, rolls of vacuum bags, a vacuum bag sealer, and $3,941 in currency. (*Id.* at ¶ 33).

***14** According to Van Alstyne, several individuals located at the premises were searched, including Mighty, Bailey, and Taylor, who was captured approximately fifteen minutes after law enforcement arrived at 54 Strong Street. (*Id.* at ¶ 34). On his person, Mighty had two cell phones, keys to 54 Strong Street, and a Bank of America receipt. (*Id.*). Bailey had a wallet with several debit cards, a cell phone, and a Bank of America receipt. (*Id.*). Taylor had one cell phone. (*Id.*).

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Van Alstyne stated that the Nissan Maxima was towed from 54 Strong Street to the Public Safety Building where it was searched. (*Id.*). During the search, officers discovered one kilogram of cocaine in a compartment behind the front center heating vent of the car, parking tickets issued in New York City for the vehicle, and a casino card in Bailey's name. (*Id.* at ¶ 35).

VII. Bailey's Affidavits

Bailey has submitted several affidavits to establish his standing to challenge the search warrants, the Section 2703(d) authorization, and the GPS tracking warrant. (Docket ## 111, 112, 119, 127). In an affidavit dated November 2, 2015, Bailey stated that he was an overnight guest at 54 Strong Street on the evening of February 10, 2015. (Docket # 111-1 at 44). He also stated that he owned a passport and personal documents that were discovered inside that location, as well as a wallet and money that were seized from his person. (*Id.*). In an affidavit dated November 7, 2015, Bailey stated that he was "given possession of the 'target vehicle' by someone with authority and possession of the keys, and also with full awareness by owner." (Docket # 112 at 15).

On February 1, 2016, Bailey executed another affidavit; this one stated that he drove the "[t]arget [v]ehicle" from 54 Strong Street, Rochester, New York to 144 Oakland Street, Rochester, New York on February 3, 2015, and February 10, 2015. (Docket # 119 at 2). According to Bailey, his travels on those occasions were monitored through use of the GPS tracking device. (*Id.*).

In a separate affidavit, Bailey stated that on February 10, 2015, Mighty, the custodian of the 2001 Nissan Maxima at the time, gave Bailey permission to drive the vehicle, with the knowledge of Brown, the vehicle's registered owner. (*Id.* at 4-6). Bailey stated that he drove the vehicle from 54 Strong Street at approximately 4:30 a.m. on February 10, 2015, and returned the vehicle to that location at approximately 10:00 p.m. that same evening. (*Id.*). Bailey stated that he exited the vehicle in order to dispose of garbage collected in the vehicle, but left it running with the keys in the ignition. (*Id.*). He also left his casino client card in the vehicle. (*Id.*). Before he could return to retrieve his card, members of law enforcement arrived at the location, arrested him, and seized the vehicle. (*Id.*).

In another affidavit, Bailey stated that Brown or Mighty occasionally permitted him to stay at 54 Strong Street, Rochester, New York, a multi-family dwelling rented by both Brown and Mighty. (*Id.* at 7-8). On February 9, 2015, he had a key to the downstairs apartment of 54 Strong Street that Brown had given him. (*Id.*). According to Bailey, both Brown and Mighty knew that he planned to be a guest at 54 Strong Street between February 9, 2015, and February 11, 2015. (*Id.*). Bailey stated that he generally had access to the entire house, including the bathrooms, kitchen, and the upstairs and downstairs apartments. (*Id.*). Although he was not given a key to the upstairs apartment, the door to that apartment was typically unlocked and Mighty placed some of Bailey's belongings in the northwest bedroom. (*Id.*). According to Baily, he had the key to 54 Strong Street in his pocket when he was searched by law enforcement on February 10, 2015. (*Id.*). Bailey stated that his passport was located in the living room of the downstairs apartment, and one of his unpaid traffic tickets was located in the upstairs apartment. (*Id.*).

***15** In another affidavit dated February 1, 2016, Bailey stated that he was arrested and subsequently interrogated at approximately 1:30 a.m. on February 11, 2015. (*Id.* at 9). According to Bailey, he was not read *Miranda* rights by the investigator who interrogated him. (*Id.*). Bailey stated that the interview commenced when the investigator recited the telephone number 347-549-0774, and Bailey responded that was his telephone number. (*Id.*).

Bailey stated that the investigator became "aggressive" when Bailey told him that he was not involved with drugs. (*Id.*). According to Bailey, the investigator asked why he was protecting his friends and told him, "You are not the one we want." (*Id.*). According to Bailey, the investigator then asked, "A man ever fuck you yet?" When Bailey responded no, the investigator threatened Bailey with sodomy by another inmate if Bailey did not provide satisfactory answers. (*Id.*). Bailey stated that he was so traumatized and fearful that the investigator would follow through on his threat that he told the investigator what he knew. (*Id.*). Bailey disputes the accuracy of the investigator's report of his interview. (*Id.*). According to Bailey, the entire interrogation lasted approximately one hour. (*Id.*).

On March 28, 2016, Bailey executed another affidavit. (Docket # 127 at 2-4). With respect to his challenged post-arrest statements, Bailey asserted that he was never informed of his *Miranda* rights and never waived those rights. (*Id.*). According to Bailey, he was interrogated for approximately one hour by an African-American male officer. (*Id.*). That

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officer concluded the interview at approximately 3:00 a.m. and left the room. (*Id.*). Bailey stated that the same officer returned approximately twenty minutes later, accompanied by Matt Allen, another law enforcement officer. (*Id.*). The African-American officer questioned Bailey and accused him of being a drug dealer. (*Id.*). Bailey disputed those allegations. (*Id.*). After approximately fifteen minutes, the African-American officer concluded the interview, stating, "If you don't cooperate now, don't come back to us later for us to help you. We will not give you another opportunity." (*Id.*).

With respect to the Nissan Maxima, Bailey stated that the vehicle was owned jointly by Mighty and Taylor, although it was registered to Brown. (*Id.* at 4-6). According to Bailey, he was with Mighty when Mighty purchased the car and later learned that Taylor had contributed cash towards the purchase price. (*Id.*). Bailey stated that either Mighty or Brown had given him permission to drive the vehicle on several occasions. (*Id.*). Bailey reiterated his assertion that, at Mighty's direction, he had driven the vehicle on February 3, 2015, and February 10, 2015. (*Id.*). He also stated that he received permission to drive the vehicle from Mighty on February 10, 2015. (*Id.*). According to Bailey, Brown knew of and approved of Bailey's use of the car. (*Id.*).

Finally, with respect to 54 Strong Street, Rochester, New York, Bailey stated that the entire dwelling, consisting of an upstairs and downstairs apartment, was jointly leased by Mighty and Brown. (*Id.* at 8-9). According to Bailey, he had observed a copy of the lease. (*Id.*). On February 9, 2015, Bailey asked Mighty for permission to stay at 54 Strong Street for two nights. (*Id.*). Bailey stated that he had previously been granted permission to stay there. (*Id.*). Mighty agreed and offered Bailey his key, but Bailey indicated that he had a key from Brown. (*Id.*). According to Bailey, occupants of the house were permitted to use the entire house, but were not permitted to enter the bedrooms of other occupants. (*Id.*). During his stay, Bailey was permitted to occupy the northwest bedroom. (*Id.*).

REPORT & RECOMMENDATION

I. Motion to Suppress Tangible Evidence

***16** Bailey challenges the validity of the search warrants for 54 Strong Street, his person, and the 2001 Nissan Maxima on the grounds that Bernabei's supporting affidavit failed to establish probable cause because it was based primarily upon Bernabei's interpretation, rather than recitation, of intercepted conversations.[8] (Docket # 111-1 at 39-43). Bailey also asserts other challenges to the issuance and execution of the warrants for 54 Strong Street and the 2001 Nissan Maxima. (Docket ## 111-1 at 38, 43; 112 at 3-9, 13-14; 119 at 61-63). He also maintains that Bernabei's warrant affidavit and the Complaint contained material falsities and omissions, entitling him to a *Franks* hearing. (Docket ## 111 at 67-70; 111-1 at 1-19; 119 at 27-58; 128 at 3-5). Finally, he maintains that the *Leon* good faith exception is inapplicable to the warrants. I address each of these challenges below.

8 Bailey also challenges the warrants on the grounds that Bernabei's affidavit relied upon communications that were unlawfully intercepted. (Docket # 111-1 at 43). Because I concluded in my previous Report and Recommendation that suppression of the wiretaps is not warranted (Docket # 164), I recommend that the district court deny Bailey's motion to suppress tangible evidence on this basis.

A. Challenges to the Search Warrants

1. Standing

Bailey maintains that he has standing to challenge the search of 54 Strong Street because he was an overnight guest at the premises the evening before the search warrant was executed. (Docket # 127 at 6-7). He also maintains that he has standing to challenge the search of the 2001 Nissan Maxima because he had recently used the vehicle with the permission of the owner. (*Id.* at 3-8). The government maintains that Bailey has failed to establish standing to challenge either search. (Docket ## 115 at 41-43; 126 at 3-5).

With respect to his standing to challenge the search of 54 Strong Street, Bailey asserts that he was permitted by the joint lessees of the premises to stay as an overnight guest and to use the northwest bedroom and the entire house, with the exception of the other bedrooms. (Docket # 127). According to Bailey, he had previously been an overnight guest at this premises and expected to stay two nights, February 9 and 10, 2015. (Docket # 127 at 6-7). I conclude that Bailey's assertions are sufficient to establish standing to challenge the search of the living areas of 54 Strong Street and the northwest bedroom, but not to challenge the searches of the other bedrooms located in the house, which he was explicitly not authorized to enter, or the basement of the premises. *See Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (establishing that overnight guest has legitimate expectation of privacy

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in host's home); *United States v. Fields*, 113 F.3d 313, 320 (2d Cir.) ("society recognizes as legitimate the expectation of privacy possessed by an overnight guest—even though he has at best a fleeting connection to his host's home") (citing *Minnesota v. Olson*, 495 U.S. at 98), *cert. denied*, 522 U.S. 976 (1997); *United States v. Osorio*, 949 F.2d 38, 41 (2d Cir. 1991) (guests have an expectation of privacy in host's home except for "areas of the host's home that are off limits to the guest or of which the guest has no knowledge"); *United States v. Figueroa*, 2015 WL 1968332, *2 (W.D.N.Y. 2015) ("[defendant's] affidavit ... wherein he asserted that he was a guest at the residence ... is sufficient to establish that defendant ... had a reasonable expectation of privacy in the place searched"); *United States v. Busch*, 2013 WL 104916, *3 n.5 (W.D.N.Y. 2013) ("[t]he [c]ourt finds that the defendant's statement that he was an overnight guest at the house is sufficient to warrant a hearing as to the legality of the searches"); *United States v. Peña Ontiveros*, 547 F. Supp. 2d 323, 329-30 (S.D.N.Y. 2008) (overnight guests' expectation of privacy did not extend to items found inside hidden trap in house), *aff'd sub nom.*, *United States v. Beltran*, 409 Fed.Appx. 441 (2d Cir. 2011); *United States v. Cruz*, 475 F. Supp. 2d 250, 258 (W.D.N.Y. 2007) (occasional overnight guest did not have standing to challenge search of refrigerator located in basement of premises).

***17** It is less clear whether Bailey has sufficiently established his standing to challenge the search of the 2001 Nissan Maxima. Although a defendant who has keys to a car and permission from the owner to use it has standing to challenge the search of the vehicle, *see United States v. Ochs*, 595 F.2d 1247, 1253 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979), in this case, the vehicle was locked and Bailey no longer possessed the keys to it at the time it was seized. Although Bailey stated that Mighty, one of the alleged owners of the car, gave him permission to use the car with the knowledge of Brown, the alleged registered owner of the car, the record does not make clear whether Bailey continued to have permission to use the vehicle after he had returned it to 54 Strong Street. Neither Brown, nor Mighty, have submitted affidavits on this issue. *See*, *e.g.*, *United States v. Pena*, 961 F.2d 333, 337 (2d Cir. 1992) (citing *United States v. Rubio-Rivera*, 917 F.2d 1271, 1275 (10th Cir. 1990) ("[w]here the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle") (collecting cases)); *United States v. Sanchez*, 635 F.2d 47, 64 (2d Cir. 1980) ("[defendant's] possession of the keys was not sufficient to give him a constitutionally protected interest [in the] car[,] ... [and] [t]he registered owner of the car ... did not appear below[;] [t]he burden was on [defendant] to establish his standing[,] ... [and] [h]e failed to do so"); *United States v. Quinones*, 2005 WL 2148333, *3 (W.D.N.Y. 2005) ("an affidavit by a defendant which does not sufficiently demonstrate ownership of the car or license from the owner to possess it does not establish standing or require an evidentiary hearing"); *United States v. Triana-Mateus*, 2002 WL 562649, *3 (S.D.N.Y. 2002) ("[defendant's] possession of the keys and his unsupported statements claiming he had permission from the owner are not sufficient to give him a constitutionally protected interest in the privacy of the car"). The question of Bailey's standing to challenge the seizure and search of the car need not be resolved, however, because I find, for the reasons discussed below, that the car was properly searched pursuant to a valid warrant.

2. Probable Cause

I turn next to Bailey's challenge that the warrants were not supported by probable cause. (Docket ## 111-1 at 39-43; 112 at 9-12; 119 at 61-65). Bailey maintains that none of the warrants were supported by probable cause because Bernabei's affidavit in support of the warrants summarized and interpreted, but did not include, the transcripts of intercepted communications. (*Id.*). Although Bailey acknowledges that an issuing judge is generally permitted to rely upon an officer's experience investigating narcotics activities and interpreting coded conversations, Bailey maintains that Judge Dinolfo was not permitted to rely solely on Bernabei's summaries and interpretations. (*Id.*). Bailey also maintains that the warrant for 54 Strong Street was not supported by a sufficient nexus between that location and drug trafficking activities. (*Id.*).

The Fourth Amendment to the Constitution provides that "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." U.S. Const. amend. IV; *see also* Fed. R. Crim. P. 41. In *Illinois v. Gates*, 462 U.S. 213 (1983), the Supreme Court affirmed the "totality of the circumstances" test to determine whether a search warrant satisfies the Fourth Amendment's probable cause requirement. According to the Court, the issuing judicial officer must "make a practical, common-sense decision whether, given all the circumstances set forth

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in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. at 238. A reviewing court's obligation is merely to determine that the issuing judge had a " 'substantial basis for ... conclud[ing]' that probable cause existed." *United States v. Smith*, 9 F.3d 1007, 1012 (2d Cir. 1993) (quoting *Gates*, 462 U.S. at 238-39) (internal quotation omitted); *Walczyk v. Rio*, 496 F.3d 139, 157 (2d Cir. 2007) ("a reviewing court must accord considerable deference to the probable cause determination of the issuing magistrate"). Moreover, "resolution of doubtful or marginal cases should be largely determined by the preference to be afforded to warrants." *United States v. Smith*, 9 F.3d at 1012 (citing *Jones v. United States*, 362 U.S. 257, 270 (1960)).

Bernabei's affidavit, which incorporated his earlier wiretap affidavits, provided sufficient probable cause to believe that evidence of a narcotics trafficking network would be found at 54 Strong Street, on Bailey's person, and in the Nissan Maxima. Bernabei's affidavits included his interpretation of intercepted communications involving narcotics activities and surveillance efforts that corroborated Bernabei's interpretation.

***18** For instance, Bernabei described a series of calls involving Taylor that occurred on January 12, 2015, which suggested that an unknown female who lived at 114 Myrtle Street had received a package containing narcotics through the postal service. (Docket # 115-18 at ¶¶ 35-39). Subsequent surveillance suggested that Brown, one of Taylor's associates, retrieved the package from 114 Myrtle Street and, after making two stops, traveled to 54 Strong Street. (*Id.*).

Another series of phone calls on January 30, 2015, suggested that a shipment of cocaine was being processed at 54 Strong Street. (*Id.* at ¶¶ 44-46). According to Bernabei, during the calls, Taylor informed Harper and Wilson that a shipment of cocaine located at 54 Strong Street would be ready for distribution in approximately one hour. (*Id.*). Later surveillance showed that Wilson drove to a suspected stash house to retrieve Harper and then traveled to 54 Strong Street. (*Id.*).

Additionally, Bernabei described a series of phone calls on January 30 and 31, 2015, which, when coupled with surveillance observations, strongly suggested that Brown traveled to New York City to obtain cocaine from Chin, the cocaine source. (*Id.* at ¶¶ 48-68). According to Bernabei, Mighty called Chin and told him that they were selling the remaining quantity of cocaine and would be sending the proceeds to Chin in order to obtain more cocaine. (*Id.*). That same day, Brown spoke with a customer and told him that Brown's supply of cocaine was exhausted and that he would be going to New York City to obtain more cocaine. (*Id.*). Both Brown and Mighty spoke with Chin that day and told him that Brown would be traveling to New York City with money that evening. (*Id.*).

Surveillance captured Brown leaving 54 Strong Street in the 2001 Nissan Maxima and traveling to Brooklyn, New York. (*Id.*). According to Bernabei, the following morning Chin and Brown spoke by phone about where and when to meet. (*Id.*). Surveillance captured Brown traveling in the Nissan from a hotel to 126 New Jersey Avenue, Brooklyn, New York. (*Id.*). While Brown was at 126 New Jersey Avenue, Chin called Mighty to inquire about the amount of money secreted in the vehicle. (*Id.*). A short while later, Brown was observed leaving the location. (*Id.*). Brown then made a series of phone calls during which, according to Bernabei, Brown informed his cocaine customers and Taylor that he was traveling to Rochester with a quantity of cocaine. (*Id.*). Brown also called Chin after he had arrived in Rochester to report that he had completed his trip. (*Id.*).

Bernabei described a series of calls and corresponding surveillance concerning activities occurring on February 3 and 4, 2015. (*Id.* at ¶¶ 69-76). According to Bernabei, Mighty spoke to both Taylor and Bailey concerning Chin's request that money be transported to him in New York City. (*Id.*). According to Bernabei, during the phone calls, Bailey agreed to transport the money and was instructed by Mighty to arrive at his residence at midnight with a money counting machine, plastic wrap, and the key for the plug in the trap car. (*Id.*). Surveillance and GPS data indicated that the black Nissan Maxima left 54 Strong Street at approximately 11:45 p.m., traveled to Mighty's residence, and left Mighty's residence at approximately 1:52 a.m. (*Id.*).

According to Bernabei, during a phone call on February 4, 2015, Mighty told Bailey that Chin was waiting for Bailey to call. (*Id.*). Bailey told Mighty that he was in New Jersey and would call Chin when he arrived. (*Id.*). GPS data indicated that the 2001 Nissan Maxima arrived at 126 New Jersey Avenue at approximately 11:14 a.m., left approximately forty-five minutes later, and arrived at 54 Strong Street at approximately 6:40 p.m. (*Id.*). Surveillance observations at 54

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Strong Street confirmed that the vehicle arrived at that time. (*Id.*).

***19** Bernabei's affidavit also described several telephone calls revealing connections between Mighty and his associates and 54 Strong Street. For instance, on January 9, 2015, a call was intercepted relating to an unnamed individual's efforts to obtain a key from Taylor and Bailey to the upstairs apartment at 54 Strong Street. (*Id.* at ¶ 34). On January 13, 2015, Mighty called Bailey and told him to pay the gas and electric bill for both the upstairs and downstairs apartments at 54 Strong Street. (*Id* at ¶ 42.). On February 7, 2015, Mighty called Taylor and indicated that a quantity of cocaine was missing from the upstairs apartment at 54 Strong Street. (*Id.* at ¶ 77).

Bailey argues that the warrants were invalid because Judge Dinolfo improperly relied upon Bernabei's summaries and interpretations of the intercepted conversations without assessing them against the transcripts of the intercepted calls. I disagree.

As an initial matter, Bailey's argument ignores the information contained in the prior wiretap applications and orders, which were specifically incorporated by reference into Bernabei's affidavits. (Docket # 115-18 at ¶¶ 1-32). Bernabei's affidavit incorporated approximately thirty warrant applications or extension requests, the majority of which were reviewed by Judge Dinolfo. This Court has reviewed several of those applications (Docket ## 115-3, 115-6, 115-9, 115-12, 115-15) and notes that the transcripts of the intercepted calls were included in those affidavits. In other words, the record shows that Judge Dinolfo was provided several opportunities to review and consider the reasonableness of Bernabei's and other agents' interpretations of intercepted conversations.

Indeed, the transcripts of several of the intercepted communications appear in the affidavit Moses submitted in support of the application of the warrant for target number 347-753-6469 (*compare* Docket # 115-12 at ¶¶ 33, 35, 37, 39, 41 *with* Docket # 115-18 at ¶¶ 50, 51, 56, 58, 68), which was specifically incorporated into Bernabei's affidavit in support of the search warrants and was provided to the Court in connection with these motions. (Docket # 115-18 at ¶ 30). This Court has reviewed Moses's affidavit, including the transcripts of the conversations and Moses's interpretation of their meanings. Moses's interpretations of the conversations do not appear unreasonable, and some were corroborated by the surveillance observations of Brown traveling to and from New York City. *United States v. Fury*, 554 F.2d 522, 530-31 (2d Cir.) (probable cause shown where ambiguous statements could be "reasonably interpreted to indicate what the detective interpreted them to be" when considered in context of defendant's criminal record and ongoing investigation), *cert. denied*, 433 U.S. 910 (1977); *see also United States v. Cancelmo*, 64 F.3d 804, 808 (2d Cir. 1995) (observing that "drug dealers rarely speak openly about their trade" and that use of "narcotics code" may support probable cause finding).

Although I agree with Bailey that the better practice would have been to include excerpts of the transcripts, Bernabei's failure to have done so does not invalidate the warrant. *See United States v. Jiminez*, 224 F.3d 1243, 1248-49 (11th Cir. 2000) ("[w]hile it would perhaps have been preferable for the affidavit to have detailed some particular phone conversations, the affidavit states that those phone conversations 'indicate that' various drug activities were taking place; this is an objective presentation of the information gained by the investigating officers"), *cert. denied*, 534 U.S. 1043 (2001); *Lebowitz v. United States*, 2015 WL 630394, *5 (N.D. Ga. 2015) ("[a]n affiant is allowed to summarize objective evidence from an investigation, as was done here"); *United States v. Valenzuela*, 2010 WL 5094232, *3 (D. Utah 2010) ("[a]lthough [the officer] did not provide the [issuing judge] with a complete transcript of the conversations giving rise to her affidavit, she does not need to [because the officer] described each conversation with sufficient detail to allow the authorizing judge to make a reasonable conclusion[;] ... [a]nalyzing the totality of the circumstances, the court finds that the information in the affidavit provided a sufficiently detailed statement of underlying facts and circumstances upon which the [issuing judge] could reasonably conclude that the telephone was being used in connection with illegal drug activities"); *United States v. Flores*, 2007 WL 2904109, *49 (N.D. Ga. 2007) (rejecting defendants' challenge that "the affidavit failed to establish probable cause because the affiant presented her summary of the months of wire intercepts to support her opinions that [d]efendants and others were engaged in drug trafficking activities ... [where] the affidavit clearly delinate[d] the source of the information, the wire intercepts, and appropriately present[ed] the conclusions from those intercepts as indications that certain activities [were] taking place"); *United States v. Welch*, 2007 WL 119954, *2 n.2 (E.D. Pa. 2007) ("[t]o the extent that [defendant] additionally argues that it was erroneous for the [issuing judge] to make a determination of probable cause in the absence of a holistic

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review of the actual transcripts of the telephone calls, this argument must fail[;] [t]he [g]overnment had no affirmative obligation to produce the transcripts, and it is the province of the [issuing judge] to determine whether probable cause exists based on the totality of the circumstances"); *United States v. Parks*, 1997 WL 136761, *8 (N.D. Ill. 1997) (rejecting defendant's contention that "mere recitation of summaries of phone calls, standing alone, is insufficient to meet the probable cause standard" where "the summaries revealed considerable information about the structure of the gang and the narcotics activities" [;] "... the court concludes that the summaries were sufficient to support a finding of probable cause for the extension orders"), *aff'd sub nom. on other grounds*, *United States v. Jackson*, 207 F.3d 910 (7th Cir.), *cert. granted in part and judgment vacated on other grounds*, 531 U.S. 953 (2000). This is particularly true where, as here, the supporting affidavit incorporated the wiretap applications, most of which had been reviewed and approved by the same judge. *See United States v. Garcia*, 630 F. Supp. 142, 147 (S.D.N.Y. 1986) ("[f]amiliar with the source of the evidence in this case, [the issuing judge] could reasonably rely upon [the agent's] summary to establish probable cause").

***20** I reject Bailey's contention that the warrant failed to establish a nexus between 54 Strong Street and drug trafficking activities. Although Bailey is correct that the affidavit did not allege that any of the defendants resided at the residence, any controlled purchases had occurred at the premises, or any packages had been observed being taken into or out of 54 Strong Street (Docket ## 111-1 at 39; 119 at 64-65), the affidavit nevertheless included several allegations strongly suggesting that Mighty and his associates stored narcotics and money at that location. (Docket # 115-18). These assertions provided sufficient probable cause to believe that evidence of narcotics trafficking would be found within 54 Strong Street. *See United States v. Morgan*, 690 F. Supp. 2d 274, 284, 287 (S.D.N.Y. 2010) ("a showing of a sufficient nexus between the alleged criminal activities and the premises to be searched 'does not require direct evidence and may be based on reasonable inference from the facts presented based on common sense and experience' ") (quoting *United States v. Singh*, 390 F.3d 168, 182 (2d Cir. 2004)).

In sum, I conclude that Bernabei's summary of the intercepted conversations, coupled with the surveillance observations and GPS data, provided sufficient probable cause to believe that evidence relating to narcotics activity would be found at 54 Strong Street, in the 2001 Nissan Maxima, and on Bailey's person.

3. Challenges to the Warrant for 54 Strong Street

Bailey challenges the validity of the warrant for the downstairs apartment of 54 Strong Street on the grounds that the signature on the warrant appears "pixelated" and forged. (Docket # 111-1 at 43). In response, the government offered to permit Bailey to inspect the original signed warrant. (Docket # 115 at 48). Bailey's subsequent motions did not address this challenge or provide any additional evidence to suggest to the Court that the signature was forged. (Docket # 119 at 61-62). On this record, Bailey's speculation that the signature was forged is insufficient to find the warrant invalid.

Bailey also challenges the execution of the warrants for 54 Strong Street on the grounds that the officers seized guns and ammunition outside the scope of the warrant. (Docket # 112 at 3-7). Bailey also maintains that the officers exceeded the scope of the warrant by searching the basement. (*Id.* at 3-4).

The affidavits of Spath and Allen establish that the challenged items were seized from the basement and the southeast and northeast bedrooms. As discussed above, Bailey has failed to establish standing to challenge the search of those locations. In any event, I conclude that, considered together, the warrants authorized a search of the entire premises, including both the upstairs and downstairs apartments, and the executing officers reasonably interpreted the warrants to authorize a search of the basement. *See United States v. Rudaj*, 2005 WL 2420360, *3 (S.D.N.Y. 2005) (executing officers reasonably interpreted warrant that authorized a search of a restaurant and an inventory of its assets to authorize search of the basement). Further, the affidavits of Spath and Allen establish that the challenged items were properly seized under the plain view exception to the warrant requirement. *United States v. McCloud*, 303 Fed.Appx. 916, 918-19 (2d Cir. 2008) ("[t]o the extent [defendant] further challenges the seizure of the [firearm and ammunition] on the ground that those items were not described with particularity in the search warrant, we conclude that the district court properly relied on the plain view exception to the warrant requirement in refusing to suppress these items[;] ... [t]he connection between a loaded rifle and evidence of drug-packaging in the foyer cannot be doubted, as we have frequently noted that a gun is generally considered a tool of the trade for drug dealers") (internal quotations omitted). Reliance upon the plain view doctrine is particularly appropriate in this case considering that both Spath and Allen affirmed that they were aware, prior to the

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search, that the occupants of 54 Strong Street had felony convictions that would make it illegal for them to possess firearms or ammunition. Accordingly, I recommend that his motion to suppress the guns and ammunition be denied.

4. Challenges to the Warrant for the 2001 Nissan Maxima

***21** Bailey challenges the validity of the warrant for the 2001 Nissan Maxima on the grounds that it was based upon stale information. (Docket # 112 at 13). He also maintains that the officers improperly seized the vehicle without authorization and in violation of Rule 41(f)(1)(B) of the Federal Rules of Criminal Procedure. (Docket ## 112 at 14; 119 at 61). I address these challenges below.

"In determining whether probable cause exists, the magistrate is required to assess whether the information adduced in the application appears to be current, *i.e.*, true at the time of the application, or whether instead it has become stale." *Rivera v. United States*, 928 F.2d 592, 602 (2d Cir. 1991). "The doctrine of staleness applies when information proffered in support of a warrant application is so old that it casts doubt on whether the fruits or evidence of a crime will still be found at a particular location." *United States v. Lamb*, 945 F. Supp. 441, 459 (N.D.N.Y. 1996). "While there is no bright line rule for staleness, the facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past." *United States v. Wagner*, 989 F.2d 69, 75 (2d Cir. 1993). Accordingly, "[t]he information offered in support of the application for a search warrant is not stale if '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. Lacy*, 119 F.3d 742, 745-46 (9th Cir. 1997) (quoting *United States v. Gann*, 732 F.2d 714, 722 (9th Cir.), *cert. denied*, 469 U.S. 1034 (1984)), *cert. denied*, 523 U.S. 1101 (1998).

"[T]he principal factors in assessing whether or not the supporting facts have become stale are the age of those facts and the nature of the conduct alleged to have violated the law." *United States v. Diaz*, 176 F.3d 52, 109 (2d Cir.) (quoting *United States v. Gallo*, 863 F.2d 185, 192 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989)), *cert. denied*, 528 U.S. 875 (1999); *United States v. Lamb*, 945 F. Supp. at 460. "Some types of evidence are more likely to remain in one location than other types of evidence." *United States v. Patt*, 2008 WL 2915433, *12 (W.D.N.Y. 2008). In addition, "[w]here the criminal activity is suspected to be ongoing, 'the passage of time between the last described act and the presentation of the application becomes less significant.' " *United States v. Gayle*, 2009 WL 4667093, *3 (S.D.N.Y. 2009) (quoting *United States v. Gallo*, 863 F.2d at 192). Accordingly, "[t]he age of the information is relevant only insofar as it affects the likelihood that evidence will be found at the premises." *See United States v. Zoernack*, 2005 WL 1837962, *2 (S.D.N.Y. 2005).

I easily conclude that the information contained in the warrant regarding the 2001 Nissan Maxima was not stale. According to the affidavit, the 2001 Nissan Maxima was repeatedly used to transport money and narcotics for Mighty's ongoing narcotics trafficking operation. Intercepted calls provided evidence that the 2001 Nissan Maxima had a secret compartment to store money and narcotics. Surveillance revealed that the vehicle had traveled to and from 54 Strong Street and the residence of the suspected cocaine source in New York City on at least two recent occasions—January 30, 2015, and February 3, 2015. Indeed, the last trip was completed just five days before the warrant was issued and six days before it was executed. Under these circumstances, I find that the information set forth in the affidavit was not stale and established probable cause for the warrant at the time it issued. *See Rivera v. United States*, 928 F.2d at 602 ("[i]n investigations of ongoing narcotics operations, we have held that intervals of weeks or months between the last described act and the application for a warrant did not necessarily make the information stale"); *United States v. Ponce*, 947 F.2d 646 (2d Cir. 1991) (information concerning activities involving vehicle that occurred within two weeks of issuance of warrant for search of vehicle was not stale; "information that is two weeks old is not necessarily stale, especially when it concerns a possible ongoing narcotics trafficking operation"), *cert. denied*, 503 U.S. 943 (1992).

***22** Nor is there any merit to Bailey's contention that the warrant was improperly executed. As an initial matter, I disagree with Bailey that Rule 41(b) of the Federal Rules of Criminal Procedure applies to the warrant. The warrant was issued by Judge Dinolfo, who is a state judge, and there is no indication that the application for the order was made at the request of a federal law enforcement officer. Accordingly, Rule 41 does not apply. *See United States v. Henry*, 150 Fed.Appx. 68, 71-72 (2d Cir. 2005) ("the mere fact that property seized pursuant to the warrant of a state judge at

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the request of state law enforcement officers for violation of state law is offered in a federal prosecution does not implicate the requirements of Rule 41"), *cert. denied*, 549 U.S. 1313 (2007).

In any event, Fed. R. Crim. P. 41(f)(1)(B) contemplates that a search and inventory of a vehicle may occur outside of the presence of the individual with an interest in the vehicle. *See* Fed. R. Crim. P. 41(f)(1)(B). Further, suppression is not a remedy for a technical violation of Rule 41, and Bailey has not articulated any prejudice resulting from the fact that the search was conducted outside his presence. *See United States v. Filippi*, 2015 WL 5789846, *6 (N.D.N.Y. 2015) ("[t]echnical violations of Rule 41 are not considered deliberate and intentional disregard of the Rule that would justify suppression") (internal quotations omitted); *United States v. Scully*, 108 F. Supp. 3d 59, 85 (E.D.N.Y. 2015) ("the Second Circuit has counseled that violations of Rule 41 alone should not lead to exclusion unless (1) there was prejudice in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule") (internal quotations omitted). Bailey has not cited any authority for the proposition that suppression is justified because the terms of the warrant did not explicitly authorize the seizure of the vehicle. As discussed at length above, the officers had a valid warrant that authorized them to search the vehicle. Under such circumstances, I discern no basis for suppression. *See United States v. Mujahid*, 2009 WL 1419073, *4 (D. Alaska) (suppression not warranted where officers seized vehicle and transported it to FBI headquarters in order to execute a warrant authorizing search of vehicle; "if vehicle is seized because it is reasonably believed to contain evidence, ... the search may be undertaken later at a station instead of at the scene[;] ... [n]othing in the case law prohibits the exercise of police discretion to choose where to search an unoccupied vehicle pursuant to a search warrant"); *subsequent determination*, 2009 WL 1419157 (D. Alaska), *report and recommendation adopted*, 2009 WL 1419096 (D. Alaska 2009).

B. Franks

Bailey also challenges the validity of the search warrants and the Complaint under *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). (Docket ## 111 at 67-70; 111-1 at 1-24; 119 at 27-58; 128 at 2-3, 3-6; 156 at 3-4). Ordinarily, a reviewing court's obligation is merely to determine that the issuing judge had a "substantial basis for ... conclud[ing] that probable cause existed." *Smith*, 9 F.3d at 1012 (quoting *Gates*, 462 U.S. at 238-39) (internal quotation omitted); *Walczyk v. Rio*, 496 F.3d at 157 ("a reviewing court must accord considerable deference to the probable cause determination of the issuing magistrate"). "Nevertheless, little or no deference is due where the government's affidavit misstated or omitted material information about probable cause." *United States v. Rajaratnam*, 2010 WL 4867402, *7 (S.D.N.Y. 2010) (citing *United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000)), *aff'd*, 719 F.3d 139 (2d Cir. 2013).

***23** Bailey requests a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), claiming that Bernabei intentionally misrepresented and omitted evidence in applying for the search warrants and that Van Alstyne intentionally misrepresented and omitted evidence in his affidavit in support of the Complaint. Under the Supreme Court's holding in *Franks v. Delaware*, "a district court may not admit evidence seized pursuant to a warrant if the warrant was based on materially false and misleading information." *United States v. Levasseur*, 816 F.2d 37, 43 (2d Cir. 1987) (citing *Franks*, 438 U.S. at 154). Similarly, a hearing may be justified when a criminal complaint contains materially false or misleading information. *United States v. Padilla*, 986 F. Supp. 163, 169 (S.D.N.Y. 1997). To justify a *Franks* hearing, a defendant challenging an affidavit must make "a substantial preliminary showing that (1) the affidavit contained false statements made knowingly or intentionally, or with reckless disregard for the truth; and (2) the challenged statements or omissions were necessary to the Magistrate's probable cause finding." *United States v. Levasseur*, 816 F.2d at 43 (citing *Franks*, 438 U.S. at 171-72) (internal quotation omitted). A hearing is required if the defendant provides the court with a sufficient basis upon which to doubt the truth of the affidavit at issue. As the Supreme Court has explained:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement

> of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Franks, 438 U.S. at 171.

With respect to the first prong, "[a]llegations of negligence or innocent mistake are insufficient." *Id.* Instead, "[t]he focus is not on whether a mistake was made, but rather on the intention behind the mistake." *United States v. Markey*, 131 F. Supp. 2d 316, 324 (D. Conn. 2001) (citing *Beard v. City of Northglenn, Colo.*, 24 F.3d 110, 116 (10th Cir. 1994)), *aff'd*, 69 Fed.Appx. 492 (2d Cir. 2003). Thus, *Franks* teaches that not all statements in an affidavit have to be true; instead "the statements [must] be 'believed or appropriately accepted by the affiant as true.' " *See United States v. Campino*, 890 F.2d 588, 592 (2d Cir. 1989) (quoting *Franks*, 438 U.S. at 165), *cert. denied*, 498 U.S. 866 (1990).

With respect to omissions, "the mere intent to exclude information is [likewise] insufficient ... [because] 'every decision not to include certain information in the affidavit is 'intentional' insofar as it is made knowingly.' " *United States v. Awadallah*, 349 F.3d 42, 66 (2d Cir. 2003) (quoting *United States v. Colkley*, 899 F.2d 297, 300-01 (4th Cir. 1990)), *cert. denied*, 543 U.S. 1056 (2005). Accordingly, "[t]o have misled knowingly or recklessly, the government must have done more than make an intentional decision not to include the information, [but] [i]nstead the misleading statement or omission must have been 'designed to mislead' or 'made in reckless disregard of whether [it] would mislead.' " *United States v. Rajaratnam*, 2010 WL 4867402 at *8 (quoting *United States v. Awadallah*, 349 F.3d at 68).

To determine whether a misstatement in an affidavit is material, the court must "set[ ] aside the falsehoods in the application, ... and determine [w]hether the untainted portions [of the application] suffice to support a probable cause ... finding." *United States v. Rajaratnam*, 719 F.3d 139, 146 (2d Cir. 2013) (internal quotations and citations omitted), *cert. denied*, 134 S. Ct. 2820 (2014). When the alleged defect involves an omission, however, " 'the literal *Franks* approach [does not] seem[ ] adequate because, by their nature, omissions cannot be deleted'; therefore '[a] better approach ... would be to ... insert the omitted truths revealed at the suppression hearing.' " *Id.* (quoting *United States v. Ippolito*, 774 F.2d 1482, 1487 n.1 (9th Cir. 1985)); *see also United States v. Colkley*, 899 F.2d at 301 ("[f]or an omission to serve as the basis for a hearing under *Franks*, it must be such that its inclusion in the affidavit would defeat probable cause[;] ... [o]mitted information that is potentially relevant but not dispositive is not enough to warrant a *Franks* hearing"). According to the Second Circuit, "[t]he ultimate inquiry is whether, after putting aside erroneous information and [correcting] material omissions, there remains a residue of independent and lawful information sufficient to support [a finding of] probable cause." *United States v. Rajaratnam*, 719 F.3d at 146 (quoting *United States v. Canfield*, 212 F.3d at 718).

***24** In this case, I find that a *Franks* hearing is not warranted. The overwhelming majority of the alleged misrepresentations or omissions identified by Bailey relate to his disagreement with Bernabei's and Van Alstyne's interpretations of intercepted communications or their inclusion of surveillance observations that Bailey maintains demonstrate lawful conduct. Specifically, Bailey challenges paragraphs 22, 23, 24 and 48 of the Complaint and paragraphs 34, 35, 36, 37, 38, 39, 40, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76 and 77 of the search warrant affidavit on these grounds. (Docket ## 111 at 70; 111-1 at 1-7; 119 at 32-57). Bailey maintains that the issuing judges were misled by false interpretations of innocent communications and conduct. (Docket ## 111 at 70; 111-1 at 1-7, 20-24; 119 at 32-57).

With respect to the Complaint, Van Alstyne made clear that he was interpreting the content of the conversations based upon his "training and experience and knowledge of [the] investigation." (Docket # 1 at ¶¶ 22, 23, 24, 48). Thus, Van Alstyne fully disclosed that he was offering his opinions on the meanings of the conversations in the context of his experience and the information he had learned through the investigation. Further, the transcribed excerpts of the conversations were included in the affidavit, thus permitting the issuing judge (the undersigned, in the case of the Complaint) "to reach [her] own conclusions concerning the conversation[s]." *United States v. Gotti*, 42 F. Supp. 2d 252, 280 (S.D.N.Y. 1999).

Similarly, with respect to the search warrant affidavit, Bernabei repeatedly informed the issuing judge that he was interpreting coded conversations or providing the "sum and substance" of the conversation based upon his training, experience, and knowledge of the investigation. (Docket #

115-18 at ¶¶ 34, 35, 37, 40, 42, 44, 45, 47, 48, 49, 50, 51, 52, 54, 56, 57, 58, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75 and 77). Further, as discussed at length above, although Bernabei did not include excerpts of the transcripts of the conversations that he interpreted, the transcripts of many of those conversations were available in the affidavits in support of the wiretaps that were incorporated by reference. I find no basis to conclude that either of the affidavits were misleading.

Although Bailey disagrees with Bernabei's and Van Alstyne's interpretations and has submitted an affidavit refuting some of the interpretations (Docket # 111-1 at 20-24), any potential misinterpretations "fall short of establishing deliberate falsehood or reckless disregard for the truth" by Bernabei and Van Alstyne. *United States v. Gotti*, 42 F. Supp. 2d at 280 (citing *United States v. Fury*, 554 F.2d at 530-31 (motion to suppress for lack of probable cause denied where intercepted conversations which were somewhat ambiguous, were not unreasonably interpreted as criminal) and *United States v. Jimenez*, 824 F. Supp. 351, 361 (S.D.N.Y. 1993) ("[a] defendant's submission of his own counter-interpretations of acts, however, does not satisfy the showing required for a *Franks* hearing")). "Even if [Bailey's] proffered conclusions were more plausible than [Bernabei's and Van Alstyne's] interpretations, he has failed to demonstrate that [their] interpretations were deliberate falsehoods instead of anything other than subtle differences over ambiguities in intercepted conversations." *See id.* at 281; *United States v. Sobamowo*, 892 F.2d 90, 94 (D.C. Cir. 1989) (denying *Franks* hearing where "[i]t is evident ... that the detective who prepared the affidavit was simply summarizing the contents of [defendant's] recorded conversations and interpreting them, guided by his experience in narcotics investigations, as referring to heroin"), *cert. denied*, 498 U.S. 825 (1990); *United States v. Cosme*, 2011 WL 3740337, *13 (S.D. Cal. 2011) ("the transcripts indicate minor, and immaterial translation and interpretive issues that may be presented to a jury"), *aff'd sub nom.*, *United States v. Luis*, 537 Fed.Appx. 752 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 394 (2014).

***25** Bailey has also identified some alleged factual misrepresentations and omissions in both affidavits. His specific challenges to the search warrant affidavit and the Complaint are addressed below.

1. Other Challenges to the Complaint [9]

9 Bailey also raises several challenges to statements made by the prosecutor during his detention hearing. (Docket # 111-1 at 11-12). Alleged misstatements on the part of the prosecutor during the detention hearing are not relevant to the motions pending before the Court.

Bailey has identified four other alleged misrepresentations in Van Alstyne's affidavit in support of the Complaint. Bailey maintains that Van Alstyne fabricated statements and attributed them to Gonzales. (Docket ## 1 at ¶¶ 27-28; 111-1 at 9-10; 128 at 2). According to Bailey, Van Alstyne was not present during the interview of Gonzales, and the report from the individual who was, Andrew J. Daher ("Daher"), does not refer to the statements that Van Alstyne attributed to Gonzales. (*Id.*). On this basis, Bailey concludes that Van Alstyne must have fabricated the statements. I disagree. The mere fact that Daher's report does not include the statements does not establish that Gonzales did not make them, let alone that Van Alstyne did not believe in good faith, based upon sources other than the report, that he had.

Bailey challenges three other statements in the affidavit as false, and the government has not demonstrated otherwise. First, Van Alstyne stated that on February 9-10, 2015, Bailey drove to Brooklyn to obtain two kilograms of cocaine from Gonzales and "immediately transported the cocaine back to Rochester *where it was distributed from* 54 Strong Street." (Docket # 1 at ¶ 20) (emphasis added). Bailey maintains that this allegation must be false because the cocaine could not have been distributed in the short time between his return and the execution of the search warrants. (Docket # 111-1 at 7-8). Bailey is correct that a very short period of time elapsed between the arrival of the Nissan at 54 Strong Street and the execution of the warrants. The government has not offered any additional information to support the assertion that the cocaine was in fact distributed within that period. (Docket # 115 at 36).

Second, Bailey maintains that Van Alstyne falsely stated that $3,941 in United States currency was found at 54 Strong Street, when in fact the majority of that currency was found on Bailey's person. (Docket ## 1 at ¶ 33; 111-1 at 13; 119 at 10). The government has not refuted Bailey's contention in its motion response.

Finally, Bailey maintains that Van Alstyne falsely represented that the interpreter who translated the intercepted Patois communications was certified, when in fact he was not. (Docket ## 1 at ¶ 10 n.1; 119 at 10-11). During a court proceeding on April 7, 2016, the government confirmed that

Bailey is correct that the affidavit inaccurately characterized the interpreter as certified.

In addition to the three apparent misrepresentations discussed above, Bailey has also identified several facts that he maintains were deliberately excluded from Van Alstyne's affidavit. First, Bailey challenges Van Alstyne's failure to include the fact that Bailey was not seen in the Nissan Maxima when it was observed arriving at and leaving Gonzales's residence on February 10, 2015. (Docket ## 1 at ¶ 25; 111-1 at 8-9). Bailey's absence from the vehicle when it arrived at Gonzales's residence, however, is implied elsewhere in Van Alstyne's affidavit. (*See* Docket # 1 at ¶¶ 27-28). Bailey also challenges Van Alstyne's failure to mention that the officer who observed the vehicle was unable to see the license plate and described the vehicle as blue rather than black. (Docket ## 1 at ¶ 25; 111-1 at 8-9).

***26** Next, Bailey challenges Van Alstyne's failure to include the fact that the Nissan was out of sight for approximately ten minutes after Bailey arrived at 54 Strong Street before the warrants were executed. (Docket ## 1 at ¶¶ 31-32; 111-1 at 15). He also asserts that Van Alstyne should have included the fact that Bailey did not have keys to the vehicle when he was searched. (Docket # 111-1 at 15).

Additionally, Bailey challenges Van Alstyne's failure to include excerpts from two phone calls, which Bailey maintains exculpate him. (Docket # 111-1 at 16-17). During the first call, which allegedly occurred between Bailey and Mighty on February 3, 2015, at 11:21 p.m., Mighty asked Bailey whether he knew how to access the hidden compartment, and Bailey responded that he did not. (Docket ## 111-1 at 16; 115-18 at ¶ 73). During the second, which allegedly occurred on the same date, Mighty and Taylor agreed that they did not want Bailey to know about the secret compartment in the vehicle or how to access it. (Docket # 111-1 at 16-17).

Having reviewed the allegations in the complaint, I conclude that a *Franks* hearing is not warranted. Even assuming that Van Alstyne deliberately included the apparent false statements and recklessly omitted the information discussed above, the challenged information was not material to this Court's probable cause finding. *See Rajaratnam*, 2010 WL 4867402 at *11 ("a *Franks* hearing is required only if the government's misstatements were necessary to [the issuing judge's] decision to authorize the [warrant] [;] ... [the inquiry] is, after setting aside the government's misstatements and adding what it omitted from the affidavit, does the Court find that the affidavit set forth minimally adequate facts to establish probable cause"). I find that the affidavit contained sufficient independent information to believe that Bailey was involved in a conspiracy to distribute narcotics. Stated another way, even if the alleged falsities were excised from the affidavit and even if Van Alstyne had included the omissions identified by Bailey above, sufficient probable cause still existed to support the charges against Bailey.

To summarize that information, the allegations described strong evidence that Bailey had traveled to New York City on February 10, 2015, to conduct a transaction involving a substantial quantity of cocaine. Although he was not observed at 126 New Jersey Avenue, a vehicle similar to the Nissan Maxima was observed arriving at that location and leaving a short time later. Gonzales stated that an individual he referred to as "Young One" had driven the vehicle to New York City and met with Gonzales at a restaurant. Gonzales stated that the vehicle contained approximately $70,000 in cash in a secreted compartment—the same amount of cash that was located in his residence during the search. Gonzales also stated that he loaded the compartment with two kilograms of cocaine and returned the vehicle to "Young One" at the restaurant.

Data collected from Bailey's phone confirmed his location as he traveled from New York City to Rochester. As he approached Rochester, Bailey texted Mighty to ensure that the driveway at 54 Strong Street was clear, and he drove the Nissan to that location. Shortly after his arrival, the Nissan was searched and a kilogram of cocaine was found in the hidden compartment. The allegations discussed above, taken as a whole, establish ample probable cause to believe that Bailey was involved in a narcotics conspiracy. Accordingly, I conclude that Van Alstyne's alleged misstatements or omissions were not material to the finding of probable cause for the complaint. *See Rajaratnam*, 719 F.3d at 156-57 & n.20 ("even assuming, *arguendo*, that these alleged misstatements and omissions regarding [the confidential informant] ... were indeed made with 'reckless disregard for the truth,' we agree with the District Court that they were not 'material' " where the other allegations were sufficient to support finding of probable cause); *United States v. Viers*, 251 Fed.Appx. 381, 383 (9th Cir. 2007) (affirming validity of warrant; "in spite of ... deliberate or reckless omissions, the informant's tip was not necessary to the finding of probable cause" because probable cause was established on basis of independent investigation), *cert. denied*, 552 U.S. 1275 (2008); *United States v. McGlown*, 200 F. Supp. 2d 1141, 1145-46 (D. Neb.

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2002) ("[t]he evidence outlined above demonstrates that even if the confidential source's uncorroborated information is excluded from consideration as unreliable[,] ... there is simply no indication that the omission of information regarding the confidential source's false statements 'compromised the affidavit to such an extent that it could not have supported a finding of probable cause if [such information] had been included' ") (alterations in original) (quoting *United States v. Hall*, 171 F.3d 1133, 1143 (8th Cir. 1999), *cert. denied*, 529 U.S. 1027 (2000)).

2. Other Challenges to the Search Warrant

***27** In addition to his disagreement with the interpretation of or inferences to be drawn from the intercepted phone conversations and surveillance observations discussed above, Bailey has identified a handful of alleged misrepresentations in Bernabei's affidavit in support of the search warrants. [10] (Docket ## 119 at 33-34; 115-18 at ¶¶ 42, 46, 75, 76; 156 at 3-4). First, Bailey challenges paragraphs 42 and 75 on the grounds that the summaries of the conversations in the affidavit conflict with the logs of the phone calls maintained by the agents who monitored the calls. (Docket # 119 at 33-34). Yet, the mere fact that the monitoring agents did not include as much detail in their logs as Bernabei did in his affidavit does not mean that Bernabei's version is misleading, nor does it warrant a *Franks* hearing. *See United States v. Badalamenti*, 1985 WL 2572, *5 (S.D.N.Y. 1985) (rejecting argument that variations between affidavit and logs maintains by monitoring agents warranted *Franks* hearing; "the logs are not intended to be precise verbatim transcriptions of the conversations to be intercepted; [r]ather they are sketchy notes hastily taken by the monitoring agent while the call is in progress").

10 Bailey also maintains that several paragraphs in Bernabei's affidavit contain stale information or are otherwise irrelevant to the probable cause determination. (Docket ## 119 at 38-41; 115-18 at ¶¶ 39, 41, 43). I disagree. Further, although Bailey purports to challenge paragraph 53 of Bernabei's affidavit, he has failed to provide the basis for this challenge. (Docket # 111-1 at 46).

Next, Bailey challenges paragraphs 46 and 76 of Bernabei's affidavit on the grounds that his review of the pole camera recordings fail to corroborate Bernabei's description of those recordings. (Docket # 156 at 3-4). In paragraph 76, Bernabei states that the pole camera captured the Nissan Maxima's return to 54 Strong Street on February 4, 2015, at approximately 6:40 p.m. (Docket # 115-18 at ¶ 76). According to Bailey, although the recording does capture a vehicle entering the driveway of 54 Strong Street at that time, the quality of the recording does not permit the viewer to determine the registration number, make, or model of the vehicle. (Docket # 156 at 4). I have reviewed the pole camera surveillance recording from February 4, 2015, that was submitted to the Court by the government by a letter dated June 30, 2016. Although the recording does not appear to capture the registration number or make and model of the vehicle, it does depict a dark colored vehicle arrive at 54 Strong Street at approximately 6:46 p.m. [11] I find no basis to conclude that Bernabei's statement was deliberately misleading.

11 The video contains two time stamps, one which reads 6:46:03 p.m. and the other which reads 6:57:59 p.m. at the beginning of the relevant portion of the video.

Additionally, Bailey challenges paragraph 46 of Bernabei's affidavit on the grounds that it misrepresents the content of the video surveillance. (Docket # 156 at 3). In his affidavit, Bernabei stated the video surveillance captured Harper exiting a 2003 Infiniti vehicle and walking down the east side of 54 Strong Street towards the rear entrance. (*Id.* at ¶ 46). According to Bernabei, a short while later, Harper was observed walking away from the rear of 54 Strong Street and "re-enter[ing] the 2003 Infiniti." (*Id.*) (emphasis added). According to Bailey, the footage does not depict these activities. The government disagrees, maintaining that Bernabei accurately describes the footage, although the government concedes that the footage does not depict Harper re-entering the vehicle. (Docket # 159 at 2-3). According to the government, Bernabei's misstatement was an innocent mistake, which, in any event, was not material to the probable cause supporting the warrant. (Docket # 159 at 2-3). The Court has reviewed the footage which depicts a vehicle arriving at 54 Strong Street at approximately 9:48:58 a.m. and leaving at approximately 9:51:34 a.m. [12] I agree that Bernabei's misstatement was not material to the probable cause finding: if that portion of Bernabei's affidavit that stated that Harper was observed exiting and entering the Infiniti were excised, the affidavit still contains sufficient information to establish probable cause to search the Nissan Maxima, 54 Strong Street, and Bailey's person. Accordingly, I conclude that a *Franks* hearing is not warranted.

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12 The video contains two time stamps. The other time stamps depicted were 9:37:20 and 9:39:56, respectively.

C. *Leon*'s Good Faith Exception

***28** Finally, Bailey argues that the *Leon* good faith exception to the exclusionary rule is inapplicable to the search warrants because Bernabei's affidavit was conclusory and the issuing judge abandoned his judicial role. (Docket # 111-1 at 41-42). In *Leon*, the Supreme Court held that the Fourth Amendment exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was based on "objective good faith," even though the warrant itself might ultimately be found to be defective. *United States v. Leon*, 468 U.S. 897, 918-23 (1984); *United States v. Salameh*, 152 F.3d 88, 114 (2d Cir. 1998), *cert. denied*, 525 U.S. 1112 (1999); *United States v. Benedict*, 104 F. Supp. 2d 175, 182 (W.D.N.Y. 2000). The rationale underlying this good faith exception is that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *United States v. Leon*, 468 U.S. at 919.

The Court in *Leon* identified four situations in which the good faith exception is inapplicable. Specifically, an executing officer's reliance on a search warrant will not be deemed to have been in good faith:

(1) where the issuing magistrate has been knowingly misled;

(2) where the issuing magistrate wholly abandoned his or her judicial role;

(3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and

(4) where the warrant is so facially deficient that reliance upon it is unreasonable.

Id. at 923; *see United States v. Cancelmo*, 64 F.3d at 807 (citations omitted).

Bailey maintains that the good faith exception should not apply in this case because Judge Dinolfo wholly abandoned his judicial role and Bernabei's affidavit was so lacking in probable cause that reliance upon it was unreasonable. (*Id.* at 42-43). Nothing that Bailey has proffered supports a suggestion that Judge Dinolfo abandoned his judicial role when he issued the warrant. Further, for the reasons explained above, it cannot be said that the application was so lacking in indicia of probable cause that the officers' reliance upon it was unreasonable. For these reasons, I recommend that Bailey's motion to suppress the evidence seized pursuant to the search warrants be denied.

II. Motion to Suppress Evidence Obtained Pursuant to 2703(d) Authorization

Bailey seeks to suppress the evidence seized pursuant to the February 10, 2015, order of Judge Dinolfo authorizing Bailey's cellular telephone service provider to provide the government with cell site and global positioning data associated with Bailey's cellular telephone. (Docket ## 111 at 63, 65-66; 115-16; 119 at 24-25). Bailey maintains that the application for the order lacked probable cause and that the issuing judge lacked authority to issue the order pursuant to Rule 41(b)(2) of the Federal Rules of Criminal Procedure. (*Id.*). Bailey also maintains that the government improperly obtained an order for the information instead of a warrant. [13] (*Id.*).

13 Bailey also challenges the Section 2703(d) authorization on the grounds that it was obtained, in part, based upon GPS tracking evidence that the government failed to preserve. (Docket # 140 at 14). Moses's affidavit in support of the application for the 2703(d) authorization did not include any information obtained from the GPS tracker. (Docket # 115-16). In any event, as discussed below, the government has provided the GPS data to Bailey. Accordingly, I recommend that Bailey's motion to suppress on this ground be denied.

As an initial matter, I disagree with Bailey that Rule 41(b) of the Federal Rules of Criminal Procedure applies to the 2703(d) authorization. The order was issued by Judge Dinolfo, who is a state judge, and there is no indication that the application for the order was made at the request of a federal law enforcement officer. Accordingly, Rule 41 does not apply, and Judge Dinolfo was authorized under state law to issue the order. *See United States v. Henry*, 150 Fed.Appx. at 71-72 ("the mere fact that property seized pursuant to the warrant of a state judge at the request of state law enforcement officers for violation of state law is offered in a federal prosecution does not implicate the requirements of Rule 41"); *Gotti*, 42 F. Supp. 2d at 285-86 ("[t]he text of [Rule 41] limits its application to warrants requested by federal officers[;] ... under New York state law, '[a] search warrant issued by ... a superior court judge sitting as a local criminal court may be executed pursuant to its terms anywhere in the state' ") (quoting N.Y. Crim. Proc. Law § 690.20(1)).

***29** I turn next to Bailey's probable cause challenge. Although "it is an open question in this Circuit whether the [g]overnment is required to demonstrate probable cause to obtain [prospective cell site data]," *see United States v. Acosta*, 2013 WL 1890337, *7 (S.D.N.Y. 2013) (collecting cases); *see also United States v. Lambis*, 2016 WL 3870940, *6 & n.2 (S.D.N.Y. 2016) ("the Second Circuit has yet to address whether these passive, [cell site location information] 'pings' fall outside the protections of the Fourth Amendment under the third party doctrine[,]" but has hinted in an unpublished opinion "that if presented with the question, it may find that [cell site location information] is not protected by the Fourth Amendment") (citing *United States v. Pascual*, 502 Fed.Appx. 75, 80 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 231 (2013)), this Court—like others, but not all, within this district and circuit—has routinely required the government to demonstrate probable cause prior to authorizing the government to obtain such information, *see In re Application of United States for an Order Authorizing Use of a Pen Register with Caller Identification Device Cell Site Location Authority on a Cellular Telephone*, 2009 WL 159187, *6 (S.D.N.Y. 2009) (denying request for an order pursuant to Section 2703(c) and (d) for prospective cell site location information, but noting "nothing in the law as it presently exists precludes the [g]overnment from obtaining [cell site location information] from a cell phone provider[;] [i]t simply has to make a showing sufficient to obtain a warrant pursuant to Federal Rule of Criminal Procedure 41"); *In re Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register and/or Trap & Trace for Mobile Identification No. (585)111-1111 & the Disclosure of Subscriber & Activity Information under 18 U.S.C. § 2703*, 415 F. Supp. 2d 211, 219 (W.D.N.Y. 2006) (denying request for an order pursuant to Section 2703, but indicating that the Court would "issue a warrant for the seizure of the requested real time cell location information upon a showing that there exists probable cause to believe that the data sought will yield evidence of a crime"); *In re Application of the United States for an Order (1) Authorizing the Use of a Pen Register & a Trap & Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information*, 396 F. Supp. 2d 294, 327 (E.D.N.Y. 2005) ("[w]hen the government seeks to turn a mobile telephone into a means for contemporaneously tracking the movements of its user, the delicately balanced compromise that Congress has forged between effective law enforcement and individual privacy requires a showing of probable cause").

Assuming that probable cause is required for court authorization to obtain prospective cell site data, I conclude that Moses's affidavit satisfied that burden. In his affidavit, Moses incorporated by reference the information in support of the applications for the wiretaps sought in connection with the investigation. He also summarized the results of the investigation to date and summarized the contents of several phone calls between Bailey and Mighty providing ample and reasonable cause to believe that Bailey would be traveling to the New York City area to obtain narcotics from Mighty's supplier on February 10, 2015. This information was sufficient to establish probable cause to obtain the cell site data and GPS information relating to Bailey's phone.

***30** Finally, I reject Bailey's contention that suppression is warranted because the court authorization to obtain the data was reflected in the form of a court order as opposed to a warrant. Having concluded that the application for the information was supported by probable cause, issued by a neutral and detached judge, and sufficiently particular, I find that the form of the judicial authorization provided is ultimately immaterial. [14] *See United States v. Myles*, 2016 WL 1695076, *8 (E.D.N.C. 2016) (suppression not warranted where government obtained cell site data through court orders instead of warrants where "[t]he orders were issued by a neutral, disinterested state superior court judge, ... they particularly describe the information to be seized[,]" and the applications for the orders established probable cause); *United States v. Martinez*, 982 F. Supp. 2d 421, 431-32 (E.D. Pa. 2013) ("[t]he [g]overnment concedes that the 'Emergent Order for Investigative Detention' is not a search warrant, but argues this formal distinction is immaterial because the Order was supported by probable cause[;] I am certainly prepared to evaluate the Order as a warrant, regardless of how it is titled"). Accordingly, I recommend that the district court deny Bailey's motion to suppress the evidence obtained pursuant to the 2703(d) authorization.

14 In any event, I discern no reason why the executing officers were not entitled to rely in good faith on Judge Dinolfo's order authorizing the production of prospective cell site and GPS data. Accordingly, suppression would not be warranted under *Leon*.

III. Motion to Suppress GPS Tracking Data

Bailey seeks to suppress the evidence seized pursuant to a warrant dated January 30, 2015, issued by Judge Dinolfo that authorized the installation of a GPS tracking device on the black Nissan four door sedan. (Docket ## 111 at 63, 65;

115-17; 119 at 25-27; 128 at 2-3; 140 at 13; 156 at 4-12). First, Bailey maintains that the government failed to preserve the data. (Docket ## 140, 156). Next, Bailey maintains that the warrant application lacked probable cause and that the warrant was invalid because it was insufficiently particular and the issuing judge lacked authority to issue the order under Fed. R. Crim. P. 41. (*Id.*). Bailey also argues that the issuing judge was misled. (*Id.*). Bailey further contends that the government has failed to prove the authenticity of the GPS data that it has produced and requests an authenticity hearing. (Docket # 156 at 4-8). Finally, Bailey maintains that the government's failure to obtain a "search" warrant, rather than a "seizure" warrant, and the government's failure to seal the GPS data warrants suppression. (*Id.* at 9-12).

As an initial matter, the government disputes Bailey's standing to challenge the installation of the tracking device on the 2001 Nissan Maxima.[15] (Docket ## 115 at 33-34; 126 at 1-2). In his affidavit, Bailey swears that he drove the vehicle at approximately 11:45 p.m. on February 3, 2015, from 54 Strong Street to 144 Oakland Street in Rochester, New York. (Docket # 127 at 4). Bailey has not affirmed that he used or had any interest in the vehicle on January 30, 2015, the date the warrant was issued, or on the date and time that the GPS tracking device was installed. On this record, and for the purposes of this motion, I will assume, without deciding, that Bailey has standing to seek suppression of the data collected while he used the vehicle on February 3.[16] *See United States v. Hernandez*, 647 F.3d 216, 220 (5th Cir. 2011) (defendant lacked standing to challenge installation of tracking device because he did not demonstrate interest in vehicle at time device was installed but had standing to challenge use of device to track vehicle when he drove it with owner's permission); *United States v. Gibson*, 708 F.3d 1256, 1277 (11th Cir.) ("[w]e conclude that [defendant] has standing to challenge the installation and use of the tracking device while the vehicle was in his possession, but not the use of the tracking device to locate the [vehicle] when it was moving on public roads and he was neither the driver nor a passenger"), *cert. denied*, 134 S. Ct. 342 (2013); *United States v. Houseal*, 2014 WL 626765, *18 (W.D. Ky. 2014) ("an express grant of permission to drive a vehicle commonly used briefly, by multiple individuals, allegedly engaged in a criminal enterprise, does not establish standing for [defendant] to challenge the warrantless attachment of a GPS tracking devise to [the vehicle]"); *United States v. Gordon*, 2013 WL 791622, *5 (E.D. Mich. 2013) ("[a] defendant who sometimes uses a vehicle, during the course of GPS surveillance, does not establish that the defendant has a reasonable expectation of privacy in the vehicle at all times"); *United States v. Tan*, 2012 WL 3535887, *2 (E.D. Cal. 2012) ("numerous courts have already rejected similar motions to suppress based on a defendant's lack of standing to challenge the installation of a GPS on a third party's vehicle") (collecting cases); *United States v. Hanna*, 2012 WL 279435, *4 (S.D. Fla. 2012) ("[o]ne must either possess the vehicle when the tracker is installed, which did not occur here, or at least one must be inside the vehicle at the time the tracker is being used to monitor the vehicle"), *aff'd sub nom.*, *United States v. Ransfer*, 749 F.3d 914 (11th Cir.), *cert. denied*, 135 S. Ct. 392 (2014).

15 By letter dated April 15, 2016, the government indicated that it continued to challenge Bailey's standing to challenge the GPS tracking data.

16 The government has represented that no data was transmitted by the GPS tracker after February 4, 2015. (Docket # 150).

***31** With respect to Bailey's challenge based upon the government's purported failure to preserve the GPS data, I find that suppression is not warranted. Initially, the government was unable to produce the GPS data and represented to Bailey and the Court that the data was missing. (Docket # 143 at 2). The Court scheduled an evidentiary hearing regarding the government's efforts to preserve the allegedly missing data. (Docket # 146). By letter dated July 19, 2016, the government informed the Court that the data had been retrieved and produced to Bailey. (Docket # 150). Based upon the government's representations, the Court adjourned the evidentiary hearing and instead conducted a status conference on August 8, 2016. (Docket ## 150, 152). During those proceedings, Bailey conceded that he had received the GPS data produced by the government. (Docket # 152). Despite being provided the information, Bailey continues to maintain that a hearing relating to the government's failure to preserve the GPS data is warranted. (Docket # 156 at 4). The challenges raised by Bailey, however, relate to authenticity issues, which, as discussed below, are premature at this time. Accordingly, I deny Bailey's request for a hearing and recommend that the district court deny Bailey's motion to suppress GPS data on the grounds that the government failed to preserve the data.

Bailey challenges the validity of the warrant on the grounds that it was insufficiently particular. (Docket # 119 at 25). The Fourth Amendment provides that "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." U.S. CONST. AMEND. IV. "Law enforcement agents are thus barred from executing warrants that purport to authorize 'a general, exploratory rummaging in a person's belongings.' " *United States v. Zemlyansky*, 945 F. Supp. 2d 438, 452 (S.D.N.Y. 2013) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the [particularity] requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

The requirement of particularity is satisfied where the warrant (1) identifies "the specific offense for which the police have established probable cause"; (2) describes the place to be searched; and, (3) specifies "the items to be seized by their relation to designated crimes." *United States v. Galpin*, 720 F.3d 436, 445-46 (2d Cir. 2013) (internal quotation omitted). "The Fourth Amendment's requirement of particularity [is] satisfied 'if the description is such that the officer(s) armed with a search warrant can with reasonable effort ascertain and identify the place intended.' " *National City Trading Corp. v. United States*, 635 F.2d 1020, 1024 (2d Cir. 1980) (quoting *Steele v. United States*, 267 U.S. 498, 503 (1925)).

The warrant in this case authorized the installation of a tracking device on "A BLACK COLORED NISSAN VEHICLE, FOUR DOOR SEDAN BEARING AN UNKNOWN VEHICLE IDENTIFICATION NUMBER." (Docket # 115-17 at 2). Bailey maintains that this description of the vehicle was insufficiently particular because it did not include information to permit the executing officers to identify the specific vehicle for which the installation was authorized. (Docket # 119 at 25). Bailey maintains that the warrant, in order to be valid, needed to include additional identifying information, such as a license plate number, vehicle identification number, or other distinctive identifying characteristics. (*Id.*). I find that the warrant was sufficiently particular.

In his supporting affidavit, Moses described the vehicle as a black Nissan four door sedan and identified several users of the vehicle, including Mighty, Bailey, and Brown. (Docket # 115-17 at ¶ 31). Moses explained that the car was kept secreted behind 54 Strong Street, which prevented surveillance officers from obtaining its license plate number, and that any attempts to obtain the license plate number would jeopardize the investigation. (*Id* at ¶ 36.). Moses also described a series of phone calls and surveillance observations suggesting that the vehicle was being used for narcotics trafficking. (*Id* at ¶¶ 33-36.). Under these circumstances, I find that the description provided in the warrant, considered in conjunction with the information Moses provided in the affidavit, was sufficiently particular to permit the executing officers to identify the correct vehicle when executing the warrant. *See United States v. Vaughn*, 830 F.2d 1185, 1186 (D.C. Cir. 1987) ("[a] vehicle search warrant ordinarily should include the license plate number on its face, but when this is not practicable a detailed description of the vehicle or a narrow geographical limit to the search may provide the requisite check on police discretion[;] [r]ead with the affidavit, the warrant in this case provided both of these limitations, stating the body, color, window type, state of registration, and owner, along with an approximate location") (footnote omitted).

***32** Despite Bailey's arguments to the contrary (Docket # 119 at 25), I conclude that Moses's affidavit established ample probable cause to support the issuance of the warrant for the GPS tracking device. *See United States v. Jones*, 132 S. Ct. 945, 949 (2012) ("the [g]overnment's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicles movements, constitutes a 'search' ") (footnote omitted). In his affidavit, Moses incorporated by reference the information in support of the applications for the wiretaps sought in connection with the investigation. He also summarized the results of the investigation to date and summarized the contents of several communications between Bailey, Mighty, Brown, and the cocaine source that, when coupled with surveillance observations, strongly suggested that the Nissan Maxima was used to further their drug trafficking activities. These allegations were sufficient to establish probable cause to believe that the installation of the GPS tracking device on the vehicle would likely yield evidence of illegal narcotics trafficking.

In any event, there is no evidence to suggest that the searching officers did not rely upon the warrant in good faith. *See Leon*, 468 U.S. at 923; *Cancelmo*, 64 F.3d at 807 (applying good faith exception to exclusionary rule where search warrant application relied on ambiguous coded conversations). Although Bailey challenges the validity of the warrant on the grounds that the issuing judge was misled (*id.* at 25, 27), Bailey has not identified any specific misrepresentations or omissions in Moses's affidavit; rather, he maintains that the transcripts of the intercepted

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conversations should have been recited in Moses's affidavit. I addressed this issue above in connection with Bailey's challenges to Bernabei's affidavit in support of the search warrants. As in Bernabei's affidavit, Moses specifically incorporated by reference approximately twenty-six warrant applications or extension requests, the majority of which had been submitted to the judge who issued the GPS tracking warrant. In sum, no credible evidence exists that the issuing judge was knowingly misled or wholly abandoned his judicial role. *See Leon*, 468 U.S. at 923; *Cancelmo*, 64 F.3d at 807. Nor was the warrant so facially deficient or so lacking in probable cause that reliance upon it would have been unreasonable. *See id.* Thus, for the reasons outlined above, I conclude that suppression is not warranted. [17]

17 For similar reasons, to the extent that Bailey maintains that a *Franks* hearing is warranted based upon any alleged misrepresentations or omissions in Moses's affidavit, I disagree and find that a hearing is not warranted.

Several of Bailey's remaining challenges to the validity of and execution of the warrant for the GPS tracking device are based upon an alleged failure to comply with Rule 41 of the Federal Rules of Criminal Procedure. (Docket ## 119 at 26-27; 156 at 10). According to Bailey, the warrant failed to comply with Rule 41 because it permitted the collection of data in excess of the forty-five days specified in Rule 41(e)(2)(C). (*Id.*). He also maintains that the execution of the warrant violated Rule 41(b)(4) because the tracker was installed on the vehicle outside of the Western District of New York. [18] (*Id.*). Here, though, the GPS tracking warrant was issued by a state judge, who was authorized to issue a warrant to be executed anywhere in the state, and Rule 41 is inapplicable. *See Henry*, 150 Fed.Appx. at 71-72 ("the mere fact that property seized pursuant to the warrant of a state judge at the request of state law enforcement officers for violation of state law is offered in a federal prosecution does not implicate the requirements of Rule 41"); *Gotti*, 42 F. Supp. 2d at 285-86 ("[t]he text of [Rule 41] limits its application to warrants requested by federal officers[;] ... under New York state law, '[a] search warrant issued by ... a superior court judge sitting as a local criminal court may be executed pursuant to its terms anywhere in the state' ") (quoting N.Y. Crim. Proc. Law § 690.20(1)). Further, the GPS tracker did not transmit any data after February 4, 2015, less than one week after the warrant was issued.

18 Bailey also maintains that the warrant required that the installation occur at the Rochester Public Safety Building. (Docket # 119 at 26). He is incorrect. The warrant permitted, but did not require, that the car be transported to the Rochester Public Safety Building. (Docket # 115-17).

***33** Finally, Bailey seeks to suppress the GPS tracking data on the grounds that the government failed to seal the information and has failed to establish its authenticity. (Docket # 156 at 4-12). Bailey has failed to cite any authority for the proposition that the government must seal GPS tracking data in order to admit the data at trial. Further, the government correctly argues that issues as to the authenticity of the GPS data should be addressed by the trial court after the government has been provided an opportunity to establish a foundation for the evidence's admission at trial. (*Id.*). Accordingly, I recommend that the district court deny Bailey's motion to suppress the GPS tracking data.

IV. Motion to Suppress Video Surveillance Footage

Bailey seeks to suppress the video surveillance footage obtained through a pole camera installed outside 54 Strong Street. (Docket # 140 at 15-17). According to Bailey, the video recordings should be suppressed because they are of low quality and because members of law enforcement conducted the video surveillance without a warrant and without establishing compliance with the requirements of Title III. (*Id.*). I agree with the government that any objections to the quality of the recordings is an evidentiary matter best addressed by the trial court. (Docket # 143 at 5).

Additionally, I reject Bailey's argument that the requirements of Title III apply to video surveillance of the exterior of 54 Strong Street. (Docket # 140 at 16-17). Although the requirements of Title III should be considered when authorizing video surveillance of locations in which an individual has a reasonable expectation of privacy, *see United States v. Biasucci*, 786 F.2d 504, 510 (2d Cir. 1986), Bailey has not demonstrated an expectation of privacy in the publicly viewable areas outside 54 Strong Street. As an initial matter, Bailey has affirmed that he was an occasional overnight guest at 54 Strong Street, which undercuts his position that he had any reasonable expectation of privacy in the areas surrounding that property. *See United States v. Brooks*, 2016 WL 1749394, *5 (W.D.N.Y.) ("I agree with the government ... that a somewhat closer question exists as to whether defendants [as occasional overnight guests] have established standing to challenge the items seized from the exterior of the residence"), *report and recommendation adopted*, 2016 WL 3742318 (W.D.N.Y. 2016).

Further, the pole camera was installed in a public place and captured activity surrounding 54 Strong Street that was exposed to the public; Bailey thus has failed to establish that his reasonable expectations of privacy were violated by the surveillance. *See Katz v. United States*, 389 U.S. 347, 351 (1967) (activity a person knowingly exposes to the public is not a subject of Fourth Amendment protection and is not constitutionally protected from observation); *United States v. Wymer*, 2016 WL 3597619, *5 (6th Cir. 2016) (no expectation of privacy in area surrounding commercial property that was exposed to the public; "[defendant] does not have a reasonable expectation of privacy in this area that was both visible by any person traveling on the roads surrounding the [property] and was recorded by a camera located on a public telephone pole") (internal quotation omitted); *United States v. Houston*, 813 F.3d 282, 287-88 (6th Cir. 2016) ("[t]here is no Fourth Amendment violation, because [defendant] had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads"); *United States v. Jackson*, 213 F.3d 1269, 1281 (10th Cir.) ("the video cameras installed on the telephone poles were incapable of viewing inside the houses, and were capable of observing only what any passerby would easily have been able to observe[;] [t]hus, [defendant] had no reasonable expectation of privacy that was intruded upon by the video cameras[,] ... [and] we conclude [defendant's] rights under the Fourth Amendment were not implicated, and there was no need for the police officers to obtain a search warrant before installing and utilizing the video cameras"), *vacated on other grounds*, 531 U.S. 1033 (2000); *United States v. Campuzano-Chavez*, 2016 WL 879326, *4 (W.D. Okla. 2016) ("the Fourth Amendment is not implicated by video surveillance obtained from cameras posted outside private property, where they observe no more than what any passerby would be able to observe and where the defendant has no reasonable expectation of privacy in the area being viewed"); *United States v. Birrueta*, 2014 WL 11369624, *9 (E.D. Wash. 2014) ("examining [d]efendant's reasonable expectation of privacy, the [c]ourt finds that the video surveillance from the pole camera was reasonable because it recorded the outside of the front of [d]efendant's home, from a vantage that anyone from the street could see[;] [w]ithout evidence that camera captured the inside of [d]efendant's home or somehow employed techniques that greatly enhanced its ability to view private goings on, not visible to the naked eye, the [c]ourt ... finds that the search was reasonable"); *United States v. Baltes*, 2013 WL 11319002, *7 (N.D.N.Y. 2013) ("the pole camera used was secured in a public place and captured video of the exterior of [d]efendant's residence[;] [n]o judicial authorization was required"); *United States v. Aguilera*, 2008 WL 375210, *3 (E.D. Wis.) ("[t]he police could have stood on the street outside defendant's house and observed the comings and goings from his driveway; substitution of a camera for in-person surveillance does not offend the Fourth Amendment; and the camera did not record activities within the defendant's home or its curtilage obscured from public view"), *report and recommendation adopted*, 2008 WL 444647 (E.D. Wis. 2008); *United States v. Clarke*, 2005 WL 2645003, *2 (D. Conn. 2005) (no Fourth Amendment protection extends to activities observable by the public "even assuming all the areas in which [defendant] conducted her activity were 'curtilage' "); *United States v. West*, 312 F. Supp. 2d 605, 616 (D. Del. 2004) ("[d]efendant admits that he was standing outside in public at the time he was videotaped, and therefore, [d]efendant cannot be said to have a legitimate expectation of privacy"); *United States v. Thomas*, 2003 WL 21003462, *5 (D. Conn. 2003) ("areas that a person knowingly exposes to the public, even in or surrounding his or her own home, are not protected by the Fourth Amendment[;] ... [the defendant] did not manifest a subjective expectation of privacy with respect to any of the areas that were subjected to surveillance"); *Rodriguez v. United States*, 878 F. Supp. 20, 24 (S.D.N.Y. 1995) ("as the activity monitored by the video surveillance occurred entirely within a public place, [petitioner] had no reasonable expectation of privacy on the public street"). Moreover, the length of the period of surveillance does not render it unreasonable, particularly because Bailey has, at best, established that he was only occasionally a guest at the premises. *See United States v. Houston*, 813 F.3d at 289 ("the long length of time of the surveillance does not render the video recordings unconstitutionally unreasonable"). Accordingly, I recommend that the district court deny Bailey's motion to suppress the video surveillance.

V. Motion to Suppress Statements

***34** Bailey seeks to suppress the statements he made to Moses and Allen on the grounds that they were the fruit of an unlawful arrest, obtained in violation of his *Miranda* rights, and not voluntarily made. (Docket ## 111-1 at 33-34; 119 at 9, 59-60; 127 at 1-3; 145). Bailey claims that he was unlawfully arrested without a warrant and his statements are the tainted fruit of that arrest. (*Id.*). He further maintains that he was never provided his *Miranda* rights, never waived those rights, and that his statements were coerced. (*Id.*).

A. Warrantless Arrest of Bailey

Bailey moves to suppress the statements he made to law enforcement officers after his arrest on February 10, 2015. Bailey contends that the officers lacked probable cause to arrest him on February 10, 2015, and that his statements should be suppressed as fruit of that unlawful arrest. (Docket # 119 at 59).

Probable cause to arrest exists when the arresting officer has "knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *United States v. Delossantos*, 536 F.3d 155, 158 (2d Cir.) (*Walczyk*, 496 F.3d at 156), *cert. denied*, 555 U.S. 1056 (2008). The Supreme Court has counseled that the probable cause standard is "a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Gates*, 462 U.S. at 231). In determining whether probable cause exists for an arrest, a reviewing court must examine the totality of circumstances surrounding the arrest, *Gates*, 462 U.S. at 230-31, judged from "the perspective of a reasonable police officer in light of his training and experience." *United States v. Delossantos*, 536 F.3d at 159. Probable cause requires no more and no less than a "reasonable ground for belief of guilt." *Maryland v. Pringle*, 540 U.S. at 371 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

The factual allegations set forth in Bernabei's affidavit to support the warrant for the search of Bailey's person demonstrate that sufficient probable cause existed to arrest Bailey on February 10, 2015. I discussed at length above the information provided by Bernabei regarding the suspected narcotics trafficking activities and the information implicating Bailey in that activity, including the information linking Bailey to both Mighty's drug trafficking activities and the premises located at 54 Strong Street. Additionally, intercepted communications involving Bailey, surveillance observations, and GPS tracking data provided sufficient cause to believe that Bailey traveled to New York City on February 3, 2015, to obtain a supply of narcotics and returned the next day. Further, as described in the Complaint, at the time of Bailey's arrest additional intercepted communications, surveillance observations, and pen register data, strongly suggested that Bailey made a similar trip to New York City on February 10, 2015, and returned to Rochester minutes before his arrest. As discussed at length above, I easily find that this information provided probable cause to believe that Bailey was involved in a drug trafficking conspiracy.

B. *Miranda* and Voluntariness of Statements

I turn next to Bailey's contention that his statements to Moses and Allen were obtained in violation of his *Miranda* rights and were not voluntarily made. (Docket ## 111-1 at 33-34; 119 at 9, 59-60; 127 at 1-3; 145). Bailey maintains that he was never provided his *Miranda* rights and therefore never waived them. (*Id.*). He also contends that he was coerced to speak because Moses threatened him. (*Id.*).

***35** Statements made during custodial interrogation are generally inadmissible unless a suspect first has been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court held that the prosecution may not use a defendant's statements that are the product of custodial interrogation unless it demonstrates that the defendant was first warned of his Fifth Amendment privilege against self-incrimination and then voluntarily waived that right. *Miranda v. Arizona*, 384 U.S. at 444. Accordingly, "[e]ven absent the accused's invocation of [his rights], the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [*Miranda*] rights when making the statement." *United States v. Plugh*, 648 F.3d 118, 127 (2d Cir. 2011) (alteration in original) (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010)), *cert. denied*, 132 S. Ct. 1610 (2012). To establish a valid waiver, the government must prove by a preponderance of the evidence that (1) the waiver was "knowing"—namely, that it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," and (2) it was "voluntary"—namely, "that it was the product of a free and deliberate choice rather than intimidation, coercion or deception." *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

In addition to establishing a valid waiver, the government must also establish that the defendant's statements were made voluntarily within the meaning of the Due Process Clause. *See Dickerson v. United States*, 530 U.S. 428, 433 (2000) (recognizing "two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment"). In examining whether a statement was made voluntarily, a court must consider the totality of the circumstances in

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which it was given "to determine whether the government agents' conduct 'was such as to overbear [a defendant's] will to resist and bring about [statements] not freely self-determined.' " *United States v. Kaba*, 999 F.2d 47, 51 (2d Cir.) (quoting *United States v. Guarno*, 819 F.2d 28, 30 (2d Cir. 1987) (citations omitted)), *cert. denied*, 510 U.S. 1003 (1993). In evaluating the totality of the circumstances, the court must assess: "(1) the characteristics of the accused, (2) the conditions of the interrogation, and (3) the conduct of law enforcement officials." *United States v. Awan*, 384 Fed.Appx. 9, 14 (2d Cir. 2010) (quoting *Green v. Scully*, 850 F.2d 894, 901-02 (2d Cir.), *cert. denied*, 488 U.S. 945 (1988)), *cert. denied*, 131 S. Ct. 969 (2011). Where circumstances suggest evidence of "brutality, [p]sychological duress, threats, [or] unduly prolonged interrogation," statements will be deemed involuntary. *United States v. Moore*, 670 F.3d 222, 233 (2d Cir.) (alteration in original) (quoting *United States v. Verdugo*, 617 F.3d 565, 575 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 954 (2011)), *cert. denied*, 133 S. Ct. 48 (2012).

On the record before me, I find that Bailey was properly advised of his *Miranda* rights and voluntarily waived them before speaking to the investigators. Specifically, Allen testified that he witnessed Moses read aloud to Bailey each of the *Miranda* warnings from a rights card and asked Bailey whether he understood his rights. Bailey responded, "Yes." Moses then asked Bailey whether he was willing to speak to them, and Bailey responded "Yes, I want to know what[']s going on." According to Moses, Bailey did not appear to be intoxicated. That he refused to sign the rights card does not preclude a finding of a valid waiver. *United States v. Plugh*, 648 F.3d at 127 (finding valid waiver even though defendant initially refused to execute a waiver of rights form); *United States v. Chisholm*, 2009 WL 29313, *3 (E.D.N.Y. 2009) ("[t]he refusal to sign a waiver form does not preclude a finding of waiver where a defendant indicates a willingness to answer questions") (citing *United States v. Spencer*, 995 F.2d 10, 12 (2d Cir.), *cert. denied*, 510 U.S. 923 (1993)). In response to Moses's question regarding whether he was willing to speak to the investigators, Bailey expressly waived his *Miranda* rights by responding affirmatively.

***36** Further, the credible testimony establishes that Bailey's statements were not coerced. Allen testified that, during his interactions with Bailey, no one made any threats or promises or used any physical force to induce him to speak. According to Allen, Bailey never asked for the questioning to cease or for an attorney, and did not make any requests that were denied. Nor did he ever complain to Allen that he had been threatened by Moses or any other officer. The interview was relatively short, and Bailey's handcuffs were removed for the interview. Further, Bailey refused the investigators' request that he acknowledge his waiver by signing the rights card, suggesting that the conduct of the interview was not so coercive that Bailey was unable to exercise his own free will. *United States v. Willis*, 2006 WL 2239738, *6 (W.D.N.Y. 2006) ("the fact that [defendant] refused to sign the *Miranda* waiver form when requested by [the officer] is persuasive evidence that the interrogation was not so psychologically coercive that [defendant's] free will was overborne").

Bailey maintains that he was never read his *Miranda* rights, never waived those rights, and was coerced to speak by threats made by Moses. (Docket # 145 at 3). Bailey maintains that the government has not presented any facts to dispute his version of events and urges the Court not to credit Allen's testimony. (*Id.*). I find that Allen's testimony, which disputes several aspects of Bailey's affidavit, was credible. First, Allen credibly testified that he was present when Moses read the *Miranda* rights to Bailey and accurately recorded Bailey's answers to the waiver questions on that card. Allen testified that although Bailey declined to place his signature on the waiver card, he nevertheless verbally waived his rights and agreed to speak to the investigators.

Next, Bailey maintains that he was interviewed by an African-American officer, presumably Moses, for approximately one hour prior to the joint interview by Moses and Allen. (Docket # 127). According to Bailey, the first interview occurred between approximately 1:30 a.m. and 2:30 a.m., during which Moses threatened Bailey. (*Id.*). According to Bailey, Moses returned to the interview room with Allen a short while later, and he told Allen what had transpired during the first interview. (*Id.*). Allen's testimony credibly refutes several portions of this version of events. First, Allen testified that when he entered the interview room with Moses, both he and Moses introduced themselves to Bailey, suggesting that Moses had not previously interviewed Bailey. Further, Allen denied that Bailey ever suggested to him that Bailey had been threatened by either Moses or any other officer.

Bailey maintains that his version of events in his affidavit should be credited over Allen's testimony because Allen was unable to remember various details of the activities, including other interviews in which he participated that morning, and because the interview form for Bailey's room did not document that Allen was present with Moses in the interview room. (Docket # 145). I disagree. As an

initial matter, I do not find that Allen's inability to recall some of the details of the events of other interviews that morning or specific details of Bailey's statements justifies a finding that his testimony as a whole is not credible. Further, "[a]lthough[ ] the [c]ourt may consider defendant's affidavit, it is a poor substitute for live testimony, which is the subject of cross-examination." [19] *United States v. Nicholson*, 2016 WL 3970927, *3 (W.D.N.Y. 2016); *United States v. Riedman*, 2014 WL 713552, *16 (W.D.N.Y. 2014) (according defendant's affidavit consideration but less weight than conflicting testimony of government witnesses who were subject to cross-examination) (collecting cases). Having carefully evaluated Allen's testimony and his demeanor as a witness, I find that Allen's testimony concerning his interview is worthy of credence.

19 In reaching this conclusion, the Court draws no adverse inference against Bailey based upon his decision not to testify. *United States v. Hill*, 2009 WL 922475, *4 (W.D.N.Y.) ("[a]lthough defendant ... had submitted an affidavit in support of his motion to suppress, he chose not to take the stand at the suppression hearing[;] ... [w]ithout drawing any adverse inference from his failure to testify, I simply indicate that, by not testifying, defendant has failed to contradict the government's evidence with his own testimony") (internal quotations and citations omitted), *report and recommendation adopted*, 2009 WL 928322 (W.D.N.Y. 2009).

***37** In sum, having carefully observed Allen testify, I conclude that he credibly testified that Bailey was read his *Miranda* rights and verbally waived those rights prior to speaking with the investigators. I also credit Allen's testimony that Bailey never complained to him that Moses had threatened him. In sum, I find that Allen's testimony supports the conclusion that Bailey's statements were voluntarily made and were not the product of undue coercion. Accordingly, I recommend that the district court deny Bailey's motion to suppress his post-arrest statements.

VI. Motion to Dismiss

Bailey moves to dismiss the indictment on various grounds. First, Bailey contends that the indictment should be dismissed because he was arrested without a warrant and without probable cause. (Docket # 111-1 at 46-49). I have already addressed this argument in connection with Bailey's motion to suppress his post-arrest statements. For the reasons explained above, I find that there was ample probable cause to arrest Bailey and recommend that his motion to dismiss the indictment on this ground be denied.

Next, Bailey argues that the indictment should be dismissed because it is the product of prosecutorial vindictiveness. (*Id.* at 49-50). Bailey alleges that after he rejected the government's plea offer, the current indictment was returned with two additional charges against him. (*Id.*).

A presumption of vindictiveness does not arise during the pretrial plea negotiation process, even if the prosecutor makes clear an intent to subject a defendant to additional charges if the defendant rejects the prosecutor's plea offer. *United States v. Goodwin*, 457 U.S. 368, 380, 384 (1982) ("just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded[;] ... [t]he possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness certainly is not warranted") (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) ("the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment")); *United States v. Jackson*, 818 F.2d 867, *1 (6th Cir.) (defendant alleged no reasonable likelihood of vindictiveness despite allegations that government official threatened to pursue additional criminal charges against defendant and his family if he did not cooperate; "[i]t is certainly within the discretion of prosecutors to attempt to induce criminal defendants to supply information"), *cert. denied*, 484 U.S. 933 (1987); *United States v. Sainato*, 53 F. Supp. 2d 316, 320 (E.D.N.Y. 1999) ("defendants' assertion that the [g]overnment's current prosecution is somehow tainted because of their 'threats' in conjunction with the rejected plea-bargains, is undermined by the well-established and constitutional prerogative of the [g]overnment to bring otherwise legitimate charges to induce a defendant to accept a plea bargain, and 'present[ing] the defendant with the unpleasant alternative[ ] of foregoing trial or facing charges on which he is plainly subject to prosecution[;]' ... [s]uch 'threats,' even against family members, which are fairly commonplace in plea negotiations, do not support the defendants['] vindictiveness claim") (quoting *United States*

v. Stanley, 928 F.2d 575, 579 (2d Cir.), *cert. denied*, 502 U.S. 845 (1991)). Accordingly, I conclude that Bailey has failed to "meet the high standard required for dismissal of an indictment based on selective or vindictive prosecution," *see United States v. Korn*, 2016 WL 525870, *3 (W.D.N.Y. 2016), because he has failed to demonstrate actual vindictiveness through a showing that the prosecutor harbored genuine animus toward him, *see Johnson v. United States*, 2014 WL 4545845, *10 (E.D.N.Y. 2014), and no presumption of vindictiveness is created by the circumstances of this case.

***38** Bailey also maintains that dismissal is proper because the indictment was obtained through the use of evidence obtained through unlawful wiretaps or false or misleading affidavits. (Docket ## 111-1 at 56-57; 119 at 65). As discussed above, and in my prior report and recommendation regarding the legality of the wiretaps (Docket # 164), I conclude that the challenged evidence was legally obtained and that Bailey has failed to demonstrate that a *Franks* hearing is warranted.

Bailey's remaining challenges to the indictment concern the sufficiency of the government's evidence. [20] (Docket # 111-1 at 50-56). Bailey speculates that the grand jury was not likely to have been provided sufficient evidence to return an indictment against him. (*Id.*).

20 Bailey also seeks dismissal of the indictment and review of the grand jury minutes on the grounds that the government failed to preserve the GPS data. (Docket # 140 at 4-5). As discussed above, the government has now produced the GPS data. Accordingly I recommend that the district court deny Bailey's motion to dismiss the indictment on this ground. Finally, Bailey also sought dismissal of the indictment on the grounds that his speedy trial rights had been violated. (Docket # 151). On November 1, 2016, I issued a Report and Recommendation in which I recommended that the district court deny Bailey's motion to dismiss on speedy trial grounds. (Docket # 168).

"An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir.), *cert. denied*, 504 U.S. 926 (1992). Moreover, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998) (internal quotation omitted). Rule 7(c) of the Federal Rules of Criminal Procedure requires only that an indictment be "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c).

It is well-established that an indictment that is valid on its face cannot be dismissed on the grounds that it is based on inadequate or insufficient evidence. *United States v. Williams*, 504 U.S. 36, 54 (1992); *United States v. Calandra*, 414 U.S. 338, 345 (1974); *United States v. Casamento*, 887 F.2d 1141, 1182 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990). The time to advance such a motion is after the government has presented its case at trial. *See*, *e.g.*, Fed. R. Crim. P. 29(a); *United States v. Gambino*, 809 F. Supp. 1061, 1079 (S.D.N.Y. 1992). Applying the above-cited authority, I find that the indictment is sufficient on its face. Any challenge to the sufficiency of the evidence at this stage is premature and should await the government's presentation of proof at trial. Accordingly, I recommend that the district court deny Bailey's motion to dismiss the indictment.

DECISION & ORDER

I. Motion for Discovery

On June 1, 2016, Bailey filed a motion seeking, among other things, discovery and inspection. (Docket # 140 at 20). The government responded to Bailey's requests and, during a court proceeding on August 8, 2016, Bailey indicated that the outstanding issues were resolved. (Docket ## 143-5 at 2-3; 146). Accordingly, Bailey's request for discovery and inspection is denied without prejudice.

II. Motion for Grand Jury Disclosure

***39** Bailey also maintains that he is entitled to review the grand jury minutes to determine whether the alleged falsities and misrepresentations that were contained in the complaint and affidavits in support of the various warrants were relayed to the grand jurors. (Docket ## 111-1 at 25-30; 119 at 58-59).

There is a presumption that grand jury proceedings are lawful and regular, *United States v. Torres*, 901 F.2d 205, 232 (2d Cir.) (quoting *Hamling v. United States*, 418 U.S. 87, 139 n.23 (1974)), *cert. denied*, 498 U.S. 906 (1990), *abrogated on other grounds by United States v. Marcus*, 628 F.3d 36 (2d Cir. 2010), and disclosure of grand jury proceedings is available only by order of the Court. Fed. R. Crim. P. 6(e). A party seeking disclosure bears the

burden of establishing a "particularized need" or "compelling necessity" for such disclosure that outweighs the policy of grand jury secrecy. *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211 (1979); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *In re Rosahn*, 671 F.2d 690, 695 (2d Cir. 1982). Unspecified allegations of impropriety or mere speculation are not sufficient to satisfy this heavy burden. *United States v. Calandra*, 414 U.S. at 345. Therefore, "review of grand jury minutes is rarely permitted without specific factual allegations of government misconduct." *United States v. Torres*, 901 F.2d at 233.

Bailey's motion for grand jury disclosure primarily reiterates the arguments he raised in connection with his motion for a *Franks* hearing—that he disagreed with the interpretations made by members of law enforcement in the various affidavits submitted in connection with this investigation. Bailey's disagreement with those interpretations is no more a basis to overcome the presumption of grand jury secrecy than it is to justify a *Franks* hearing or dismissal of the indictment. For these reasons, Bailey's motion for disclosure of grand jury minutes is denied.

CONCLUSION

For the reasons stated above, Bailey's motions for discovery and for disclosure of the grand jury minutes **(Docket ## 111-1; 119; 140)** are **DENIED**. Further, for the reasons stated above, I recommend that the district court deny Bailey's remaining motions to dismiss the indictment, for a *Franks* hearing, to suppress tangible evidence, to suppress statements, to suppress electronic surveillance evidence, including video surveillance, GPS data and cell site data, and for relief based upon the government's failure to preserve the GPS data. **(Docket ## 111, 112, 119, 127, 128, 140, 145, 156).**

IT IS SO ORDERED.

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby
ORDERED, that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of this Court within fourteen (14) days after receipt of a copy of this Report and Recommendation in accordance with the above statute and Rule 59(b) of the Local Rules of Criminal Procedure for the Western District of New York. [21]

21 Counsel is advised that a new period of excludable time pursuant to 18 U.S.C. § 3161(h)(1)(D) commences with the filing of this Report and Recommendation. Such period of excludable delay lasts only until objections to this Report and Recommendation are filed or until the fourteen days allowed for filing objections has elapsed. *United States v. Andress*, 943 F.2d 622 (6th Cir. 1991); *United States v. Long*, 900 F.2d 1270 (8th Cir. 1990).

***40** The district court will ordinarily refuse to consider on *de novo* review arguments, case law and/or evidentiary material which could have been, but was not, presented to the magistrate judge in the first instance. *See*, *e.g.*, *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988).

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Ltd.,* 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 59(b) of the Local Rules of Criminal Procedure for the Western District of New York, "[w]ritten objections ... shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 59(b) may result in the District Court's refusal to consider the objection.**

Let the Clerk send a copy of this Order and a copy of the Report and Recommendation to the attorneys for the parties.

IT IS SO ORDERED.

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UNITED STATES of America,
v.
George W. BALTES, Defendant.

8:11-cr-282 (MAD)
|
Signed 04/22/2013

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MEMORANDUM-DECISION AND ORDER

***1** Mae A. D'Agostino, U.S. District Judge

I. INTRODUCTION

Currently before the Court is Defendant's pretrial motion seeking the following relief: (1) suppression of evidence obtained as a result of an unlawful stop of Defendant's car in violation of the Fourth Amendment; (2) suppression of evidence obtained as a result of an unlawful search of the car in which Defendant was a passenger and Defendant's home, without consent, a warrant, or probable cause; (3) dismissal of the indictment in light of the illegal use of GPS, Pentrap and Pole Camera evidence; (4) dismissal of the indictment because it fails to state facts sufficient to constitute an offense against the United States; (5) an order requiring the Government to preserve and produce rough notes taken during the investigation of this case; (6) an order requiring the Government to produce any *Brady* material; and (7) an order requiring the Government to produce the Grand Jury transcript.

II. BACKGROUND

In early 2011, members of the Adirondack Drug Task Force ("ADTF") conducted an investigation into a drug trafficking organization in the Plattsburgh, New York area. As a result of this investigation, the ADTF believes that from April 2009 to June 2011, Defendant was selling large quantities of cocaine to dealers in and around the Plattsburgh, New York area.

On June 10, 2011, Defendant and a friend, Jeremy Gittens, left Plattsburgh heading to New York City in Mr. Gittens' vehicle. *See* Dkt. No. 113-1 at ¶ 2. After leaving New York City later that afternoon, and while returning to Plattsburgh, Mr. Gittens and Defendant were pulled over during a pre-arranged stop by law enforcement personnel, along Interstate 87, in or around the Town of AuSable, Clinton County, New York. *See id.* at ¶ 3. During this stop, the law enforcement personnel searched Mr. Gittens' vehicle and Defendant's belongings therein and allegedly found narcotics. *See id.* at ¶ 4.

On June 10, 2011, Defendant was arrested and charged by complaint. On June 15, 2011, Defendant was charged in a one-count indictment with conspiracy to possess with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B). On March 13, 2013, the grand jury returned a third-superceding indictment charging Defendant with one count of conspiracy to possess with intent to distribute and to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A).

In his motion, Defendant contends that the initial vehicle stop and search was without consent, a warrant, or probable cause. *See* Dkt. No. 113-1 at ¶ 4. Further, Defendant contends that the Government utilized GPS, and a Pentrap to monitor his movement, without a validly issued warrant. *See id.* at ¶ 8. Moreover, Defendant alleges that, "thereafter, Law Enforcement allegedly obtained a warrant and searched Defendant's residence and allegedly found more narcotics." *See id.* at ¶ 5. Defendant argues that all evidence obtained in this matter should be suppressed because the Government either failed to obtain a warrant or failed to obtain a sufficient warrant.

***2** On April 22, 2013, the Court conducted an evidentiary hearing on Defendant's motion. At the hearing, the only witness was DEA Agent Kadish, who was the agent in charge of Defendant's investigation.

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III. DISCUSSION

A. Defendant's motion to suppress the evidence related to the stop of Mr. Gittens' vehicle on June 10, 2011

Defendant has moved to suppress evidence related to the stop and search and Mr. Gittens' vehicle on June 10, 2011. During the stop, law enforcement officials conducted a search and seized approximately 374 grams of cocaine in a bag located on the front passenger seat. *See* Dkt. No. 125 at 11. Referencing the recent Supreme Court decision in *United States v. Jones*, 132 S. Ct. 945 (2012), Defendant implies that the seizure of the drugs during the stop is the "fruit of the poisonous tree" because the Government did not have a warrant to install the GPS tracker on Mr. Gittens' vehicle.

The Government, however, argues that Defendant's motion should be denied for three reasons: (1) Defendant lacked a reasonable expectation of privacy in Mr. Gittens' vehicle and, therefore, lacks any Fourth Amendment interest in the installation of a GPS tracker and monitoring of the vehicle; (2) "assuming that law enforcement officers relied on illegally obtained evidence, law enforcement officers acted in good faith compliance with judicial precedent and the exclusionary rule should not apply;" and (3) "assuming that law enforcement officers relied on illegally obtained evidence, they would have nevertheless inevitably discovered the defendant's location and conducted the stop and search irregardless of the tracker information." *See* Dkt. No. 125 at 12.

1. Reasonable expectation of privacy

To challenge an illegal search and invoke Fourth Amendment protection, a defendant bears the burden to demonstrate standing. *See Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978). In order to demonstrate standing to challenge a search, the defendant must establish that he has "a legitimate expectation of privacy in the invaded place." *Id.* at 143. The defendant's expectation must be "personal[ ]" and "reasonable," and it 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." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (internal citations omitted).

"A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed" and, therefore, lacks standing to suppress evidence obtained from the search. *See Rakas*, 439 U.S. at 134 (citation omitted). Generally, a person does not possess a legitimate expectation of privacy in a vehicle in which he has no lawful ownership or possessory interest. *See id.* at 148-49 (holding that the petitioners who "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized" did not have a legitimate expectation of privacy).

The Supreme Court held in *United States v. Jones*, —— U.S. ——, 132 S. Ct. 945, 949 (2012), that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search[ ]' " within the meaning of the Fourth Amendment. The Court, however, expressly declined to consider whether the attachment and use of the device, without a warrant, to track a vehicle's movements is valid under the Fourth Amendment if supported by probable cause or reasonable suspicion. *See id.* at 954. The Court also expressly declined to consider whether the defendant had standing to challenge the installation of the device on the car for which he was "the exclusive driver," but that was registered in his wife's name. *See id.* at 949 n.2.

***3** The decision of the Fifth Circuit in *United States v. Hernandez*, 647 F.3d 216, 219-20 (5th Cir. 2011), is instructive on the issue of standing. In *Hernandez*, an agent with the Drug Enforcement Administration attached a tracking device with a global positioning system to a truck owned by Angel Hernandez while the vehicle was parked on a public street in front of Angel's residence. *See id.* at 218. Two days later, agents used the tracking device to locate the vehicle and observed Angel's brother, Jose Hernandez, load several packages onto the truck. *See id.* The agents alerted local patrol officers who then stopped Jose for a traffic violation, obtained consent to search the truck, and discovered illegal narcotics hidden in the packages Jose had loaded onto the vehicle. *See id.* The Fifth Circuit concluded that Jose lacked standing to challenge the installation of the tracking device on his brother's truck, in part, because he had no possessory interest in the vehicle when the device was installed. *See id.* at 219. But the Fifth Circuit concluded that Jose, as a borrower, had standing to challenge the use of the tracking device to locate the truck on the day of the search because, "where a person has borrowed an automobile from another, with the other's consent, the borrower becomes a lawful possessor of the vehicle and thus has standing to challenge its search." *Id.*

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(citing *United States v. Lee*, 898 F.2d 1034, 1038 (5th Cir. 1990)).

In the present matter, the only evidence presented suggests that Defendant was an infrequent passenger in Mr. Gittens' vehicle, as he was on June 10, 2011. Defendant does not contend that he had a possessory interest in Mr. Gittens' Chevy Tahoe. *See* Dkt. No. 113-2 at ¶ 2. Further, Defendant does not contend that he had a possessory interest in the vehicle when the GPS tracking device was installed on it or that he was using the vehicle during that time. Therefore, unlike the defendant in *Jones*, Defendant did not establish that he was an "exclusive driver" of Mr. Gittens' Chevy Tahoe and failed to submit any evidence demonstrating that he was operating the vehicle with the permission of its owner at the time of the stop. *See Jones*, 132 S. Ct. at 949. In fact, at the evidentiary hearing, Agent Kadish's testimony established that Defendant was simply a passenger in Mr. Gitten's vehicle. *See* Transcript of Evidentiary Hearing dated April 22, 2012 at 25. As such, Defendant has failed to establish that he had standing to challenge the Government's installation of the GPS tracking system. [1] This conclusion, however, does not end the Court's inquiry.

1 Even if Defendant had standing to challenge the installation of the GPS monitoring device on Mr. Gitten's vehicle, the Court would still deny Defendant's motion because the installation and use of the device during the day in question was supported by probable cause that Defendant and Mr. Gitten's were transporting narcotics from New York City to Plattsburgh. As such, the installation and use of the GPS device was reasonable and did not violate Defendant's Fourth Amendment rights.

2. Probable cause to seize and search Mr. Gittens' vehicle

Although a passenger generally has no standing to challenge a search of the vehicle unless he can establish a specific expectation of privacy, it is clear from established case law that a passenger in a vehicle has the right to make a Fourth Amendment challenge to a stop of the vehicle. *See, e.g., Rakas*, 439 U.S. at 148-49; *United States v. Paulino*, 850 F.2d 93, 97 (2d Cir. 1988), *cert. denied*, 490 U.S. 1052 (1989). Since an automobile stop may result in a Fourth Amendment "seizure" of a car and the passengers alike, a passenger may have standing to challenge the seizure of the vehicle even if he or she lacks standing to challenge a search. *See United States v. Eylicio–Montoya*, 70 F.3d 1158, 1164 (10th Cir. 1995); *United States v. Muyet*, 946 F. Supp. 302, 304-05 (S.D.N.Y. 1996); *United States v. Clark*, 822 F. Supp. 990, 1004 (W.D.N.Y. 1993). Indeed, if the initial stop of the vehicle was illegal — that is, not supported by probable cause or a reasonable suspicion of unlawful conduct — evidence seized in a subsequent search may well be excludable as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *United States v. Scopo*, 19 F.3d 777, 781 (2d Cir.), *cert. denied*, 513 U.S. 877 (1994).

***4** "[A]n ordinary traffic stop constitutes a limited seizure within the meaning of the Fourth and Fourteenth Amendments." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Accordingly, such stops must be justified by probable cause or a reasonable suspicion, based on specific and articulable facts, of unlawful conduct. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968). "Probable cause exists if a law enforcement official, on the basis of the totality of the circumstances, has 'knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested.' " *United States v. Howard*, 489 F.3d 484, 491 (2d Cir. 2007) (quotation omitted). "Under the automobile exception, 'police may conduct a warrantless search of a readily mobile motor vehicle if probable cause exists to believe the vehicle contains contraband or other evidence of a crime.' " *Id.* (quotation and other citation omitted).

In *United States v. Howard*, 489 F.3d 484 (2d Cir. 2007), the defendant argued that the officers lacked probable cause to pull him over and subsequently search his vehicle. *See id.* at 491. At an evidentiary hearing, the government established that they had intercepted six telephone calls between the defendant and co-defendants establishing that he planned to travel from Schenectady, New York to New York City to purchase cocaine. *See id.* In one of the intercepted telephone calls, the defendant told a co-defendant that he wanted four kilograms of cocaine and that he would be prepared to pick it up the following day on June 1, 2004. *See id.* Three additional telephone calls intercepted on June 1, 2004, indicated that the defendant had gone to New York City to procure the cocaine, and that he had bought two kilograms of the drug while there. *See id.* As a result of these intercepted telephone calls, on June 1, 2004, the officers set up surveillance northbound on the Thruway and, upon observing the defendant, stopped his vehicle. *See id.* at 489. While several of the officers were interrogating the defendant away from his vehicle at the police barracks, other officers searched his vehicle, without a warrant, and found two kilograms of cocaine and $50,000.

See id. The Second Circuit agreed with the government that probable cause existed to support the initial stop and subsequent search of the defendant's vehicle.

In the present matter, the Government has established that they had more than sufficient information to establish probable cause that Defendant was involved in drug trafficking and that Defendant had drugs or instrumentalities of drug trafficking in Mr. Gitten's vehicle on June 10, 2011. In reaching this conclusion, the ADTF agents relied on the following facts: (1) intercepted oral and electronic communications between Defendant and local cocaine dealers, including Shepard, Miller, and Lawrence, in which Defendant used coded conversations to coordinate drug transactions; (2) on May 31, 2011 and June 1, 2011, the ADTF agents intercepted electronic communications between Defendant and Mary Lawrence in which Lawrence asked to meet Defendant "4 lunch;" (3) the ADTF agents observed Lawrence and Russell Ashe meet with Defendant and subsequently seized fourteen grams of cocaine from Lawrence; (4) during a post-arrest statement, Lawrence admitted that she had been purchasing cocaine from Defendant for six-to-eight months and typically purchased a half ounce at a time; (5) Ashe also made a post-arrest statement to law enforcement and admitted that he and Lawrence had been purchasing cocaine from Defendant for approximately six months; (7) on June 3, 2011, ADTF agents observed Kurt Shepard at Defendant's residence; (8) during a subsequent car stop, the ADTF seized seven grams of cocaine from Shepard; (9) during a post-arrest statement, Shepard stated that he had been purchasing cocaine from Defendant for a year and that Defendant kept the cocaine in his residence; and (10) on June 6, 2011, the ADTF agents used a confidential source to purchase fourteen grams of cocaine from Defendant at his residence. *See* Dkt. No. 125; *see also* Transcript of Evidentiary Hearing dated April 22, 2012, at 35-42. Based on this information, the Government clearly had probable cause to believe that Defendant was involved in drug trafficking.

***5** Moreover, the ADTF had probable cause to believe that Defendant had cocaine and/or instrumentalities of drug trafficking in Mr. Gitten's vehicle based on the following facts: (1) on June 10, 2011, Defendant sent text messages to a New York City number indicating that he was traveling to New York City for "breakfast" and that he was going to pick up three and one-half boxes of "shirts" – code for 350 grams of cocaine; and (2) a drug detecting K-9 conducted an exterior search of the vehicle and provided a positive alert for the presence of narcotics in the front passenger seat area. *See id.* at 25-26. In the text messages, Defendant initially indicated that he wanted five "boxes of shirts" and then changed his order to three and one-half "boxes of shirts," which the Government determined was a coded conversation indicating grams of cocaine. *See id.* at 20;[2] *see also* Transcript of Evidentiary Hearing dated April 22, 2012 at 45-48 (discussing the text messages sent and received by Defendant on June 9-10, 2011, and establishing that Defendant intended to travel to New York City on June 10, 2011 in order to purchase narcotics). Moreover, according to Shepard, Defendant routinely traveled to New York City to purchase large quantities of cocaine and, from this information, the ADTF determined that Defendant was likely traveling to New York City to purchase 350 grams of cocaine on the date in question. *See id.* at 21; Transcript of Evidentiary Hearing dated April 22, 2012 at 35-42. Finally, on June 10, 2011, at approximately 1:50 p.m., the ADTF intercepted text messages from Defendant indicating that he would be back in the Plattsburgh areas ("the office") around 4:00 p.m. *See id.*

2 During the evidentiary hearing, Agent Kadish discussed the codes that Defendant and his co-conspirators used to discuss the alleged narcotics transactions. *See* Transcript of Evidentiary Hearing dated April 22, 2012 at 45-48.

In light of the foregoing, it is clear that the Government had probable cause to stop Mr. Gitten's vehicle and subsequently search the vehicle for contraband or other evidence of a crime. *See Howard*, 489 F.3d at 491; *see also United States v. Shefler*, No. 5:06-CR-448, 2009 WL 102819, *5 (N.D.N.Y. Jan. 13, 2009) (citation omitted). As such, the Court denies Defendant's motion to suppress.

3. Inevitable discovery

The Supreme Court has held that where "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received." *Nix v. Williams*, 467 U.S. 431, 444 (1984). The doctrine of inevitable discovery provides that "evidence obtained during the course of an unreasonable search and seizure should not be excluded 'if the government can prove that the evidence would have been obtained inevitably' without the constitutional violation." *United States v. Heath*, 455 F.3d 52, 55 (2d Cir. 2006) (citing *Nix v. Williams*, 467 U.S. 431, 447, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); *United States v. Eng*, 997 F.2d 987, 990 (2d Cir. 1993)).

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"In essence, the inevitable discovery doctrine's application turns on a central question: Would the disputed evidence inevitably have been found through legal means 'but for' the constitutional violation? If the answer is 'yes,' the evidence seized will not be excluded." *Id.*; *see also United States v. Mendez*, 315 F.3d 132, 137 (2d Cir. 2002). Thus, illegally-obtained evidence will be admissible only where the court can find "with a high degree of confidence ... that each of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor." *Heath*, 455 F.3d at 60. The government bears the burden of proving by a preponderance of the evidence that discovery of the challenged items "would inevitably have happened," *id.* at 58 n.6 (citing *United States v. Cabassa*, 62 F.3d 470, 474 (2d Cir. 1995)), by pointing to "demonstrated historical facts capable of ready verification or impeachment," *United States v. Eng*, 971 F.2d 854, 859 (2d Cir. 1992) ("[P]roof of inevitable discovery 'involves no speculative elements' ") (quoting *Nix*, 467 U.S. at 444 n.5, 104 S. Ct. 2501).

In the present matter, the Government established, by a preponderance of the evidence, through testimony and evidence received at the evidentiary hearing that they would have inevitably seized the evidence in question through legal means. At the hearing, Agent Kadish testified that even if Mr. Gitten's vehicle "slipped through their surveillance net," he had other agents conducting surveillance of Defendant's home so that Defendant would inevitably be found and the vehicle pulled over on sight. *See* Transcript of Evidentiary Hearing dated April 22, 2012 at 53-56. Also, Agent Kadish testified that they knew when Defendant would be returning to Plattsburgh at approximately 4:00 p.m. because they had intercepted text messages providing this information. *See id.* at 63-64. Agent Kadish testified that, even if they did not have the GPS device, they still would have conducted the same surveillance operation on June 10, 2011 based on all of the additional information that they had. *See id.* at 62-64.

***6** Agent Kadish testified that using the "pen and trace order," the ADTF agents were able to ascertain Defendant's general location based on what cellular tower his telephone was connected to. *See id.* at 22. Using this information, on May 16, 2011, the agents were able to track Defendant from New Jersey – near the George Washington Bridge – to Albany, New York at approximately 1:30 p.m. *See id.* at 23-24. Then, using this information, the agents placed several officers in vehicles along Interstate 87 who eventually observed Mr. Gitten's vehicle near Plattsburgh, and proceeded to place the vehicle under surveillance. *See id.* at 24. Finally, on June 10, 2011, through the use of the Pentrap and register, the ADTF agents were able to determine when Defendant and Mr. Gitten's reached Albany, New York. *See id.* at 63. Considering all of the available information, the Government has established that they would have inevitably effected the stop of Mr. Gitten's vehicle and seized the evidence in question, without use of the GPS device.

Based on the foregoing, the Court denies Defendant's motion to suppress on this alternative ground.

B. Defendant's motion to suppress based on insufficiency of the warrant

Defendant argues that the warrant issued in this case is facially insufficient in that the description states " 'the real property and residence located at 45 Johnson Avenue, Plattsburgh, New York, a two story family residence, which is more fully described in Attachment A.' " *See* Dkt. No. 113-1 at ¶ 21. Defendant claims that, although the warrant provided by the Government references Attachments "A" and "B," "neither of which were attached to the warrant or provided to the Defendant on the date of execution of same or during discovery." *See id.* at ¶ 22. As such, Defendant argues that the warrant is insufficient on its face. *See id.*

"In determining whether probable cause for a search warrant exists, the issuing judicial officer is simply to make a practical common sense decision whether, given the 'totality of the circumstances' set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Barnes*, 399 F. Supp. 2d 169, 178 (W.D.N.Y. 2005) (citing *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S. Ct. 2317, 76 L.Ed. 2d 527 (1983)); *see also United States v. Ponce*, 947 F.2d 646, 650 (2d Cir. 1991). A "magistrate's finding of probable cause is itself a substantial factor tending to uphold the validity of this warrant." *United States v. Travisano*, 724 F.2d 341, 345 (2d Cir. 1983); *see also United States v. Ventresca*, 380 U.S. 102, 106 (1965) (holding that a magistrate's disinterested finding of probable cause based on reasonable inferences is given preference). "The process does not deal with hard certainties, but with probabilities." *Gates*, 462 U.S. at 230; *see also United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985) ("Probable cause to believe certain items will be found in a specific location ... need not be based on direct, first-hand, or 'hard' evidence") (internal citation omitted).

In the present matter, the warrant issued for the search of Defendant's residence is sufficient. The affidavit filed in support of the warrant by Special Agent Kevin Kadish of the DEA details with specificity the investigation into Defendant. It provides details regarding the surveillance that was conducted, controlled sales performed by confidential informants, and other observations that clearly established probable cause to support the warrant. Moreover, Attachment "A" includes a detailed description of the area to be searched. [3] Finally, Attachment "B" details the property to be seized and specifies the crime(s)/criminal activity for which the warrant was issued.

3 Although Defendant's copy of the warrant may not have contained Attachments "A" and "B," the copy on file with the Court contains both Attachments.

Based on the foregoing, the Court denies Defendant's motion to suppress evidence seized at his home.

C. Dismissal of the Indictment

1. Insufficient evidence presented to the Grand Jury to return an indictment

***7** Defendant argues that the "[e]vidence presented to the Grand Jury was obtained by means of illegal use of GPS, Pentrap and Pole Camera, and an invalid warrant. Without such evidence, it would not be possible to return an indictment." *See* Dkt. No. 113 at ¶ 3. The Government, however, argues that Defendant's arguments must fail because none of the described evidence was obtained illegally. *See* Dkt. No. 125 at 29.

As discussed in detail above, the evidence in dispute was legally obtained and, therefore, Defendant's argument must fail. First, the pen register and trap and trace device was authorized by Magistrate Judge Homer on April 28, 2011 in accordance with 18 U.S.C. § 2703(d). Nothing more was required. Second, the pole camera used was secured in a public place and captured video of the exterior of Defendant's residence. No judicial authorization was required. *See United States v. Anderson-Bagshaw*, No. 12-3074, 2012 WL 6600331, *6 (6th Cir. Dec. 19, 2012) (holding that "[s]ince the 'backyard' was visible from a publicly accessible location, the government agents were constitutionally permitted to view whatever portions of it were visible from this point" using a pole camera) (citation omitted). Defendant has presented no evidence to suggest that the video surveillance captured anything other than activity that occurred in open view to the public, from a surveillance device that was placed on public property and directed at the curtilage of Defendant's home. *See United States v. Clarke*, No. CRIM.3:04 CR SRU, 2005 WL 2645003, *2 (D. Conn. July 19, 2005) ("All of the activity in question could have been seen with only the naked eye, and the use of telephoto capabilities (capabilities that would be available to any neighbor who wished to purchase similar equipment) to clarify that viewing does not change the nature of the protection afforded to the activities viewed") (citing *United States v. Lace*, 669 F.2d 46, 51 (2d Cir. 1982)). Third, the search warrant for Defendant's residence, including the attachments, specified with particularity the place and things to be searched. Defendant has provided no evidence to suggest that the search exceeded the parameters placed by this clearly sufficient warrant.

Based on the foregoing, the Court denies Defendant's motion to dismiss the indictment on this ground.

2. Sufficiency of the indictment

Defendant argues that the indictment does not state fact sufficient to constitute an offense against the United States. *See* Dkt. No. 113 at ¶ 4.

An indictment charging a defendant with participation in a narcotics conspiracy is sufficient if it "allege[s] the existence of a narcotics conspiracy, a relevant time frame, and the statute alleged to be violated." *United States v. Macklin*, 927 F.2d 1272, 1276 (2d Cir. 1991) (citations omitted). A narcotics-conspiracy indictment need not detail each and every act committed in furtherance of the conspiracy, *see United States v. LaSpina*, 299 F.3d 165, 182 (2d Cir. 2002) (quotation omitted); and it need not specify any overt act at all, *see United States v. Bermudez*, 526 F.2d 89, 94 (2d Cir. 1975) (citations omitted).

For example, in *United States v. Elliott*, 363 F. Supp. 2d 439 (N.D.N.Y. 2005), the court found sufficient an indictment alleging a narcotics conspiracy even though it did not specifically identify the role of the particular defendant in the conspiracy. *See id.* at 450. The indictment recited the appropriate time and location of the conspiracy, the specific object of the conspiracy, the illicit agreement between the defendant and others, and referenced the underlying statutory authority. *See id.*

***8** In the present matter, the third superceding indictment provides as follows:

> Between in or about April 2009, the exact date being unknown, and on or about June 10, 2011, in Clinton County in the Northern District of New York and elsewhere, the defendant, **GEORGE BALTES,** and other, known and unknown, conspired to knowingly and intentionally possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846. That violation involved five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(b)(1)(A).

See Dkt. No. 119.

The indictment tracks the language of the statute, provides a general description of the alleged offense, indicates the alleged statutory violation, the location and time frame for the alleged offense, and provides the amount of cocaine involved in the conspiracy. *See id.* As such, the third superceding indictment is sufficient to satisfy the Sixth Amendment. *See Elliott*, 363 F. Supp. 2d at 450.

Based on the foregoing, the Court denies Defendant's motion to dismiss the indictment on this ground.

D. Defendant's motion for *Brady, Giglio* and Jencks material

Defendant requests that the Court enter an Order directing the Government to provide him with all evidence favorable to him, including evidence that could be used for purposes of impeachment, as *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and the Jencks Act require. *See* Dkt. No. 113 at ¶ 6. The Government asserts that it is aware of its obligations and has acknowledged its continuing obligation. The Government states that it has preserved the agent's rough notes and will provide the rough notes and Jencks material in compliance with the Court's pretrial order and local rules. Based on these representations, the Court denies Defendant's motion without prejudice to renew if it becomes necessary for Defendant to do so.

E. Production of Grand Jury transcript

Defendant requests that the Court order the Government to disclose the Grand Jury transcript. *See* Dkt. No. 113 at ¶ 7. Defendant "anticipates that at leas[t] one government agent testified in front of the Grand Jury. His or her testimony will be Jenck's material. Defendant requests tha[t] it be disclosed for trial preparation as all other e[a]rly Jenck's material is disclosed pursuant to agreement between the prosecution and Defendant." *See id.* Generally, Defendant appears to argue that the Grand Jury transcript will establish that "illegal evidence" was presented to the Grand Jury. *See* Dkt. No. 113-1 at ¶ 17.

It is a long-established rule that "[t]he burden ... is on the defense to show that 'a particularized need' exists for the minutes [of the grand jury] which outweighs the policy of secrecy." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959). Generally, disclosure of grand jury proceedings is permissible only by court order and only if a defendant identifies a "particularized need" or a "compelling necessity" to warrant disclosure of an otherwise secret proceeding. *See United States v. Elliot*, 363 F. Supp. 2d 439, 451 (N.D.N.Y. 2005) (quotation and other citations omitted). "Unspecified allegations of impropriety and mere speculation do not satisfy this heavy burden." *Id.* (citing *United States v. Calandra*, 414 U.S. 338, 345, 94 S. Ct. 613, 38 L.Ed. 2d 561 (1974)). "Consequently, 'review of grand jury minutes is rarely permitted without specific factual allegations of governmental misconduct." *Id.* (citing *Torres*, 901 F.2d at 233). "Additionally, indictments are not open to challenge on the ground that they are unsupported by sufficient or competent evidence." *Id.* (citations omitted).

***9** In the present matter, Defendant has failed to satisfy his burden that there is a "particularized need" or "compelling necessity" for disclosure of the Grand Jury proceedings. As discussed above, the Court has denied Defendant's motion to suppress evidence, finding that the evidence was not obtained in violation of Defendant's Fourth Amendment rights. As such, the evidence that Defendant assumes was presented to the Grand Jury was not "illegal." Defendant's unspecified allegations of impropriety and mere speculation are insufficient to meet his burden. *See Elliot*, 363 F. Supp. 2d at 451 (citation omitted).

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Based on the foregoing, the Court denies Defendant's motion for production of the Grand Jury transcript.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions, and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant's motion to dismiss the Indictment is **DENIED**; and the Court further

ORDERS that Defendant's motion to inspect the grand jury minutes is **DENIED**; and the Court further

ORDERS that Defendant's motion to suppress physical evidence is **DENIED**; and the Court further

ORDERS that Defendant's motion for *Brady* and *Giglio* material is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

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United States District Court, E.D. Washington.

UNITED STATES of America, Plaintiff,
v.
Jose Manuel BIRRUETA, Defendant.

NO: 13-CR-2134-TOR
|
Signed 03/21/2014

Attorneys and Law Firms

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ORDER RE VARIOUS PRETRIAL MOTIONS

THOMAS O. RICE, United States District Judge

***1** BEFORE THE COURT are Defendant's Motion In Limine (ECF No. 40), Motion to Exclude Text Messages (ECF No. 45), Motion for Discovery Regarding Pole Camera, Video and Footage (ECF No. 59), Motion to Expedite (ECF No. 58), Motion to Suppress Evidence and Observations Obtained from Continuous Video Surveillance Pole Camera (ECF No. 61), Motion to Expedite (ECF No. 60), Motion to Exclude Evidence and Observations Obtained from Pole Camera (ECF No. 63), Motion to Expedite (ECF No. 62), Motion to Exclude Proposed Expert Testimony and Request for *Daubert* Hearing (ECF No. 66), and Motion to Expedite (ECF No. 65). This matter was submitted for consideration without oral argument. The Court has reviewed the briefing and the record and files herein, and is fully informed.

BACKGROUND

Defendant Jose Manuel Birrueta is charged with possession and intent to distribute 5 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) (Count 1); receipt and possession of a firearm not registered to him in violation of 26 U.S.C. §§ 5841, 5845, 5861(d) and 5871 (Count 2); and being an alien illegally and unlawfully in the United States in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(5) and 924 (Count 3). Before the Court are Defendant's pretrial motions.

DISCUSSION

A. Defendant's Motions *in Limine* (ECF No. 40)

Defendant moves *in limine* on various issues; the Court addresses each in turn. The Court's rulings are preliminary, dependent on how evidence is offered at trial. As the Supreme Court has noted, *in limine* rulings are

> subject to change when the case unfolds.... Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.

Luce v. United States, 469 U.S. 38, 41–42 (1984); *McSherry v. City of Long Beach*, 423 F.3d 1015, 1022 (9th Cir. 2005).

1. Cocaine Located Under Trailer No. 14

Defendant moves to exclude evidence of a substance alleged to be cocaine found under trailer No. 14 on grounds that he is charged with possession of methamphetamine with intent to deliver and therefore the cocaine is irrelevant and overly prejudicial, citing Fed. R. Evid. 402, 403, and 404(b). ECF No. 40 at 2. The Government responds that it does not intend to introduce evidence of the white powdery substance found inside a coffee cup under the trailer adjacent to the parking spot for Defendant's vehicles. ECF No. 51 at 2. Accordingly, this motion is denied as moot.

2. Allegedly False Documents

Defendant moves to exclude an allegedly false Social Security card and a permanent resident card in Mr. Birrueta's name. Defendant argues that the documents are irrelevant to the charges in Counts 1 and 2 and overly prejudicial, and as such should be excluded under Fed. R. Evid. 401, 402, and 403.

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The Government contends that the documents are admissible during the trial of Counts 1 and 2 to show dominion and control over the premises were the ammunition and firearm were found. ECF No. 51 at 2.

***2** Fed. R. Evid. 403 states that "the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." The Court has "discretion to admit evidence that sheds light on disputed issues of fact at trial if the court balances the probative value of such evidence against its prejudicial effect." *United States v. Taylor,* 239 F.3d 994, 999 (9th Cir. 2001).

The Court agrees with the Government that the identity cards in Mr. Birrueta's name go to dominion and control of the premises and thus are relevant to Counts 1 and 2 in that respect. However, insofar as the Government intends to introduce evidence of the cards' falsity, the Court finds that such evidence is more unfairly prejudicial than probative with respect to Counts 1 and 2 and thus will be excluded during the trial on those counts pursuant to Fed. R. Evid. 403.

3. Evidence of Field Tests or Results of Field Tests for Contraband

Defendant moves to exclude any statement or evidence of the results of field tests for contraband on grounds that no expert has been identified or evidence produced thereon pursuant to Fed. R. Crim. P. 16(G). The Governments states that it does not intend to elicit testimony regarding field tests that were performed on the narcotics seized in this case. ECF No. 51 at 2. Accordingly, this request is denied as moot.

4. Execution of a Search Warrant at 1524 S. Fair Avenue, #13

Defendant moves to limit any explanation regarding the execution of a search warrant at 1524 S. Fair Avenue, #13, to simply stating that the officers were at the residence pursuant to a search warrant. Defendant argues that further explanation of the officers' reasons for going to the scene are not relevant, citing *United States v. Dean*, 980 F.2d 1286 (9th Cir. 1992). The Government states that it will not seek to elicit testimony regarding facts which the witness has no personal knowledge of and expects that the law enforcement agents will testify that they were at Defendant's residence to execute a search warrant. ECF No. 51 at 3. In addition, the Government notes that Agent Posada had previously observed a pattern of drug activity at the residence, and will testify regarding what he observed. ECF No. 51 at 3.

In *Dean*, the defendant's wife and another person consented to a search of defendant's mobile home, which revealed a gun that gave rise to the charged offense. The Court noted that out-of-court statements were probative of why law enforcement went to the mobile home, but did not bear on any issue involving elements of the charged offense and therefore were not relevant because they were not of consequence to determination of the action. *Dean*, 980 F.2d 1286, 1288.

Here, the law enforcement officers' statements regarding their observations about patterns of activity at Defendant's mobile home may be relevant to showing intent to distribute or another element of the crime. Accordingly, they Court declines to exclude it wholesale on the grounds Defendant cites. Defendant's request is denied with leave to renew.

5. Opinion Testimony by Any Person Who Has Not Been Previously Identified as an Expert and Who the Government Has Failed to Previously Provide Discovery Pursuant to Fed. R. Crim. P. 16(G)

Defendant moves to exclude opinion testimony by any person who has not previously been identified as an expert and/or for whom the government has failed to provide discovery pursuant to Fed. R. Crim. P. 16(G). The Government filed its expert witness list on March 17, 2014, after the motion now before the Court. *See* ECF No. 56. Accordingly, Defendant's request is denied as moot.

6. Any Statement From Law Enforcement Regarding Evidence or Statements Alleged to Be Made by Cooperating Witnesses or Confidential Informants

***3** Defendant moves to exclude all out-of-court statements by non-testifying individuals, citing his right under the Sixth Amendment to the United States Constitution to confront all witnesses against him. ECF No. 40 at 3. The Government cites the anticipated testimony of Juan Meza-Correa, whose residence is at trailer #14, next to Defendant's. ECF No. 51 at 3. Looking for a key to a shed on Meza's

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property, agents searched Meza's house and asked him where the key was; Meza replied that Defendant had it, and, based on this statement, the agents returned to Defendant's residence to look for the key. *Id.* The Government contends that Defendant's statements to Meza are admissible as the statements of a party opponent. ECF No. 51 at 4. If Meza does not testify at trial, the Government contends, Meza's statement to the agents is admissible to explain why the agents returned to Defendant's property to search for the key there. ECF No. 51 at 4.

Insofar as Defendant objects to the testimony of Meza as hearsay, the Court reserves ruling on this request pending foundational evidence that may be presented at trial.

7. Evidence of Persons Meeting With or Contacting Defendant at His Residence

Citing Defendant's 404(b) submissions, Defendant contends that surveillance of multiple individuals at the house without any observation by law enforcement of illegal activity or even the suspicion of illegal activity except for "a couple of small exchanges" that are unidentified as to substance or purpose is irrelevant and overly prejudicial and requests that the evidence be excluded under Fed. R. Evid. 401, 402, and 403. ECF No. 40 at 5-6. [1] Defendant argues that any testimony regarding surveillance of multiple individuals at the house without any observation by law enforcement of illegal activity or even the suspicion of illegal activity other than "a couple of small exchanges" is irrelevant and overly prejudicial. *Id.*

1 Defendant also contends that the Government has not identified where or how the surveillance was conducted or submitted any information to allow the court to analyze its factual assertions with respect to location, conditions and factual basis of the surveillance. *Id.* at 4. The Court notes that later motions indicate that Officer Posada may have observed these transactions via pole camera surveillance. Concerns about the manner of surveillance are addressed in the Court's order on subsequent motions.

The Government counters that Officer Posada observed numerous individuals arriving at the Defendant's residence, conducting a hand-to-hand transaction with Defendant and then leaving, and that these transactions are intrinsic to the crime charged in this case because they provide a complete story of the crime charged, they arise out of the same series of transactions as the charged offense, and they are so blended or connected with the crime charged that they tend logically to prove an element of the charged crime. ECF No. 51 at 4.

Here, Defendant was charged in Count 1 with possession with intent to distribute. The Court finds that evidence of previous distribution is relevant and more probative of intent than unfairly prejudicial. Accordingly, Defendant's request to exclude on 401, 402 and 403 grounds is denied.

Defendant also argues that evidence of the repeated visits should be inadmissible under 404(b). ECF No. 40 at 6.

Under Fed. R. Evid. 404(b), evidence of crimes, wrongs, or other acts are inadmissible "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, such evidence may be admissible for another purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b).

" 'Other act' evidence that is 'inextricably intertwined' with a charged offense is independently admissible and is exempt from the requirements of Rule 404(b)." *United States v. Anderson*, 741 F.3d 938, 949 (9th Cir. 2013). "Such intrinsic evidence includes evidence constituting 'a part of the transaction that serves as the basis for the criminal charge.' " *Id.* (quoting *United States v. Dorsey*, 677 F.3d 944, 951(9th Cir. 2012)). This includes contemporaneous uncharged drug transactions. *Id.* (citing *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995)). However, a transaction distant in time from the charged transaction cannot be considered a part of the charged transaction. *Id.* (citing *United States v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004)).

***4** Here, Defendant has been charged with possession with intent to distribute on or about November 14, 2013. Thus the Court will allow testimony concerning the foot traffic at the residence within a reasonable period of time leading up to the November 14th date.

8. Eight Cellular Telephones Located in the Residence

Defendant moves to exclude evidence that eight cellular phones were located in the residence, on grounds that the number of cellular phones is irrelevant and overly prejudicial and should be excluded pursuant to Fed. R. Evid. 401, 402, and 403. The Government responds that it intends to introduce

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evidence that agents seized eight cellular phones from Defendant's residence. ECF No. 51 at 5. The Government argues that it is common knowledge that narcotics traffickers use cell phones to facilitate narcotics transactions, and that the cell phones and the text messages therein are relevant to proving that Defendant possessed the methamphetamine with the intent to distribute it. ECF No. 51 at 5.

The Government's theory of the case is that cell phones are instruments and tools of the drug trade. Accordingly, the cell phones are admissible.

9. Testifying Witnesses Excluded From the Courtroom

Defendant moves to exclude all witnesses from the courtroom until they are excused from service, pursuant to Fed. R. Evid. 615. In the event that the law enforcement agent selected to sit at counsel's table during the trial be a witness, Defendant request that the case agent's testimony be taken first, so as to not violate the spirit of Fed. R. Evid. 615, citing *United States v. Valencia-Riascos*, 696 F.3d 938 (9th Cir. 2012). "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony," with some exceptions. Fed. R. Evid. 615. Accordingly, the Court grants Defendant's request to exclude witnesses from the courtroom in accordance with Rule 615, but will not dictate the order within which the Government calls its witnesses in this straightforward and uncomplicated case.

10. Leave to File Additional Motions in Limine

Defendant also reserves the right to file additional motions in limine should the need arise prior to either of the separated trials. ECF No. 40 at 15. Defendant's request is GRANTED.

B. Defendant's Motion to Prohibit the Introduction of Text Messages (ECF No. 45)

Defendant moves to exclude text messages on grounds that the text messages were not previously identified as 404(b) evidence pursuant to the Court's order and will entail substantial preparation by the defense, including translation, briefing regarding suppression, admissibility and foundation. ECF No. 45 at 3. The Government counters that the text messages are admissible to show intent to distribute narcotics; as such, they are evidence of the actual crime charged, not 404(b) material. ECF No. 67 at 3. The Government argues that the text messages are intrinsic to the crime charged in this case because (1) the text provide a complete story of the charged crime; (2) the texts arise out of the same series of transactions as the charged offense; and (3) the texts are so blended or connected with the crime charged that they tend logically to prove an element of the charged crime. *Id.*

The Government states that it provided Defendant the text messages and their translation from Spanish to English on January 14, 2014. ECF No. 67 at 3-4. The texts are as follows:

***5 Two texts from "Negro" sent on June 19, 2014:**

- Cousin how are you it's me Jose?
- Joes' son. Do you have some white? I have money, and I want to buy a twenty?

Ten Texts from 509-949-9816 sent on September 6-15, 2014

- Old man this is the last time after this movie there'll be money and I'm going to be cool with you old man.
- ? ?
- No oh well old man you can't but hey give me a call when you want a haircut.
- Old man can you half of a movie I have ten old man
- Old man you can't give me credit cause this time I'm not going to leave you in a bad way old man give me a call I need a movie I'll pay you this week.
- Sorry I know not yet but you know how sometimes we need to be cool but this time it's on credit but if it can't be then it can't what can we do
- Thanks old man
- Old man we can't do anything yet?
- Old man can I old man you know if I can I can
- Old man, is it alright if I stop by your house

ECF No. 67 at 2-3.

Here, as the Government argues, the text messages are not "other acts" for the purposes of Rule 404(b). As noted above, as the Ninth Circuit has stated, " '[o]ther act' evidence that is 'inextricably intertwined' with a charged

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offense is independently admissible and is exempt from the requirements of Rule 404(b).” *United States v. Anderson*, 741 F.3d 938, 949 (9th Cir. 2013). “Such intrinsic evidence includes evidence constituting 'a part of the transaction that serves as the basis for the criminal charge.' ” *Id.* (quoting *United States v. Dorsey*, 677 F.3d 944, 951(9th Cir. 2012)). This includes contemporaneous uncharged drug transactions. *Id.* (citing *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995)). However, a transaction distant in time from the charged transaction cannot be considered a part of the charged transaction. *Id.* (citing *United States v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004)).

The Superseding Indictment indicates that Defendant was charged with possession of methamphetamine with intent to distribute on November 14, 2013. The text messages in question were sent in June and September. The text messages potentially arise out of the same transaction of events as the charged crime, because they are evidence of distribution and may indicate an ongoing practice of possessing and selling illegal substances. Nor are the text messages in question so far removed in time. Accordingly, Defendant’s motion to exclude is denied.

C. Defendant’s Motion for Discovery Regarding Pole Camera, Video and Footage (ECF No. 59)

Defendant moves the Court for an order requiring the Government to disclose and produce information and evidence regarding a pole camera installed to view the property at 1524 South Fair Avenue, Yakima, Washington. ECF No. 59 at 2. The Government, in its response, provided information about the pole camera’s date of installation and removal, operation, and Officer Posada’s viewing of the footage. ECF No. 72. The Government also notes that, after surveillance was terminated, the data drives crashed and as a result the footage from the pole camera is no longer accessible. *Id.*

***6** Rule 16 of the Federal Rules of Criminal Procedure governs criminal discovery. It has been significantly expanded since the Rules were first adopted, and it now imposes discovery obligations both on the government and the defense. *See* Fed. R. Crim. P. 16. Unlike civil discovery, where some materials are automatically produced as a matter of right, in criminal discovery, the defendant must invoke the right to discovery. *Compare* Fed. R. Crim. P. 16(a)(1) with Fed. R. Civ. P. 26(a). Once a defendant makes a Rule 16 discovery request and the government complies, the government is entitled to seek reciprocal discovery from the defendant. *See* Fed. R. Crim. P. 16(b)(1). The Ninth Circuit recently outlined the district court’s role in the discovery process in light of the obligations imposed by Rule 16:

> Congress has thus addressed the kinds of information the government and defendants are obligated to provide to each other before trial by way of discovery and the district court's authority to enforce those obligations. Rule 2 bolsters that authority by instructing that the rules “are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.” The thrust of Rule 16-viewed in light of Rule 2-is to allow the district court to ensure that the parties comply with the letter and spirit of the rule.

United States v. W.R. Grace, 526 F.3d 499, 510 (9th Cir. 2008). Rule 16 imposes obligations upon the government to produce discovery irrespective of a court order. Indeed, each of the introductory phrases of Rule 16(a)(1) contain the following language:

> Upon a defendant’s request, the government **must** [disclose] [furnish] [permit] [give] ...

Fed. R. Crim. P. 16(a)(1)(A), (B), (C), (D), (E), (F) and (G) (emphasis added). The obligation is a continuing one. Fed. R. Crim. P. 16(c). The Court’s authority to fashion a remedy for a failure to comply with the Rule does not depend upon a prior court order. Fed. R. Crim. P. 16(d)(2) (“If a party fails to comply with this rule, the court may...”).

Brady v. Maryland held “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87. In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes. *Bagley* also held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” 473 U.S. at 682 (it abandoned the

distinction between the "specific-request" and "general – or no-request" situations).

The Ninth Circuit summarized the obligation of the prosecutor concerning *Brady* material under *Kyles v. Whitley*, 514 U.S. 419 (1995):

> Moreover, as we have previously held:
>
> > actual awareness (or lack thereof) of exculpatory evidence in the government's hands, ... is not determinative of the prosecution's disclosure obligations. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf. Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned.

United States v. Price, 566 F.3d 900, 909 (9th Cir. 2009) (*citing Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (*en banc*)).

***7** Here, because the Government appears to have produced the information Defendant requested, Defendant's discovery motion is DENIED as moot.

D. Motions to Suppress Evidence and Observations Obtained from Continuous Video Surveillance Pole Camera (ECF No. 61 and 63)

Defendant moves to suppress all evidence obtained by law enforcement from the surreptitious, long-term, continuous live and recorded video surveillance of Defendant's home and property on two grounds: that the records' destruction is a due process violation and that the video surveillance itself is a violation of the Fourth Amendment to the United States Constitution. ECF No. 61 at 2, ECF No. 63 at 1. The Court addresses each in turn.

1. Motion to Suppress on Due Process Grounds

Defendant states that counsel first became aware of the existence of surveillance videos on March 17, 2014, when the Assistant United States Attorney assigned to the case emailed defense counsel regarding pole camera surveillance the footage of which had become unavailable. ECF No. 63 at 2. Though Defendant requested information about the unavailable surveillance footage that it has not yet received, Defendant contends that there has been a potential due process violation because the Government has lost or destroyed evidence needed to present a complete defense. ECF No. 63 at 4. The Government counters that surveillance footage is inculpatory, not exculpatory, as required for a due process violation. ECF No. 73 at 5.

To demonstrate a due process violation from failure to preserve evidence, Defendant must establish: (1) that the Government acted in bad faith, the presence or absence of which turns on the Government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed, and (2) that destruction of the evidence prejudiced the defense because Defendant could not obtain comparable evidence by other reasonably available means. *United States v. Sivilla,* 714 F.3d 1168, 1172 (9th Cir. 2013) (citing *California v. Trombetta,* 467 U.S. 479, 489 (1984); *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988)). The Government's failure to preserve potentially exculpatory evidence violates Birrueta's due process rights only if Birrueta can demonstrate that the Government acted in bad faith in so doing. *Villafuerte v. Lewis*, 75 F.3d 1330, 1340 (9th Cir. 1996); *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988).

Here, Defendant contends that the "observations allegedly made by Officer Posada include the Defendant's movements which are exculpatory. Presumptively, the fact that Mr. Birrueta never went to trailer 4 where guns and drugs were located. In addition that he never went to trailer 14 where drugs were located." ECF No. 63 at 5. The Government counters that the footage is inculpatory and it would seek to admit the footage as evidence during the trial were it available. ECF No. 73 at 5. The Court finds that there is no suggestion that the Government acted in bad faith in its loss of the footage; rather, as it argues, it would seek to admit the footage were it available. Thus, Defendant's motion to exclude on due process grounds is denied.

2. Motion to Suppress on Fourth Amendment Grounds

***8** Defendant contends that the warrantless installation and use of a pole camera to continuously record all activities at an in front of Defendant's house constitutes a warrantless search under the Fourth Amendment and is accordingly unreasonable. ECF No. 61 at 3. Defendant maintains that he had a reasonable expectation of privacy in his home and the right to be free from continuous video monitoring. *Id.* The installation of a pole camera, he contends, allowed the officers

to effectively trespass into the curtilage of his home to obtain information about him. *Id.* at 3-4. As such, Defendant argues, the fruits of that illegal search and the evidence obtained from the video surveillance must be suppressed. *Id.* at 4

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States,* 533 U.S. 27, 33 (2001) (citing *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring)) (quoted in *United States v. Gonzalez*, 328 F.3d 543, 546 (9th Cir. 2003)). The Supreme Court held in *Jones* that, while the reasonable expectation of privacy test is not the exclusive test for evaluating whether a Fourth Amendment search occurred, cases "involving merely the transmission of electronic signals without trespass would *remain* subject to the [reasonable expectation of privacy] analysis." *Jones,* 132 S.Ct. at 953 (emphasis in original). As such, to determine whether a search was conducted under the Fourth Amendment, this Court must analyze the Fourth Amendment implications of pole camera surveillance under a "reasonable expectation of privacy" test.

"[W]hat 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 (1967). Law enforcement agents may use their resources to conduct surveillance where they have a legal right to occupy. *See, e.g., Florida v. Riley,* 488 U.S. 445, 449 (1989) (citing *California v. Ciraolo,* 476 U.S. 207, 213 (1986)) ("[T]he police may see what may be seen 'from a public vantage point where [they have] a right to be....' "); *United States v. Dubrofsky,* 581 F.2d 208, 211 (9th Cir. 1978) ("Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities."). "A person has a stronger claim to a reasonable expectation of privacy from video surveillance than against a manual search." *United States v. Gonzalez*, 328 F.3d 543, 548 (9th Cir. 2003) (citing *United States v. Taketa,* 923 F.2d 665, 675 (9th Cir. 1987)) (noting that the Ninth Circuit has held that the Fourth Amendment forbids warrantless videotaping of a private office and hotels rooms). But videotaping in public places does not violate the Fourth Amendment. *Id*

***9** For example, a district court found that law enforcement officials violated a defendant's reasonable expectation of privacy where a neighbor acting for the state conducted round-the-clock video surveillance of defendant's back yard for 56 days. *Shafer v. City of Boulder*, 896 F. Supp. 2d 915 (D. Nev. 2012). Similarly, in affirming a conviction based on evidence derived through video surveillance of the defendant's back yard from a camera placed on a power pole, the Fifth Circuit held that: (1) the video surveillance constituted a search for Fourth Amendment purposes because he had a reasonable expectation of freedom from such surveillance in his back yard; but (2) the search warrant authorizing the surveillance was proper and did not violate defendant's Fourth Amendment rights. *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987). However, the Tenth Circuit held that warrantless installation of silent video surveillance cameras on telephone poles outside an accused narcotics offender's house, and outside the house of another person, was held not to violate the accused's Fourth Amendment rights. *United States v. Jackson*, 213 F.3d 1269 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 629 (2000) and *cert. granted, judgment vacated on other grounds*, 121 S. Ct. 621 (2000) (noting that cameras could not view within the houses and could observe only what any person passing by could easily see, and concluding that the accused had no reasonable expectation of privacy intruded on by the cameras).

The Government states that the pole camera in this case was attached to a utility pole adjacent to the trailer park where Defendant lived. ECF No. 73 at 2. The Government states that the Defendant's trailer is not surrounded by a solid fence or other privacy device and activities around the trailer can be plainly seen by passersby on the street. *Id.* The Government further contends that the trailer is surrounded on all sides by other trailers in close proximity, all of whom can see the Defendant's trailer, including the curtilage. *Id.*

Here, without additional evidence of the surveillance's intrusiveness, the Court finds that the video surveillance was reasonable under the Fourth Amendment. First, Defendant's argument that video surveillance of the trailer's curtilage is unreasonable is unpersuasive. Though the area immediately surrounding Defendant's trailer may well be considered its curtilage, such an area is protected from physical incursions, not observation from the outside. The Supreme Court has held with respect to aerial surveillance:

> That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views

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> of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. *E.g., United States v. Knotts,* 460 U.S. 276, 282 (1983). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz, supra,* 389 U.S., at 351, 88 S.Ct., at 511.

California v. Ciraolo, 476 U.S. 207, 213 (1986). Accordingly, the Court does not find that the Government's video surveillance is unreasonable simply because it provides a *view* of an area "intimately linked to the home." *See Ciraolo*, 476 U.S. 207, 212.

Rather, examining Defendant's reasonable expectation of privacy, the Court finds that the video surveillance from the pole camera was reasonable because it recorded the outside of the front of Defendant's home, from a vantage that anyone from the street could see. Without evidence that camera captured the inside of Defendant's home, or somehow employed techniques that greatly enhanced its ability to view private goings on, not visible to the naked eye, the Court—like the Tenth Circuit on similar facts in *Jackson*—finds that the search was reasonable.

More information regarding the camera's position and capabilities may change the Courts view. Thus, the Court will reserve final ruling on this issue pending the hearing set for 8:00 a.m. the morning of trial.

E. Defendant's Motion to Exclude Proposed Expert Testimony and Request for *Daubert* Hearing (ECF No. 66)

Defendant contends that the Government's witness disclosure is too general to meet the requirements of Fed. R. Crim. P. 16(a)(1)(G) because it does not describe the basis or reason for TFO Posada's opinions and the mere fact that Officer Posada has experience in investigating drug cases is insufficient to establish him as an expert under *United States v. Hermanek*, 289 F.3d 1076 (9th Cir. 2002). ECF No. 66 at 3. Defendant applies the same objection to DEA Special Agent Jason Diaz. *Id.*

***10** Defendant further moves the Court to strike the proposed expert testimony because it does not meet the requirements of Fed. R. Evid. 701 and 702. ECF No. 66 at 3. Defendant argues that the factual claim that narcotic traffickers frequently use cell phones or text messaging is not something outside the common knowledge of most jurors and that as such it is an inappropriate topic for expert testimony. *Id.* at 4.

Defendant also contends that using the officer and agent not only as fact witnesses but as expert witnesses heightens the risk of improper testimony; confers upon the agent or officer an aura of special reliability and trustworthiness; can inhibit cross-examination because challenges to expert witnesses can unintentionally bolster the witness's credibility; and increases the dangers that the expert testimony will stray from applying reliable methodology and convey to the jury sweeping conclusions about the Defendant's activities contrary to the strictures of Rules 403 and 702. ECF No. 66 at 4-6.

Defendant's request for a *Daubert* hearing is GRANTED. The Court will determine admissibility of the Officer Posada and Agent Diaz's proposed testimony at the pretrial hearing scheduled for 8:00 a.m. the morning of trial.

IT IS HEREBY ORDERED:

1. Defendant's Motions to Expedite (ECF Nos. 58, 60, 62, and 65) are **GRANTED**.

2. Defendant's Motions in Limine (ECF No. 40) are **GRANTED in part and DENIED in part**, as follows:

   a. Defendant's request to exclude the white substance found under trailer #14 is **DENIED as moot.**

   b. Defendant's request to exclude allegedly false documents is **GRANTED in part.** Evidence of the cards' falsity will be excluded during the trial on counts 1 and 2.

   c. Defendant's request to exclude evidence of field tests is **DENIED as moot.**

   d. Defendant's request to limit any testimony regarding the execution of a search warrant at trailer No. 13 is **GRANTED in part.** Officer Posada's testimony regarding the execution of the search warrant is limited to his personal observations.

   e. Defendant's request to exclude opinion testimony by any person not previously identified as an expert is **GRANTED in part.** The Government's introduction of opinion testimony is limited to that by experts identified in the timely filed expert report.

f. The Court **reserves ruling** on Defendant's request to exclude all out-of-court statements by non-testifying individuals pending testimony at trial.

g. The Court **reserves ruling** on Defendant's request to exclude any statement from law enforcement regarding evidence or statements alleged to be made by cooperating witnesses or confidential informants.

h. Defendant's request to exclude evidence of persons meeting with or contacting Defendant at his residence is **DENIED**.

i. Defendant's request to exclude evidence of the number of cellular phones at Defendant's residence is **DENIED**.

j. Defendant's request to exclude all witnesses from the courtroom until they are excused from service is **GRANTED** pursuant to Fed. R. Evid. 615.

k. Defendant's request for leave to file additional motions in limine is **GRANTED**.

3. Defendant's Motion to Exclude Text Messages (ECF No. 45) is **DENIED**.

4. Defendant's Motion for Discovery Regarding Pole Camera, Video and Footage (ECF No. 59) is **DENIED as moot.**

5. Defendant's Motions to Suppress Evidence and Observations Obtained from Continuous Video Surveillance Pole Camera (ECF No. 61 and 63) are disposed of as follows:

***11** a. Defendant's request to exclude evidence obtained from the pole camera surveillance on due process grounds is **DENIED**.

b. The Court **reserves ruling** on Defendant's request to exclude evidence obtained from the pole camera surveillance on Fourth Amendment grounds.

6. Defendant's Motion to Exclude Proposed Expert Testimony and Request for *Daubert* Hearing (ECF No. 66) is **GRANTED in part.** The Court will hold a *Daubert* hearing at 8 a.m. on the morning of trial and reserves ruling on all issues raised in this motion until that time.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

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Declined to Extend by State v. Jones, S.D., September 20, 2017

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Only the Westlaw citation is currently available.
United States District Court, W.D. Oklahoma.

UNITED STATES of America, Plaintiff,
v.
Manuel Ricardo CAMPUZANO-CHAVEZ, et al., Defendants.

NO. CR-15-00154-HE
|
Signed March 7, 2016

Attorneys and Law Firms

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ORDER

JOE HEATON, CHIEF U.S. DISTRICT JUDGE

***1** Defendants Javier Alfredo Herrera-Hernandez ("Javier Herrera") and Julio Cesar Herrera-Hernandez ("Julio Herrera") were charged along with six others in a five-count indictment.[1] Javier Herrera was charged in two of the counts, with conspiracy to possess methamphetamine with intent to distribute (Count 1) and with distribution of methamphetamine (Count 4). Julio Herrera was charged only in the referenced conspiracy count.

1 *The defendants have subsequently been charged in a superceding indictment. This order addresses defendants' motions as filed. To the extent that the superseding indictment raises new issues or alters the basis for this order, pertinent matters may be raised by further motion within the revised motions deadline set by the court.*

Both defendants have filed motions for a James[2] hearing to determine the admissibility of coconspirator statements [Doc. Nos. 81 and 117], motions for an order directing the government to give notice of 404(b) evidence [Doc. Nos. 79 and 116], and motions to sever or bifurcate their trials [Doc. Nos. 106 and 118]. Javier Herrera has also filed a motion to suppress the testimony of a confidential informant [Doc. No. 77], a motion for a Jackson-Denno[3] hearing to determine the admissibility of his statements [Doc. No. 83], a motion to dismiss the conspiracy charge [Doc. No. 78], a motion for an order requiring the jury to determine forfeiture [Doc. No. 80], and a motion to suppress all video surveillance [Doc. No. 82]. The government has responded to the motions. A hearing was held on February 23, 2016, directed to the motions to determine the admissibility of coconspirator statements and of Javier Herrera's statements.

2 *United States v. James, 590 F.2d 575 (5th Cir. 1979).*

3 *Jackson v. Denno, 378 U.S. 368 (1964).*

Coconspirator Statements

Fed. R. Evid. 801(d)(2)(E) permits the admission of an out-of-court statement offered against a party which was made "by the party's coconspirator during and in furtherance of the conspiracy." To be admissible as non-hearsay, the government must establish by a preponderance of the evidence that a conspiracy existed, that the defendant and declarant were members of the conspiracy, and that the statements were made in the course of and in furtherance of the conspiracy. United States v. Owens, 70 F.3d 1118, 1123 (10th Cir. 1995) (citing United States v. Urena, 27 F.3d 1487, 1490 (10th Cir. 1994)). Coconspirator statements can be admissible even if they were made before the defendant joined the conspiracy. United States v. Brown, 943 F.2d 1246, 1255 (10th Cir. 1991).

The evidence submitted at the hearing principally consisted of the testimony of DEA Special Agent Robert Murphy and transcripts of intercepted telephone exchanges among various defendants and a confidential informant. The evidence was sufficient to establish, by a preponderance of the evidence, that there existed a conspiracy to possess methamphetamine with intent to distribute it, that the referenced statements were made in the course of and in furtherance of that conspiracy, and that Javier Herrera, Julio Herrera, and the other parties to the telephone exchanges were members of the conspiracy. Whether the government had identified these defendants as targets or had otherwise begun investigating them in particular by the time of those statements, or

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whether the defendants were part of the conspiracy at the time the statements were made, is not determinative of the admissibility of the statements. *See* Brown, 943 F.2d at 1255. The telephone exchanges detail a concerted effort to arrange the purchase and sale of methamphetamine, including discussions between both Javier Herrera and Julio Herrera regarding the pricing and availability of the drugs and arrangements for the purchases.

***2** Accordingly, the motions requesting a pretrial determination of the admissibility of coconspirator statements [Doc. Nos. 81 and 117] are **GRANTED**. Having now conducted the necessary hearing, the court concludes the coconspirator statements are admissible as against a hearsay objection.

404(b) Evidence

Both defendants have moved for an order directing the government to give notice of its intent to rely on evidence to which Federal Rule of Evidence 404(b) applies. The government's response acknowledges its obligations under the rule and identifies certain statements as to Javier Herrera [Doc. No. 124]. The government will be required to identify any other 404(b) evidence it intends to offer not less than seven days prior to trial. A request for notice, rather than a formal motion, is all that is required under Rule 404(b), so the motions [Doc. Nos. 79 and 116] are **STRICKEN** as moot.

Severance

Both defendants have moved to sever the trial of the charges against them, arguing they will be prejudiced by being tried jointly with other defendants who are charged with a completely separate conspiracy (a conspiracy to possess marijuana with intent to distribute it). However, all of the defendants charged in the marijuana conspiracy have either entered guilty pleas or are in the process of doing so. Thus, Javier Herrera and Julio Herrera no longer face any potential prejudice by reason of multiple conspiracies being charged.

To the extent that either defendant argues he is prejudiced by being tried for the same conspiracy with the other defendant, neither defendant has demonstrated that he will be actually prejudiced by a joint trial or that, if there is any prejudice, it is not outweighed by "the obviously important considerations of economy and expedition in judicial administration." United States v. Dirden, 38 F.3d 1131, 1140 (10th Cir. 1994) (internal quotation marks and citation omitted). Accordingly, defendants' motions to sever or bifurcate trial [Doc. Nos. 106 and 118] are **DENIED**.

Confidential Informant

Defendant Javier Herrera has moved to suppress the testimony of a confidential informant on the basis the informant's testimony was obtained in violation of the federal anti-gratuity statute, 18 U.S.C. § 201(c)(2). Stating that he "believes that the payments [to the informant] in this case went beyond legal limits," Javier Herrera has requested a hearing to determine whether the witness's testimony was in consideration of one or more promises not normally made in exchange for testimony and whether the promises were inconsistent with the assistant U.S. attorney's role as a prosecutor. *See* United States v. Jackson, 213 F.3d 1269, 1289 (10th Cir. 2000), *judgment vacated on other grounds*, Jackson v. United States, 531 U.S. 1033 (2000).

The government's response indicates the confidential informant involved is currently awaiting sentencing in another case in this district and that a sentence previously imposed in that case was vacated while the informant assists the DEA in several drug investigations. The government also indicates the payments to the CI have been made pursuant to DEA policy and that payment information will be provided to the defendant prior to trial.

Beyond speculation, defendant has offered nothing that would call into question the accuracy of the government's representations. On the present showing, the court concludes there is no basis for excluding the informant's testimony. Any payments made to the informant, like the prospect of leniency granted in the informant's criminal proceeding, may be explored on cross examination, but the fact of payments by itself is not a basis for excluding the testimony altogether. Defendant's motion to suppress the testimony of the confidential informant [Doc. No. 77] is **DENIED**.

Defendant Statements

***3** Javier Herrera has also moved to suppress statements he made in an interview with law enforcement agents after his arrest on October 6, 2015. He challenges the validity of his waiver of rights under Miranda v. Arizona, 384 U.S. 436 (1966).

A defendant's waiver of the Fifth Amendment privilege against self-incrimination must be voluntary, knowing, and intelligent. United States v. Curtis, 344 F.3d 1057, 1066

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(10th Cir. 2003). The waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must also be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* Courts must look at the totality of circumstances surrounding the interrogation to determine if a waiver was both uncoerced and made with a sufficient level of comprehension. *Id.*

At the hearing, Oklahoma Bureau of Narcotics agent Larry Morgan testified about his interview of Javier Herrera. Agent Morgan testified that he explained Mr. Herrera's Miranda rights to him and that, after doing so, he presented and defendant signed a written waiver of his Miranda rights. The transcript of the interview indicates Agent Morgan said: "It talks about waiving rights. You really never waive your rights." [Def.'s Hr'g Ex., at 2]. Agent Morgan testified that he intended the statement to clarify that a waiver of rights did not mean the defendant had to answer all questions if he signed the waiver or that he could not change his mind in the course of the interview. The transcript of the interview is generally consistent with that account. While the explanation of defendant's right to change his mind and invoke his rights during the interview could have been clearer, the court cannot say the explanation was misleading or so unclear as to vitiate defendant's consent. There is no indication that Mr. Herrera misunderstood his rights or that his waiver of them was anything other than voluntary. Javier Herrera's motion to suppress his statements [Doc. No. 83] is therefore **DENIED**.

Conspiracy Charge

Javier Herrera has also filed a motion to dismiss the conspiracy charge (Count I) against him. He argues that the government purposefully allowed the conspiracy to run until July 2015—four months after the government could have arrested him for selling methamphetamine to the confidential informant in a controlled purchase. He argues the government's failure to arrest him then was only for the purpose of adding to his sentence for conspiracy and that it therefore constituted "sentencing entrapment."

In the Tenth Circuit, the concept of "sentencing entrapment" is considered a form of outrageous governmental conduct. United States v. Scull, 321 F.3d 1270, 1276 n. 3 (10th Cir. 2003). This defense can be successfully invoked only by a showing that the government's conduct, viewed in light of the totality of circumstances, "is so shocking, outrageous, and intolerable that it offends the universal sense of justice." *Id.* at 1277 (internal quotation marks and citation omitted). In the context of a drug distribution conspiracy, the Circuit has recognized that multiple undercover transactions may be necessary to reveal the depth and extent of the conspiracy or to identify the source of the drugs. *Id.* Thus, the government's choice to continue an investigation rather than make an arrest immediately after a controlled drug buy does not, without more, constitute outrageous conduct. *Id.*

***4** Here, the government indicates the investigation continued after the March 2015 controlled drug buy for the purpose of tracing the source of the drugs and determining the identities and roles of other members in the conspiracy. Given the nature of the conspiracies and the relatively short duration of the timeframes involved, there is no basis here for characterizing the government's continued investigation as outrageous. Javier Herrera's motion to dismiss Count I [Doc. No. 78] is **DENIED**.

Jury Determination of Forfeiture

Defendant Javier Herrera has also moved for a jury determination of forfeiture amounts in the event he is convicted. The government has responded that it does not object to this motion [Doc. No. 80], which is **GRANTED**.

Video Surveillance

Defendant Javier Herrera has also moved for suppression of all video surveillance conducted by the government. He argues that because no warrant was obtained, the videos may have been obtained by searches which were unreasonable under the Fourth Amendment. However, the Fourth Amendment is not implicated by video surveillance obtained from cameras posted outside private property, where they observe no more than what any passerby would be able to observe and where the defendant has no reasonable expectation of privacy in the area being viewed. United States v. Jackson, 213 F.3d 1269, 1280–81 (10th Cir. 2000), *judgment vacated on other grounds*, Jackson v. United States, 531 U.S. 1033 (2000).

The government indicates in its response that the cameras were not placed on private property nor were they monitoring an area ("the Ranch") in which these defendants had a reasonable expectation of privacy. It also indicates the cameras recorded silent video only. On the present showing, Mr. Herrera's Fourth Amendment rights were not violated by the camera surveillance. Defendant's motion to suppress video surveillance [Doc. No. 82] is **DENIED**.

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IT IS SO ORDERED.

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684 Fed.Appx. 703
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Ruben CANTU, Defendant-Appellant.

No. 16-2191
|
Filed April 5, 2017

Synopsis

Background: Defendant was convicted on conditional guilty plea in the United States District Court for the District of New Mexico of being a felon in possession of a firearm and ammunition. The District Court denied defendant's motion to suppress. Defendant appealed.

[Holding:] The Court of Appeals, Timothy M. Tymkovich, Chief Judge, held that defendant did not have reasonable expectation of privacy in outdoor common area between defendant's residence and his brother's residence next door.

Affirmed.

West Headnotes (1)

[1] **Searches and Seizures** Expectation of privacy

Defendant did not have reasonable expectation of privacy in outdoor common area between defendant's residence and his brother's residence next door, and thus warrantless installation of surveillance camera on utility pole to monitor activity between residences did not violate Fourth Amendment, even if common area was curtilage; pole camera could only see what a passerby could observe. U.S. Const. Amend. 4.

1 Cases that cite this headnote

(D.C. No. 5:14-CR-02114-RB-1) (D. New Mexico)

Attorneys and Law Firms

Terri J. Abernathy, Office of the United States Attorney, District of New Mexico, Las Cruces, NM, for Plaintiff-Appellee

Brock Morgan Benjamin, Benjamin Law Firm, El Paso, TX, for Defendant-Appellant

Before TYMKOVICH, Chief Judge, HOLMES, and PHILLIPS, Circuit Judges.

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Timothy M. Tymkovich, Chief Judge

Ruben Cantu appeals the district court's denial of his motion to suppress evidence seized as the result of surveillance by a camera placed without a warrant on a utility pole near his residence. After the district court denied his motion to suppress, Cantu pleaded guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g), reserving the right to appeal the district court's order. The only issue before us in this appeal is whether the district court erred in denying Cantu's motion to suppress.

We affirm because we can find no error in the district court analysis. The district court correctly followed our decision in *United States v. Jackson*, 213 F.3d 1269, 1280 (10th Cir.), *judgment vacated on other grounds*, 531 U.S. 1033, 121 S.Ct. 621, 148 L.Ed.2d 531 (2000), which involved similar facts, as well as the relevant Supreme Court precedent.

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I. Background

The arrest in this case arose from an investigation by the Lea County Drug ***704** Task Force and the FBI of a drug-trafficking organization operating in Hobbs, New Mexico. One of the subjects of their investigation was Rolando Cantu, the defendant's brother and also his next-door neighbor. At the request of the Task Force, the local utility company installed a video camera on a utility pole approximately 70 yards from the brothers' adjacent residences. This was the closest utility pole to the properties. The pole was on the side of a paved alley providing access to a parking lot and commercial buildings. The camera allowed agents to observe the front of the brothers' properties, as well as a common, unpaved area between Rolando Cantu's house and the defendant's trailer. The camera did not record sound, and it did not allow the agents to see inside either property. It provided a continuous live feed to a television screen at the Task Force office. Agents at the Task Force office could adjust the camera, zoom it in and out, and take still photographs. Although they are uncertain precisely when it was removed, the Task Force was using the camera at another address a few months after the surveillance of the Cantus's properties.

During the course of this surveillance, the Task Force's commander saw someone on the video feed walking in the common area between the two residences, carrying what looked like an assault rifle. The commander captured several still photographs from the feed. It is apparent from these photographs that a car or pedestrian coming down the street would have seen the man carrying the weapon. *See* Attachments to Aple. Br. The Task Force agents knew from New Mexico Probation and Parole that Ruben Cantu, the defendant, lived in the residence next to Rolando Cantu. The agents compared a photograph of Ruben Cantu with the still photographs from the video camera, which allowed them to identify the man carrying the assault rifle as Ruben Cantu. After reviewing his criminal history and seeing a prior felony conviction, the Task Force obtained a search warrant for Ruben Cantu's property. The agents found an AR-15 assault rifle and over 100 rounds of ammunition.

II. Analysis

The parties have stipulated all relevant facts, so we review only the district court's legal analysis. We review questions of law de novo, including the "ultimate determination of reasonableness under the Fourth Amendment." *United States v. Shuck*, 713 F.3d 563, 567 (10th Cir. 2013) (quoting *United States v. Polly*, 630 F.3d 991, 996 (10th Cir. 2011)).

Our analysis could begin and end with *United States v. Jackson*, 213 F.3d 1269 (10th Cir.), *judgment vacated on other grounds*, 531 U.S. 1033, 121 S.Ct. 621, 148 L.Ed.2d 531 (2000). The facts in *Jackson* were quite similar. Law enforcement had "installed video cameras on the tops of telephone poles overlooking the residences of" the suspected leaders of drug organizations. *Id.* at 1276. "[B]oth of these cameras could be adjusted by officers at the police station, and could zoom in close enough to read a license plate, [but] neither had the capacity to record sound, and neither could view the inside of the houses." *Id.*

On appeal, the subject of the surveillance argued the pole cameras violated her Fourth Amendment rights because they were installed without a warrant. *Id.* at 1280. We disagreed, holding that "[t]he use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment." *Id.* at 1280-1281 (citing *Dow Chem. Co. v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986); *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)). Not only that, but ***705** "activity a person knowingly exposes to the public is not a subject of Fourth Amendment protection, and thus, is not constitutionally protected from observation." *Id.* at 1281 (citing *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). Pointing to two facts—(1) the pole cameras could not see inside the houses and (2) the pole cameras could only see what a passerby could observe—we found the subject of the surveillance "had no reasonable expectation of privacy that was intruded upon by the video cameras." *Id.* The surveillance therefore did not violate the Fourth Amendment, and the police officers did not need to obtain a warrant to install or use the pole camera. *Id.*

Cantu attempts to distinguish his case from *Jackson*. He points out that the pole camera evidence in *Jackson* was used against the subject of the investigation, whereas he "simply unknowingly walked into the path" of the pole camera. Aplt. Br. at 25. But this is a distinction without legal significance. Our holding in *Jackson* was not premised on the fact that the evidence was used against the subject of the investigation. Here, agents saw a man walk from a suspected drug trafficker's residence to a neighboring house carrying a large assault rifle. "Fourth Amendment protection of the home has never been extended to require law enforcement

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officers to shield their eyes." *Ciraolo*, 476 U.S. at 213, 106 S.Ct. 1809. And it has never been extended to prevent them from acting when in the course of their investigation they see someone other than their target committing a likely criminal act.

Cantu also argues that *Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013), a Supreme Court case decided after *Jackson*, casts *Jackson*'s holding into doubt. We disagree. Cantu's argument confuses the two different tests articulated in the Fourth Amendment jurisprudence: the reasonable-expectation-of-privacy test and the common-law trespassory test. The Supreme Court clarified in *United States v. Jones*, 565 U.S. 400, 405-08, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), that an unconstitutional search can be established under either standard. As Cantu himself notes, the "reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." Aplt. Br. at 13 (quoting *Jones*, 565 U.S. at 409, 132 S.Ct. 945). *Jardines*, unlike here, involved a "physical intrusion of a constitutionally protected area." 133 S.Ct. at 1414 (quoting *United States v. Knotts*, 460 U.S. 276, 286, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (Brennan, J., concurring)). The police in *Jardines* "gather[ed] information in an area belonging to [the suspect] and immediately surrounding his house ... by physically entering and occupying the area." *Id.* at 1414. By contrast, Cantu's motion to suppress must be assessed under the reasonable-expectation-of-privacy test, since he does not allege any physical intrusion occurred. *Jardines* has no bearing on *Jackson* or on Cantu's appeal.

Cantu also tries to avoid *Jackson*'s application by arguing that the common area in which he was carrying the assault rifle was his curtilage and thus a protected area under the Fourth Amendment. Even assuming for the sake of argument that it was curtilage, the surveillance did not violate Cantu's constitutional rights. "That [an] area is within the curtilage does not itself bar all police observation." *Ciraolo*, 476 U.S. at 213, 106 S.Ct. 1809. The question is still whether society is willing to recognize Cantu's expectation of privacy as reasonable. *See, e.g.*, *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). And *Jackson* stands for the proposition that it is not. 213 F.3d at 1281.

***706** He further argues that the surveillance failed to comply with our precedent in *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990) (delineating requirements for domestic video surveillance). But that case is not on point: *Mesa-Rincon* involved the installation of a video camera *inside* a business, a place where there was a reasonable expectation of privacy. Its requirements do not pertain to surveillance of places where, like here, there is no reasonable expectation of privacy.

III. Conclusion

Finding no error in the district court's reliance on our opinion in *Jackson*, we **AFFIRM** its judgment.

All Citations

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United States District Court, D. Arizona.

UNITED STATES of America, Plaintiff,
v.
Margo CRUZ, Defendant.

No. CR-18-00827-001-PHX-DGC
|
Signed 10/17/2019

Attorneys and Law Firms

Glenn B. McCormick, US Attorney's Office, Phoenix, AZ, for Plaintiff.

ORDER

David G. Campbell, Senior United States District Judge

***1** Defendant Margo Cruz is charged with conspiracy and possession with intent to distribute cocaine. Doc. 1 at 1-2. Four kilograms of cocaine were found in his vehicle after a drug-detecting dog alerted to the vehicle following a traffic stop. Defendant filed a motion to suppress evidence obtained as a result of the stop, which the Court denied. *See* Docs. 39, 79. Defendant now asserts a second motion to suppress, focused on evidence obtained from a pole camera used to surveil the house of his co-defendant. Doc. 91. The motion is fully briefed, and no party has requested oral argument. Docs. 97, 100. The Court will deny the motion.

I. Background.

The facts in this order are based on the briefing by the parties and evidence presented during the hearing on Defendant's first motion to suppress. *See* Doc. 79.

On December 19, 2016, Special Agent Kyle Stalder of the Drug Enforcement Administration ("DEA") was conducting video surveillance of a residence at 5123 East Red Bird Lane in San Tan Valley, Arizona ("the Residence"), by means of a pole camera. The pole camera had been installed after the DEA received information that co-defendant David Gallego-Machado was using the Residence as a "drug and/or drug proceeds storage location." Doc. 44 at 1-2. The pole camera was located about 25 feet in the air on a power pole, approximately 75 yards from the Residence, across a vacant lot, and focused on the front of the house, including the driveway and garage. The Residence had no fence or landscaping that obstructed a full view of the house. *See* Doc. 91-1 at 4.

At approximately 11:01 a.m., Agent Stalder saw a silver Jeep Cherokee registered to Gallego-Machado depart from the residence. Around noon, the Jeep returned, driving in tandem with a white sedan that Agent Stalder thought was either an Infiniti or a Jaguar. The white vehicle had yellow license plates. Agent Stalder could not zoom the camera quickly enough to read the plates, but he had received information that the drug trafficking operation was sending drugs to New Mexico and assumed the yellow plates were New Mexico plates. *See* Court's Livenote Transcript, July 12, 2019 ("Tr.") at 10. [1] The white sedan entered the garage of the Residence and the garage door was closed. After about 11 minutes, the garage door opened and the white vehicle pulled out and left the area. *Id.*

1 The Court takes judicial notice that standard license plates issued by New Mexico are yellow. *See* MVD New Mexico, http://www.mvd.newmexico.gov/standard-plates.aspx (last visited Oct. 16, 2019).

Anticipating that the vehicle was headed to New Mexico, Agent Stalder contacted Navajo County Sheriff Office ("NCSO") Sergeant William Murray and explained that the DEA was surveilling the Residence and a suspicious vehicle just left. Tr. at 12. Sergeant Murray suggested Agent Stalder contact NCSO Deputy Randall Keith, who was on patrol. Tr. at 12. Deputy Keith is part of the NCSO Traffic Enforcement and Criminal Interdiction Unit. Doc. 44 at 3. Agent Stalder contacted Deputy Keith, relayed the information, and sent him a picture of the white vehicle taken from the pole camera. Tr. 20-21; *see also* Tr. at 40. This communication is not documented in DEA or NCSO reports, but the Court found the testimony of Agent Stalder and Deputy Keith credible on this point.

***2** At approximately 3:50 p.m., Deputy Keith initiated a traffic stop of the white Infiniti sedan with New Mexico plates that Defendant was driving east on I-40 in the Holbrook area, heading toward New Mexico. After Deputy Keith's drug-detection canine alerted to the trunk of Defendant's vehicle, Deputy Keith searched the trunk and found four vacuum-packed rectangular packages of a white powdery substance in the spare tire compartment. Doc. 44 at 6. *Id.* Testing revealed that the powdery substance was cocaine. *Id.*

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Defendant moves to suppress all evidence obtained by use of the pole camera. He argues that the pole camera was installed without a warrant, that he had a reasonable expectation of privacy at the Residence, and that surveillance by the pole camera violated his Fourth Amendment rights. Doc. 91. Because the Court concludes that Defendant had no reasonable expectation of privacy at the Residence, it need not address whether surveillance by the pole camera was otherwise lawful under the Fourth Amendment. [2]

2 Both parties cite cases addressing the warrantless use of pole cameras. Courts in this district have held that such cameras, when focused on public spaces, do not violate the Fourth Amendment. *See United States v. Brooks*, 911 F. Supp. 2d 836, 841-42 (D. Ariz. 2012); *U.S. v. Krawczyk*, 2013 WL 2481275, at *4 (D. Ariz. 2013). The government cites many cases that have reached the same conclusion. *See* Doc. 97 at 11-13.

II. Defendant Lacked a Reasonable Expectation of Privacy.

In *Minnesota v. Carter*, 525 U.S. 83 (1998), a law enforcement officer looked through a gap in the closed blinds of a first-floor apartment and observed a narcotics bagging operation. *Id.* at 85. Officers detained two males in a vehicle after they left the apartment. A search of the vehicle revealed a firearm, pagers, a scale, and cocaine. *Id.* A subsequent search of the apartment revealed cocaine residue and additional plastic baggies. *Id.* at 86. One of three males observed inside the apartment had leased the premises, while the other two had traveled from another state for the purpose of packaging the cocaine. *Id.* The two males filed a motion to suppress the evidence obtained from the apartment and the vehicle, arguing that it constituted the fruit of an unlawful search by the law enforcement officer who looked through the window without a warrant. *Id.*

The Supreme Court explained that "that in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable[.]" *Id.* at 88. Although "an overnight guest in a home may claim the protection of the Fourth Amendment, ... one who is merely present with the consent of the householder may not." *Id.* at 90. The Court reached the following conclusion with respect to the two defendants before it:

> Respondents here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with Thompson [the fellow who leased the apartment], or that there was any other purpose to their visit. Nor was there anything similar to the overnight guest relationship in [*Minnesota v. Olson*, 495 U.S. 91 (1990)] to suggest a degree of acceptance into the household. While the apartment was a dwelling place for Thompson, it was for these respondents simply a place to do business.

525 U.S. at 90 (footnote omitted).

***3** The Court held that due to "the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder," the defendants had no reasonable expectation of privacy in the apartment and could not assert a Fourth Amendment violation. *Id.* at 91.

Carter's holding applies here. The pole camera was focused on the Residence of the co-defendant, not on property owned or occupied by Defendant. Defendant visited the Residence for the sole purpose of engaging in a commercial drug transaction. As the government notes without dispute from Defendant, the co-defendant's fingerprints were found on the cocaine packages located in Defendant's trunk, showing that the packages were obtained from the co-defendant. Doc. 97 at 6 n.3. Defendant visited the Residence only briefly – for 11 minutes according to the time shown on the pole camera film. And Defendant provides no evidence that he had any previous connection with the co-defendant or the Residence. Thus, like the defendants in *Carter*, Defendant lacked any reasonable expectation of privacy in the Residence and cannot assert a Fourth Amendment violation based on surveillance of the Residence.

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This decision is reinforced by the Ninth Circuit's decision in the *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015). *Lyall* held that plaintiffs who were attending a musical event in a warehouse could not assert a Fourth Amendment violation based on a warrantless search of the warehouse and its occupants. 807 F.3d at 1187-88. The plaintiffs had no ownership in or control of the warehouse, and thus could not assert a trespassory violation as in *United States v. Jones*, 565 U.S. 400 (2012). *Id.* And as mere temporary guests on the property, they had no reasonable expectation of privacy:

> [T]hey have no grounds on which to claim a reasonable expectation of privacy in the warehouse. They happened to be inside the warehouse when the police entered, but that fact, without more, is insufficient to confer Fourth Amendment standing. *See Rakas* [*v. Illinois*, 439 U.S. 128, 135 (1978)] (holding that the mere fact that a person is "legitimately on premises where a search occurs" is not enough to show that the search infringed the person's expectation of privacy); *United States v. Armenta*, 69 F.3d 304, 309 (9th Cir. 1995) (evidence suggesting, at most, that defendant was legitimately on the premises searched was "insufficient to demonstrate a legitimate expectation of privacy").

Id.

Likewise, in this case, the fact that Defendant was briefly at the Residence to conduct a drug transaction with the co-defendant did not give him a reasonable expectation of privacy in the Residence. [3]

3 Defendant argues that the holding in *Carter* has been undercut by the Supreme Court's subsequent decision in *Jones*, 565 U.S. 400, but *Lyall* was decided after *Jones* and, as it explained, is wholly consistent with that decision. *See Lyall*, 807 F.3d at 1185-87. Nor does the Court find that *Carpenter v. United States*, 138 S. Ct. 2206 (2018), a decision on cell site location information, reduces the relevancy of *Carter* and *Lyall*.

Defendant argues that the Court should follow the Ninth Circuit's decision in *United States v. Nerber*, 222 F.3d 597, 604 (9th Cir. 2000), which distinguished *Carter*. But the Court finds this case to be much more like *Carter* than *Nerber*. Like the defendants in *Carter*, Defendant in this case visited the Residence briefly, to conduct a drug transaction, with no apparent prior connection to the co-defendant or the Residence. Furthermore, he was observed by the pole camera for only 11 minutes and while engaged in publicly-visible activities. In *Nerber*, by contrast, the defendants were invited into a hotel room by informants working for the government and later were left alone in the hotel room without knowledge that they were being recorded by a concealed video camera. 222 F.3d at 599. The Ninth Circuit looked to the degree of the intrusion in determining whether the defendants had a reasonable expectation of privacy. *Id.* at 602-03. It held that although the defendants had no reasonable expectation of privacy while the informants were in the room, they gained such a reasonable expectation once the informants left the room, given the severe nature of the government's intrusion:

> ***4** We also agree with the district court, however, that once the informants left the room, defendants' expectation to be free from hidden video surveillance was objectively reasonable. When defendants were left alone, their expectation of privacy increased to the point that the intrusion of a hidden video camera became unacceptable. People feel comfortable saying and doing things alone that they would not say or do in the presence of others. This is clearly true when people are alone in their own home or hotel room, but it is also true to a significant extent when they are in someone else's home or hotel room. Even if one cannot expect total privacy while alone in another person's hotel room (i.e., a maid might enter, someone might peek through a window, or the host might reenter unannounced), this diminished privacy interest does not eliminate society's expectation to be protected from the severe intrusion of having the government monitor private activities through hidden video cameras.

Id. at 604.

This case is different. Defendant was not videotaped in a private setting where he thought he was alone. The only video surveillance of Defendant occurred while he was in full public view, arriving at the Residence, entering the garage, and departing. No surveillance occurred while he was in the

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garage. There simply is no intrusion in this case comparable to *Nerber*.

Because the Court finds that Defendant had no reasonable expectation of privacy at the Residence, Defendant cannot assert a Fourth Amendment violation based on the pole camera's surveillance of the Residence.

IT IS ORDERED that Defendant's motion to suppress (Doc. 91) is **denied.**

Excludable delay pursuant to U.S.C. § 18:3161(h)(1)(D) is found to run from 9/4/2019.

All Citations

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United States District Court, S.D. West Virginia,
Charleston Division.

UNITED STATES of America, Plaintiff,
v.
Aurelius EDMONDS, Defendant.

CRIMINAL ACTION NO. 2:18-cr-00225-01
|
Signed 02/05/2020

Attorneys and Law Firms

Joshua C. Hanks, U.S. Attorney's Office, Charleston, WV, for Plaintiff.

MEMORANDUM OPINION AND ORDER

IRENE C. BERGER, UNITED STATES DISTRICT JUDGE

***1** The Court has reviewed the *Defendant's Motion to Suppress and Exclude the Contents of the Fruits of Pole Camera Surveillance in this Case, Cell Site Surveillance, Cell Phone Searches, and State and Federal Title III Wiretaps* (Document 636), filed by Defendant Aurelius Edmonds. The Defendant seeks to suppress "the contents of any electronic surveillance, and any and all fruits of all pole camera surveillance in this case, all cell site surveillance, all cell phone searches, all pen register and trap and trace [PRTT], all latitude and longitude data (geolocation information), and all state and federal Title III wiretaps in this matter." (Mot. 636 at 1.) He further seeks to suppress the fruits of all searches on the residences at 1008 18th Street and 2126 Liberty Street and his cell phones, as well as the residences and mobile devices of any other co-defendant.

He argues that the Title III applications were insufficient on their face and were based on illegally acquired information, and that the PRTT geolocation and cell site searches were authorized under the same inadequate affidavits. He contends that some evidence in the case was gathered through state Title III wiretap applications, unsupported by affidavits, and that unlawfully acquired evidence contributed to the basis of the federal wiretap applications. He further challenges the qualifications of the agents involved in reviewing and monitoring the intercepts.

He argues that much of the evidence in this case, including evidence used to support the Title III application, was derived from the warrantless use of pole cameras placed at the residences of Mr. Rhodes, Mr. McGuirk, Mr. Hughes, Mr. Hopkins, and Mr. Edmonds. (citing *U.S. v Moore-Bush*, 381 F.Supp.3d 139 (2019)) (D. Ma.) (finding pole cameras require a warrant if being used as an investigative tool rather than general guard against crime). In addition, Mr. Edmonds contends that the wiretap was improper because it was not necessary, and normal surveillance and investigation techniques could have exposed the (alleged) crime. He argues that the wiretap collected information beyond the scope of the application. In addition, he contends that the wiretap applications for August 13, 2018 and September 10, 2018 failed to properly recite the previous court-ordered interceptions, and thus the evidence gathered should be suppressed. Finally, he contends that his warrantless arrest was without probable cause, and any evidence derived therefrom should be suppressed.

Mr. Edmonds requests that the Court hold a hearing, suppress the evidence described in the motion, and dismiss the charges against him.

The Court has also reviewed the *United States Response to Motion to Suppress and Exclude the Contents of the Fruits of Pole Camera Surveillance in This Case, Cell Site Surveillance, Cell Phone Searches, and State and Federal Title III Wiretaps* (Document 668), together with the attached exhibits and separately filed sealed exhibits. The United States urges the Court to disregard the Defendant's arguments regarding an alleged state court wiretap order, a warrantless search of Mr. Edmonds' residence on 18th Street in Parkersburg, and a purportedly warrantless search of a residence on Liberty Street in Parkersburg. It contends that there was no state wiretap order and all wiretap evidence in this case was collected pursuant to federal court orders, that the 18th Street residence was not searched, and that the Liberty Street residence was searched pursuant to a valid warrant.

***2** The United States further contends that each warrant was supported by probable cause and contained all required information, as to both wiretap applications and affidavits and warrants for searches of residences and electronic devices. In addition, the United States argues that the pen register trap and trace devices were authorized under the wiretap orders. It argues that Fourth Circuit precedent permits use

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of pole cameras without a warrant under the open-fields doctrine. It notes that the Defendant failed to set forth specific deficiencies in the wiretap affidavits. The United States contends that the wiretap applications adequately set forth evidence supporting the Court's finding of necessity, properly recited previous wiretap orders in the case, and that the interception remained within the authorized scope.

Finally, the United States argues that Mr. Edmonds' warrantless arrest was supported by probable cause, and notes that a criminal complaint and warrant were issued the day after his arrest. It again notes that the Defendant failed to identify specific deficiencies.

In addition, the Court has reviewed the *Defendant's Reply to the Government's Response to the Defendant's Motion to Suppress* (Document 704) and attached exhibits. [1] The Defendant contends that, contrary to the United States' representation, state electronic intercepts were used to investigate Michael Rhodes in February 2018, and the information derived from those intercepts contributed to the federal wiretap application. He contends that the state electronic interception warrant was deficient, and tainted information from that warrant began the chain of events leading to each federal wiretap application, tainting those wiretaps. He further argues that "one or more people handling the interception were not qualified." (Reply 704 at 3.)

1 Reply briefs for pretrial motions, including motions to suppress and motions in limine, are not contemplated by the Local Rules of Civil Procedure for this district. In addition, the reply brief in this instance contains numerous arguments presented for the first time, depriving the United States of the opportunity to address those arguments in its response. The Court has considered the arguments contained in the reply brief in order to ensure a fair trial. However, the Defendant's counsel would be well-advised to familiarize herself with the applicable rules prior to trial.

Mr. Edmonds further contends that the facts asserted in the August 13, 2018 wiretap application and affidavit were insufficient to support a probable cause finding because there was no direct evidence of criminal activity, the alleged drug activity discussed in intercepted calls was "only a theory," meeting and communications with others under investigation did not provide direct evidence of crimes, and surveillance of a vehicle does not confirm whether and when Mr. Edmonds was in the vehicle. (Reply 704 at 3-5.) He also presents additional argument regarding alternative investigative methods that he believes would have been successful without the need for a wiretap.

A. Physical Searches and Arrest

The Defendant's bare, conclusory allegations that the searches of residences, [2] cell phones, and searches derivative of his arrest were not supported by probable cause do not contain sufficient detail to warrant a hearing. The motion does not permit either the United States or the Court to meaningfully address the motion or prepare for a hearing, as it does not identify any specific deficiency or area of potential factual dispute. To the extent the motion argues that the arrest was not supported by probable cause on the same grounds that it contends that the wiretaps were not supported by probable cause, the Court incorporates its findings and reasoning addressing the wiretaps. Accordingly, the motion to suppress as to those searches will be denied.

2 Given the United States' representation that the 18th Street residence was not subject to a search, a motion to suppress evidence from such a search is moot.

B. Pole Cameras

***3** Law enforcement used pole cameras to surveil the area outside residences used by certain defendants and individuals investigated in this matter. Evidence from the warrantless pole cameras, in turn, was used to help establish probable cause for wiretap applications. Mr. Edmonds relies on a recent district court decision from Massachusetts to argue that the use of pole cameras requires a warrant. He does not cite precedent from within the Fourth Circuit.

The Court does not find the analysis in *United States v. Moore-Bush* to be persuasive. 381 F. Supp. 3d 139 (D. Mass. 2019), *as amended* (June 4, 2019). Long-standing Supreme Court precedent establishes "a two-part inquiry" into whether the Fourth Amendment provides protection against a challenged search: "first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *Smith v. Maryland,* 442 U.S. 735, 740 (1979)). In *Ciraolo*, the Supreme Court held that there was no reasonable expectation of privacy in the airspace above a residence, where officers used an airplane to discover marijuana plants in the fenced backyard of a home. *Id.* at 213-14. *Moore-Bush* relies on a Supreme Court decision holding that a warrant was required to obtain cell phone location records that

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tracked an individual's movements over an extended period. *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018) (finding an invasion of "Carpenter's reasonable expectation of privacy in the whole of his physical movements"). However, the Supreme Court in *Carpenter* expressly stated that its opinion did not "call into question conventional surveillance techniques and tools, such as security cameras." *Id.* at 2220.

Mr. Edmonds does not contend that the pole cameras utilized in this case were able to record or observe any area not visible to the public. The only specific evidence gathered by pole camera footage that Mr. Edmonds identifies and challenges is footage of vehicles coming and going from the residences —something that can be observed by any neighbor, passer-by, or officer physically surveilling the area. *United States v. Adams*, No. 3:08-CR-77, 2011 WL 13161193, at *5 (N.D.W. Va. Feb. 23, 2011) (finding no warrant requirement for use of a pole camera that recorded the view of a public waiting room that could be seen from the parking lot). The Court declines to adopt the Defendant's proposed blanket rule that a warrant is required for use of a pole camera placed in a public location with a view available to the public. Because the Defendant has identified no facts suggesting that the pole camera in this case recorded areas or behavior over which he possessed a reasonable expectation of privacy, the motion to suppress the pole camera footage will be denied.

C. Wiretap

Mr. Edmonds alleges generally that the wiretap applications were "based on illegally acquired information, lacked sufficient probable cause, and the communications were illegally intercepted." (Mot. 636 at 4.) The only specific "illegally acquired information" cited consists of state Title III interceptions and pole cameras. The wiretap applications and affidavits do not contain any reference to interceptions acquired through state wiretaps, and the United States indicates that there were no such wiretaps.[3] The wiretap applications at issue were approved without relying on any state Title III interceptions, and so the Court finds no merit to the motion to suppress. Likewise, the Court has found that no warrant was required for the use of pole cameras, and evidence garnered from pole camera footage and included in the wiretap applications was therefore not illegally obtained. Mr. Edmonds relies in part on the same arguments as co-Defendant Terrence McGuirk in challenging the probable cause of the wiretap applications. The Court has issued separate orders denying Mr. McGuirk's motions and incorporates those orders by reference herein.

3 The Defendant attached an "Order Authorizing Electronic Interception pursuant to West Virginia Code § 62-1-F-1 et. seq." to his reply brief. The "electronic interception" described in that code section relates to wires worn by officers and informants, rather than the type of interception of electronic communications contemplated by federal Title III wiretaps. The federal Title III application and affidavit references communications recorded by a confidential informant that may have been authorized by this order.

***4** In his reply brief, he contends that the evidence relied upon to connect him to the crimes at issue and to support the issuance of the order authorizing interception of his communications was insufficient. The August 13, 2018 application and affidavit detail evidence that Mr. Edmonds was involved in supplying substantial quantities of methamphetamine to other alleged conspirators. The application and affidavit recount a recorded conversation in which Mr. Edmonds discusses his travel plans and the progress of a drug transaction, including discussion of whether he should stay to get the other half of the drugs they intended to purchase, or accept half and get half of Mr. McGuirk's money back. In another recorded call, Mr. McGuirk requests additional drugs from Mr. Edmonds and they discuss pricing. In a call two days later, Mr. Edmonds tells Mr. McGuirk that he underpaid by $990, and Mr. McGuirk promises to get the money to him shortly. Context from the surrounding investigation, including other calls and cooperating witness statements, provides clarity where Mr. McGuirk and Mr. Edmonds use coded or vague language rather than explicitly identifying the drugs and quantities involved. In addition, officers observed Mr. Edmonds' vehicle leaving Mr. McGuirk's residence on July 31, 2018. Given the other evidence, including wire transfers, recorded calls, and statements from cooperating witnesses, of a conspiracy to purchase large quantities of methamphetamine for distribution in the Parkersburg area, the phone calls involving Mr. Edmonds are sufficient to establish probable cause to approve the Title III application as to the telephone associated with him.

The September 10, 2018 application and affidavit recount calls from Mr. Edmonds' phone (Subject Telephone 9) that had been intercepted pursuant to the August wiretap, including discussions of large drug transactions, pricing, payment, and transportation of substantial drug quantities. In

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addition, communications between other wiretapped phones and additional phones used by Mr. Edmonds both establish that Mr. Edmonds was using those phones and provide additional evidence of his involvement in drug transactions, including transportation of substantial drug quantities into this region. Those calls, together with the other evidence providing additional context for the alleged offenses and Mr. Edmonds' role, are sufficient to establish probable cause.

Mr. Edmonds also challenges the assertions contained in the wiretap applications as to necessity. 18 U.S.C. § 2518 governs the interceptions of wire, oral, and electronic communications. That provision requires that wiretaps be authorized in advance by a judge and requires the presentation of specified information.

> In order to issue a wiretap, a judge must determine, on the basis of the application for the wiretap, that probable cause exists to believe that (1) an individual is committing, has committed, or is about to commit an offense enumerated in 18 U.S.C. § 2516; (2) particular communications concerning that offense will be obtained by the wiretap; and (3) the target facilities will be used in connection with the offense. The trial judge must also determine (4) the necessity for the wiretap—that is, normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or appear to be too dangerous.

United States v. Sellers, 512 F. App'x 319, 328 (4th Cir. 2013) (unpublished) (internal citations omitted).

"While the government cannot discharge its burden [to show the necessity of a wiretap] with bare conclusory statements that normal techniques would be unproductive or mere boilerplate recitation of the difficulties of gathering usable evidence, it is not required to show that other methods have been wholly unsuccessful, or that it has exhausted *all* possible alternatives to wiretapping." *United States v. Smith*, 31 F.3d 1294, 1297–98 (4th Cir. 1994) (internal quotation marks, punctuation, and citations omitted). "Although wiretaps are disfavored tools of law enforcement, the Government need only present specific factual information sufficient to establish that it has encountered difficulties in penetrating the criminal enterprise or in gathering evidence such that wiretapping becomes reasonable." *United States v. Wilson*, 484 F.3d 267, 281 (4th Cir. 2007) (internal quotation marks, punctuation, and citations omitted).

The wiretap applications in this case detailed the traditional investigation methods used, including pole cameras, surveillance, controlled transactions, and use of confidential informants. The affidavits indicate that confidential informants and witnesses did not have access to all members of the conspiracy, particularly individuals more closely connected with suppliers, and could not safely seek greater access or ask questions that would provide more information about the supply chain. Drug transactions did not take place in public locations subject to physical surveillance, and meeting locations changed regularly. Some members of the conspiracy regularly switched vehicles and even residences, reducing investigators' ability to effectively use physical surveillance, GPS tracking devices, or trash pulls. Arrests of lower-level individuals or customers triggered some alleged conspirators to switch cell phones, and those arrested were generally uncooperative with investigators. Telephone calls monitored through the use of confidential informants or previously approved wiretaps revealed that transactions were regularly arranged in phone calls or text messages.

***5** The Court has carefully considered the evidence of necessity presented in each application, both at the time of the applications and in consideration of this motion. The Court finds that the applications adequately set forth facts specific to the case that establish the wiretaps were necessary to accomplish the goals of the investigation, including identifying individuals involved in importing drugs to this region and intercepting those drugs. The Defendant's motion to suppress does not set forth facts that either call into question the assertions contained in the wiretap affidavits or that negate the necessity finding. Therefore, the motion to suppress the wiretaps based on the asserted lack of necessity will be denied.

The Defendant further argues that the 8-13-2018 and 9-10-2018 wiretap applications and affidavits "fail to properly recite the previous court-ordered interceptions in the case." (Mot. 636 at 12.) A review of those applications

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and affidavits reveals that they contain a recitation of the previous court-ordered interceptions. Similarly, contrary to the Defendant's assertions, each of the wiretap applications and affidavits properly identify the law enforcement officer and government official responsible for the applications. The assertion that "one or more people handling the interception" were not qualified relies on speculation without additional specific factual allegations regarding either the process or the individuals involved. Thus, the Defendant's motion to suppress on that basis should also be denied.

D. PRTT and Geolocation Data

The wiretap applications include requests for authorization to collect pen register and trap and trace data, as well as geolocation data. The Defendant does not identify specific deficiencies as to the probable cause showing contained in those requests, which were approved by the Court. To the extent the Defendant(s) have not been provided with the court authorizations for collection of this material, the United States has indicated it will promptly provide those documents. Accordingly, the motion to suppress will be denied as to the PRTT and cell phone location data. [4]

4 Should the Defendant identify *specific* evidence that he believes, after requesting the relevant court authorizations from the United States, was collected without authorization, he may file a supplemental motion as to that specific evidence.

CONCLUSION

The Court further finds that the Defendant has not made a preliminary showing that information contained in any warrant or wiretap application was deliberately false or offered with reckless disregard for the truth, and so no hearing is required. *Franks v. Delaware*, 438 U.S. 154, 171–72 (1978).

Wherefore, after thorough review and careful consideration, the Court **ORDERS** that the *Defendant's Motion to Suppress and Exclude the Contents of the Fruits of Pole Camera Surveillance in this Case, Cell Site Surveillance, Cell Phone Searches, and State and Federal Title III Wiretaps* (Document 636) be **DENIED**.

All Citations

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Pennsylvania.

UNITED STATES of America
v.
Randee GILLIAM, Dorian Gilliam, Lamont Wright, Eric Campbell and Frederick Ellis, Defendants.
United States of America
v.
Myrene Gilliam, Defendant.

Nos. 02:12–cr–93, 02:13–cr–235.
|
Signed Sept. 4, 2015.

OMNIBUS OPINION AND ORDER RE: DEFENDANTS' PRETRIAL MOTIONS

TERRENCE F. McVERRY, District Judge.

***1** These related cases arise from a lengthy investigation of an alleged large/ significant cocaine conspiracy. Presently before the Court for disposition are numerous pre-trial motions which have been filed by the remaining Defendants. [1] (Criminal Case No. 12–93, ECF Nos. 389, 428, 446, 532, 533, 538–542, 544–546, 547, 549, 614, 669, 674, 676,678, 680, 682685, 689; Criminal Case No. 13–325, ECF Nos. 29–35). The government, with the Court's permission, filed an omnibus response to the motions of Defendants, and has submitted an appendix filed under seal. No remaining Defendant has filed a reply. The motions are now fully briefed and ripe for disposition. The motions to suppress evidence related to a search and seizure of an Avis rental car on March 10, 2012 (ECF Nos. 443, 458, 684, 700) will be addressed in a separate opinion.

1 Defendants John Saban, Sr., Genaro Coleman, Courtney Wallace, Arlen Smith and Kevin McKinzie have heretofore pled guilty.

Factual and Procedural Background

The charges in this case stem from a lengthy investigation of cocaine trafficking which allegedly involves a Pittsburgh, Pennsylvania distribution ring, an Atlanta-based source of supply, and express mail packages to/from Las Vegas, Nevada. The investigation included, among other techniques: surveillance (including a pole camera), controlled purchases of drugs, Court-sanctioned Title III wiretap intercepts of cellular telephones, a search of a Fed Ex package pursuant to a search warrant, a search of the home of Defendant Ellis pursuant to a warrant, and a "walled-off" warrantless stop of an Avis rental car.

On April 10, 2012, a grand jury returned a one-count Indictment in Criminal Case No. 12–93, which charged ten (10) named Defendants with conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine from July 2011 through March 20, 2012. On November 8, 2012, the grand jury returned a 4–count Superseding Indictment. In addition to re-asserting the cocaine conspiracy in Count One, the Superseding Indictment charged Defendants Randee Gilliam, Dorian Gilliam and John Saban in Count Two with conspiracy to commit money laundering from July 2011 through March 20, 2012. [2] This case was originally assigned to the Honorable Judge Nora Berry Fischer. On April 2, 2015, the case was re-assigned to this member of the Court. On August 29, 2013, the grand jury returned a two-count indictment in Criminal No. 13–235, which charged Myrene Gilliam with participation in the same cocaine and money laundering conspiracies set forth in Criminal Case No. 12–93.

2 Counts Three and Four asserted firearms charges against Defendants who have pled guilty.

Legal Background

The principles of law governing an alleged drug conspiracy can be difficult to grasp. The Third Circuit Model Jury Instructions regarding the crime of "Conspiracy" illustrate the vast scope of the liability to which even a minor or tangential member may be exposed. "Conspiracy" is a criminal offense separate and apart from the underlying drug possession/ distribution offenses that were the alleged objectives of the conspiracies in this case. It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they do not ever actually achieve their objective.

***2** A conspiracy is a type of criminal partnership. In order to establish the crime of conspiracy to distribute and possess with intent to distribute a controlled substance, the jury in this

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case will be instructed that the government must prove each of the following elements beyond a reasonable doubt:

1. That two or more persons agreed to distribute and possess with the intent to distribute a controlled substance;

2. That a Defendant was a party to, or member of, that agreement; and

3. That a Defendant joined the agreement or conspiracy knowing of its objective to distribute and possess with the intent to distribute a controlled substance and intending to join together with at least one other alleged conspirator to achieve those objectives; that is, that said Defendant and at least one other alleged conspirator shared a unity of purpose and the intent to achieve those objectives.

The government must prove beyond a reasonable doubt that two or more persons knowingly and intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve the overall objective of the conspiracy. The government does *not* have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The government also does *not* have to prove that all the members of the conspiracy directly met, or discussed among themselves their unlawful objective, or agreed to all the details, or agreed to what the means were by which the objective would be accomplished. The government is *not* required to prove that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known to one another. What the government must prove beyond a reasonable doubt is that two or more persons in some way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective.

The government must prove that each Defendant knew the goals or objectives of the agreement or conspiracy and voluntarily joined it during its existence, intending to achieve the common goals or objectives and to work together with the other alleged conspirators toward those goals or objectives. However, the government does *not* have to prove that a Defendant knew everything about the conspiracy or that he/she knew everyone involved in it, or that he/she was a member of the conspiracy from the beginning. The government also does *not* have to prove that he/she played a major or substantial role in the conspiracy. On the other hand, evidence which reveals that Defendant only knew about the conspiracy, or only kept "bad company" by associating with members of the conspiracy, or was only present when it was discussed or when a crime was committed, is not sufficient to prove that he/she was a member of the conspiracy even if he/she approved of what was happening or did not object to it.

***3** The acts or statements of *any* member of a conspiracy are treated as the acts or statements of *all* the members of the conspiracy, if these acts or statements were performed or spoken during the existence of the conspiracy and to further the objectives of the conspiracy. Therefore, a jury may consider as evidence against a Defendant any acts done or statements made by *any* member of the conspiracy, during the existence of and to further the objectives of the conspiracy. The jury may consider these acts and statements even if they were done and made in a Defendant's absence and without his/her knowledge.

There are different statutory maximum penalties for offenses involving different quantities of cocaine: (20 years if the quantity is less than 500 grams; 40 years if the quantity is more than 500 grams but less than 5 kilograms; and life imprisonment if the quantity is more than 5 kilograms). [3] Therefore, the government must prove the amount of cocaine involved in the alleged conspiracy beyond a reasonable doubt. However, it is the amount of cocaine involved in the *entire* conspiracy charged—not the amount attributable directly to any particular individual Defendant—that must be so proven. *United States v. Phillips,* 349 F.3d 138, 143 (3d Cir.2003), *vacated and remanded on other grounds sub nom., Barbour v. United States,* 543 U.S. 1102 (2005). Once the jury makes a finding as to the drug quantity attributable to the conspiracy as a whole, the sentencing judge must determine, by a preponderance of the evidence, the drug quantity attributable individually to each convicted Defendant. *Id.* If a Defendant is convicted of conspiracy, he/she is responsible for the quantity involved in the entire conspiracy, not just the quantity of drugs with which he/she was individually involved. *United States v. Barndt,* 2013 WL 3929041 at *3 (3d Cir. July 31, 2013) (non-precedential). *See generally United States v. Claxton,* 685 F.3d 300 (3d Cir.2012) (discussing whether evidence was sufficient to prove drug conspiracy).

3 Different statutory mandatory minimum penalties also apply.

Legal Analysis

With that background, the Court now turns to the pending motions of the Defendants. The Court has elected to largely follow the "grouping" methodology employed by the government in its Omnibus Response as the most efficient and easiest to follow, for the convenience of all concerned. Certain defense motions are addressed in more than one section of this opinion. *See, e.g.,* Omnibus Motion of Lamont Wright (ECF No. 389).

1. General Discovery Motions

Discovery in a criminal case is far different from that in a civil case. The government's obligation to make available pretrial discovery materials is governed primarily by Rule 16 of the Federal Rules of Criminal Procedure. Beyond Rule 16, the Jencks Act, and *Brady v. Maryland,* 373 U.S. 83 (1963), and their progeny, however, a criminal defendant has no general constitutional right to pretrial discovery. *Weatherford v. Bursey,* 429 U.S. 545, 559 (1977). The rights conferred by rule, statute, and case law cannot be used to compel the United States to disclose the minutia of its evidence, trial strategy, or investigation. *United States v. Fiorvanti,* 412 F.2d 407, 411 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969). The Third Circuit Court of Appeals has recognized that discovery in criminal cases is limited to those areas listed in Federal Rule of Criminal Procedure 16(a)(1), "with some additional material being discoverable in accordance with statutory pronouncements and the due process clause of the Constitution." *United States v. Ramos,* 27 F.3d 65, 68 (3d Cir.1994). Generally, these other areas are limited to the Jencks Act and materials available pursuant to the *Brady* doctrine. *Id.* The Court appreciates, and in some circumstances shares, the frustration of the Defendants with these discovery limitations.

***4** At the outset, the Court notes that the government has repeatedly acknowledged its obligations under *Brady* and its progeny, *Giglio,* Federal Rules of Criminal Procedure 12 and 16, and the Jencks Act. The government has also made the following representations: (1) that it is willing to cooperate with any reasonable request of Defendants; (2) that it is unaware of any exculpatory *Brady* material pertaining to Defendants; (3) that it will voluntarily turn over Jencks Act materials in its possession at least one week prior to trial; (4) that it will turn over any impeachment materials at least one week prior to trial so that defense counsel can effectively cross-examine government witnesses; (5) that it has already provided copies of reports of relevant scientific tests and will provide a written summary of any expert testimony at least 14 days prior to trial; (6) that it will provide any *Brady* impeachment material as to each trial witness at least two weeks prior to trial; (7) that it will preserve the rough notes taken by agents in accordance with *United States v. Ammar,* 714 F .2d 238 (3d Cir.1983); (8) that at least two weeks prior to trial it will inform Defendants of the general nature of any specific bad act evidence it will seek to introduce at trial pursuant to Fed.R.Crim.P. 404(b) and 609 and that it has already provided copies of their respective criminal records; and (9) that it will provide redacted copies of the Presentence Investigation reports ("PSI") of cooperating witnesses at least one week prior to trial. The Court is confident that the government is well aware of its continuing duty to provide material to Defendants, and that it will faithfully discharge its duty without "tacking too close to the wind." *Kyles v. Whitley,* 514 U.S. 419, 439 (1995).

The government also represents that it has already disclosed substantial amounts of evidence in this case to Defendants, including written and recorded statements of Defendants, copies of all of the wiretap intercepts, copies of the Applications, Affidavits and Court Orders pertaining to the wiretap intercepts, case photos, pen register data, copies of agent reports and lab reports. At least two weeks prior to trial, the government will provide defense counsel with a list of the wiretap calls it intends to use in its case-in-chief. Similarly, the government notes that its physical evidence has long been available for review and it has invited defense counsel to meet with and question the government agents regarding their clients' alleged roles in the conspiracy.

The Court will now address the various categories of information sought by one or more of the remaining Defendants.

a. Early Disclosure of Jencks Act Materials

Defendants seek early disclosure of Jencks Act materials. The Jencks Act, 18 U.S.C. § 3500, requires the government to provide the defense with statements of witnesses that the government intends to call *at trial.*[4] The government has no duty to make an earlier disclosure. The government recognizes that evidence which would tend to impeach the testimony and/or the credibility of a witness must be turned over in advance so that defense counsel is able to effectively cross-examine that witness. Moreover, the government recognizes that strict compliance with the Jencks and *Brady* time limits could result in delay during the trial. Thus, the government has represented that impeachment materials relating to its trial witnesses will be provided at

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least one week prior to trial. Given the potential scope of this trial, the Court encourages the government to provide Jencks materials at least fourteen (14) days prior to trial, although the Court will not require the government to do so. Accordingly, these motions of Defendants (Criminal Case No. 12–93, ECF Nos. 389 § F, 539, 549, Criminal Case No. 13–235, ECF No. 30) are **DENIED.**

4 The government is reminded of the mandate from our appellate court that in gathering potential Jencks Act materials "prosecutors have an obligation to make a thorough inquiry of all enforcement agencies that ha [ve] a potential connection with the[ir] witnesses." *United States v. Risha,* 445 F.3d 298, 304 (3d Cir.2006) (*citing United States v. Thornton,* 1 F.3d 149, 158 (3d Cir.1993)). *See also United States v. Reyeros,* 537 F.3d 270, 281 (3d Cir.2008).

b. *Brady* Exculpatory Material

***5** Defendants request disclosure of all material and information that may be favorable to them on the issues of guilt and/or punishment. Defendants correctly point out that this information must be viewed cumulatively. As noted *supra,* the government has represented that it accepts its obligations under *Brady,* but is not aware of any exculpatory or *Brady* material pertaining to any Defendant. Accordingly, these motions of Defendants (Criminal Case No. 1293, ECF Nos. 389 § E, 674, 675) are **DENIED WITHOUT PREJUDICE .**

c. Law Enforcement Rough Notes

Defendants have sought preservation of the "rough notes" taken by law enforcement agents during their investigations. The government acknowledges its obligation to preserve such rough notes. *United States v. Ramos,* 27 F.3d 65, 68–69 (3d Cir.1994). To the extent that Defendants have also sought disclosure of the rough notes, the government objects to disclosure. The rough notes of law enforcement agents generally are not discoverable unless those notes, pursuant to Fed.R.Crim.P. 16(a)(1)(A), constitute the substance of oral statements of a defendant which the government intends to offer into evidence at trial, which statement was given in response to interrogation by a person then known by the defendant to be a government agent. *See United States v. Fischbach and Moore, Inc.,* 576 F.Supp. 1384, 1390 (W.D.Pa.1983).

In accordance with the foregoing, the motions (Criminal Case No. 12–93, ECF Nos. 389 § D, 532, Criminal Case No. 13–235, ECF No. 31) are **GRANTED IN PART** as to the preservation of such notes and **DENIED IN PART** as to disclosure of such notes to Defendants.

d. Witness List

Defendants seek early disclosure of the government's anticipated trial witnesses. The government objects to any expansion of its discovery obligations beyond its applicable legal requirements. The government has articulated a particularized concern regarding premature disclosure of its witnesses in this case, given the scale and scope of the alleged conspiracy. The government is not obliged to provide a witness list in a non-capital case except in conformity with the Jencks Act, which requires the government to provide the defense with statements of witnesses that the government intends to call *at trial.* The government recognizes that strict compliance with the Jencks and *Brady* time limits could result in delay and has represented that impeachment materials relating to its trial witnesses will be provided at least one week prior to trial. Although the Court encourages an earlier disclosure, the government will not be required to do so. Accordingly, Defendants' motion (Criminal Case No. 12–93, ECF No. 389 § C) is **DENIED WITHOUT PREJUDICE** to reassert in the context of a specific alleged breach by the government.

e. Miscellaneous Discovery Motion of Defendant Ellis

Defendant Ellis seeks numerous itemized categories of discovery, many of which have been hereinabove addressed. The government has addressed each of the itemized categories of information sought by Ellis. The government contends that: (1) it has fully complied with its discovery obligations (or will do so); and (2) it objects to any efforts to expand its discovery and/or disclosure duties. Defendant Ellis has not articulated any specific violation of the government's duties or its responses to the itemized categories of information. Accordingly, the discovery motion of Defendant Ellis (Criminal Case No. 12–93, ECF No. 538) is **DENIED WITHOUT PREJUDICE** to reassert in the context of any specific alleged breach by the government. The Court notes that all Defendants will have the opportunity to assert appropriately targeted motions in limine.

f. Miscellaneous Discovery Motion of Defendant Campbell

***6** Defendant Campbell also seeks numerous itemized categories of discovery, many of which have been

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hereinabove addressed. The government has addressed each of the itemized categories of information sought by Campbell. As with Defendant Ellis, the government contends that: (1) it has fully complied with its discovery obligations (or will do so); and (2) it objects to any efforts to expand its discovery and/or disclosure duties. In particular, the government has provided details regarding the arrangements for defense counsel to view the pole camera videos. Defendant Campbell has not articulated any specific violation of the government's duties or its responses to the itemized categories of information. Accordingly, the discovery motion of Defendant Ellis (Criminal Case No. 12–93, ECF Nos. 676, 677) is **DENIED WITHOUT PREJUDICE** to reassert in the context of a specific alleged breach by the government.

g. Test Results and Expert Reports

Defendant Myrene Gilliam has requested disclosure of scientific test results and expert reports. As noted above, the government represents that it has previously provided test results, and that summaries of expert testimony will be provided at least two weeks prior to trial. In accordance with the foregoing, the motion of Defendant Myrene Gilliam (Criminal Case No. 13–235, ECF No. 34) is DENIED WITHOUT PREJUDICE to reassert in the context of a specific alleged breach by the government.

h. Motions for Disclosure of Evidence Subject to Suppression

Defendant Ellis asks the Court to require the government to disclose evidence that may be subject to suppression. The government represents that it has already made such disclosures. In accordance with the foregoing, the said motion of Defendant (Criminal Case No. 12–93, ECF No. 541) is **DENIED WITHOUT PREJUDICE** to reassert in the context of a specific alleged breach by the government.

2. Rule 404(b) and 609 Evidence

Defendants have requested the disclosure of evidence of other crimes, wrongs or acts that the government intends to introduce at trial, pursuant to Fed.R.Evid. 404(b) and 609. The government has stated that it has not yet identified the specific "bad act" evidence it will seek to introduce at trial, and notes that it has already provided Defendants with copies of their respective criminal records. In addition, the government has represented that it is aware of its obligation and will provide such evidence at least two weeks prior to trial. Accordingly, Defendants motions (Criminal Case No. 12–93, ECF Nos. 389 § B, 540, 544, 678, 679, 683, Criminal Case No. 13–235, ECF No. 33) are **GRANTED AS UNOPPOSED** in part, in accordance with the government's agreement and representation. To the extent that Defendants seek to exclude Rule 404(b) evidence, those motions are premature and must await the further development of the record at trial. Accordingly, such motions are **DENIED WITHOUT PREJUDICE.** A pretrial hearing is not warranted on this issue.

3. Motion to Designate Recordings to be Used at Trial

***7** Defendant Ellis seeks disclosure of the specific phone calls that will be played at trial. The government represents that such disclosure will be made at least two weeks prior to trial and objects to any earlier disclosure. The Court encourages earlier disclosure but the government will not be required to do so. The Court also notes that no Defendant has raised an audibility-related concerns which might necessitate a *Starks* hearing. In accordance with the foregoing, the motion (Criminal Case No. 12–93, ECF No. 542) is **DENIED WITHOUT PREJUDICE** to reassert in the context of a specific alleged breach by the government.

4. Motion for James Hearing on Admissibility of Co–Conspirator Statements

Defendant Myrene Gilliam moves for a pretrial hearing pursuant to Fed.R.Evid. 104 and 801(d)(2)(E) to determine whether a conspiracy exists such that the government can introduce statements of alleged co-conspirators. *See United States v. James,* 590 F.2d 575 (5th Cir.1979); *Bourjaily v. United States,* 483 U.S. 171, 175 (1987). A *James* hearing is not required in every case, but is within the discretion of the Court. The government contends that such a hearing would be protracted, duplicative of the trial on the merits, is unnecessary, and is a backdoor attempt to obtain premature disclosure of its witnesses. The government argues that the admissibility of co-conspirator statements should be decided at trial.

The Court agrees with the government that a pretrial hearing is not warranted under the facts and circumstances of this case. There is substantial evidence of the existence of a drug conspiracy, as reflected by the guilty pleas of a significant number of the Defendants charged in this case. Moreover, in *Government of Virgin Islands v. Brathwaite,* 782 F.2d 399, 403 & n. 1 (3d Cir.1986), the Court explained that "the prosecution must lay a foundation for the admission of co-conspirator testimony by establishing

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the existence of a conspiracy that included the defendant or defendants," but noted that there is a distinction between the crime of conspiracy and the "coconspirator exception to the hearsay rule set forth in Federal Rule of Evidence 801(d)(2) (E)." In *United States v. Giampa,* 904 F.Supp. 235, 286 (D.N.J .1995), the Court explained: "a practical evidentiary rule has developed whereby a co-conspirator's statement is conditionally admitted into evidence, subject to the Government's obligation to prove the conspiracy's existence and each conspirator's participation therein before the close of the Government's case." "In the event the Government fails sufficiently to connect the defendant to the conspiracy, the "connection up" rule of admitting co-conspirator statements can lead to a mistrial." *Id.* This procedure appears to be eminently practical in this case, and it will be the government's burden to "connect up" each Defendant at trial. Accordingly, the motion for a pretrial *James* hearing regarding the admissibility of co-conspirator statements (Crim. No. 13–235, ECF # 32) is **DENIED.**

5. Motion for Bill of Particulars

***8** Defendant Myrene Gilliam seeks more particular information regarding the alleged conspiracy, and specifically, the date on which the government contends that she joined the conspiracy.

Federal Rule of Criminal Procedure 7(f) provides as follows:

> The Court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Fed.R.Crim.P. 7(f).

A district court has broad discretion in granting or denying a criminal defendant's motion for a bill of particulars. *United States v. Rosa,* 891 F.2d 1063, 1066 (3d Cir.1989). The purpose of a bill of particulars is to inform the defendant of the nature of the charge(s) brought against him or her so that the defendant is able to adequately prepare a defense. *United States v. Addonizio,* 451 F.2d 49, 63 (3d Cir.), *cert. denied,* 40 U.S. 936 (1972). The Court of Appeals for the Third Circuit has instructed that a district court should grant a motion seeking a bill of particulars when an indictment's failure to provide factual or legal information "significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial." *Rosa,* 891 F.2d at 1066. However, a defendant is not entitled to general discovery of the government's case, evidence or witnesses. *United States v. Armocida,* 515 F.2d 49, 54 (3d Cir.), *cert. denied,* 423 U.S. 858 (1975).

A bill of particulars need reveal "only the minimum amount of information necessary to permit the defendant to conduct [her] own investigation." *United States v. Smith,* 776 F.2d 1104, 1111 (3d Cir.1985). In ruling on a request for a bill of particulars, the Court should consider all information that has been disclosed to the defendant in the course of the prosecution, whether or not included in the indictment. *United States v. Kenny,* 462 F.2d 1205, 1212 (3d Cir.), *cert. denied,* 490 U.S. 914 (1972). In this case, Defendants have been provided with the extensive Affidavits in support of the wiretap applications, copies of intercepted calls and the government represents that it has made other ongoing disclosures of evidence.

In exercising its discretion in this case, the Court concludes that a bill of particulars is not warranted. The government has provided substantial pretrial disclosures, the Indictment adequately apprises Ms. Gilliam of the pending charges, and the alleged drug conspiracy is straight-forward and of relatively short duration. Although there are numerous alleged coconspirators, it is not incumbent upon the government to prove the role(s) played by each Defendant. *United States v. Boffa,* 513 F.Supp. 444, 485 (D.Del .1980) (citations omitted). Accordingly, the motion for a bill of particulars (Crim. No. 13–235, ECF # 35) is **DENIED.**

6. Motion to Review PSI's of Cooperating Witnesses

***9** Dorian Gilliam seeks to review the Pre–Sentence Investigation Reports ("PSIs") of all cooperating witnesses. The government represents that it will provide redacted copies of such PSIs to the defense along with the Jencks materials at least one week prior to trial. Personal, non-impeachment information will be redacted prior to this disclosure.

The Court agrees that this is an efficient, practical way to provide legitimate impeachment information to the defense. The Court will authorize disclosure of the redacted PSI

reports to the defense, as represented by the government pursuant to Local Rule 32.1. In accordance with the foregoing, the motion (Crim. No. 12–93, ECF # 533) will be **GRANTED.**

7. Motion to Suppress Evidence From Pole Camera

Defendant Lamont Wright seeks to suppress evidence obtained by the operation of a pole camera that was directed at his home on National Drive. The camera was located on a utility pole across the street, with the knowledge and consent of the utility company. It captured images of the front of Wright's home that were in plain view from the public street, which were transmitted to law enforcement agents.

Although the Court of Appeals for the Third Circuit has not directly ruled on the admissibility of images from a pole camera, the Court of Appeals for the First Circuit addressed this precise issue in *United States v. Bucci,* 582 F.3d 108, 116–17 (1st Cir.2009). The *Bucci* Court held that the defendant had clearly failed to establish that he had an objectively reasonable expectation of privacy. The Court explained:

> An individual does not have an expectation of privacy in items or places he exposes to the public. *See Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("[T]he 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 also California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986). That legal principle is dispositive here. *See Kyllo v. United States,* 533 U.S. 27, 31–33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (noting lawfulness of unenhanced visual surveillance of a home).

Id. at 117. *Accord United States v. Jackson,* 213 F.3d 1269, 1280–81 (10 Cir.2000), *vacated on th other grounds,* 121 S.Ct. 621, ("use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment").

The reasoning in *Bucci* and *Jackson* is compelling. In this case, Lamont Wright cannot establish an objectively reasonable expectation of privacy when the images captured by the pole camera were visible to any person who was located in the public street looking at his home. Defendant's attempt to analogize a pole camera to a GPS device is not persuasive.

In accordance with the foregoing, the motion to suppress the pole camera images (Criminal No. 12–93, ECF # 446) is **DENIED.**

8. Motion to Suppress Fed Ex Package

***10** Randee Gilliam seeks to suppress evidence relating to the seizure of a Fed Ex package on October 6, 2011, which contained $28,980 [5] in United States currency. The search was conducted pursuant to a search warrant.

5 Defendant's motion states that there was $30,000 in the package.

Gilliam raises two arguments: (1) that the affidavit does not explain why the package came to the attention of law enforcement; and (2) that a *Franks* hearing is warranted because the affidavit contains material, false information; namely, that the sender's address does not exist. The government contends, first, that Randee Gilliam has not yet demonstrated that he has standing to challenge the search. In addition, the government contends that the search warrant was supported by probable cause and that there is no need for a *Franks* hearing.

The Court will assume, arguendo, that Gilliam is able to establish standing because his motion to suppress fails on its merits. In order to be entitled to a hearing pursuant to *Franks v.. Delaware,* 438 U.S. 154, (1978), a defendant must make a dual showing: (1) "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit ....," *id.* at 155–56; and (2) that the offending information is "necessary to the finding of probable cause." If the offending information is excluded and probable cause still remains, a *Franks* hearing is not required. *Id.* at 156. *See also United States v. Frost,* 999 F.2d 737, 743 (3d Cir.1993) (reiterating the *Franks* test as a two-part test which requires the defendant to "show both bad faith or reckless disregard existed on the part of the affiant, and that there would have been no probable cause but for the incorrect statement"). As to the first prong of the *Franks* standard, the defendant must make a substantial preliminary showing "of deliberate falsehood or of reckless disregard for the truth ... accompanied by an offer of proof." *Franks,* 438 U.S. at 171. *See United States v. Marranca,* 98 Fed. Appx. 179 (3d Cir.2004) (non-precedential).

In this case, Randee Gilliam argues that the affidavit contains a material, factual falsity. The affidavit prepared by officer

Steven Dawkin states that the package was shipped from "24 5th 8th Street, Pittsburgh, PA 15203." The affidavit further states that this address "does not th th exist" and explained that it is common for narcotic laden parcels to contain such fictitious information. Gilliam contends that the "ship from" address, in actuality, is 24 South 8th Street, Pittsburgh, PA 15203, which is an actual address. Defendant has attached a copy of the Fed Ex label as an exhibit.

The Court concludes that Defendant has failed to establish either prong of the *Franks* test. Upon examination of the Fed Ex label, there is no factual falsity in the affidavit. Contrary to Defendant's contention, the Fed Ex label *does* appear to have a "ship from" address of "24 5th 8th St., Pgh., PA 15203," exactly as stated by officer Dawkin. Even assuming, arguendo, th th that the shipper intended to refer to "South" 8th Street, rather than "Fifth" 8 Street, there is th th absolutely no evidence that any mis-interpretation by officer Dawkin was deliberate or recklessly false. [6] To the contrary, officer Dawkin accurately and fairly reflected the information on the Fed Ex label.

6 The "5" and the "S" are confusingly similar and it would be odd to abbreviate "South" as "Sth" rather than "S." As an aside, the address of "24 South 8th Street, Pittsburgh, PA 15203" also th appears to be fictitious, as the Court cannot locate such an address on Google Maps or the Allegheny County Real Estate website, nor ownership by J. Saban or First Group of any parcels on South 8th Street.

***11** The "materiality" prong of the *Franks* test is intertwined with the probable cause analysis. The affidavit contained more than sufficient information to support a practical, common-sense expectation that contraband or evidence of a crime would be found in the package. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). To wit, even excluding the fictitious "ship from" address, the affidavit explained that the package exhibited numerous indications of narcotics-related activity. Specifically, the package was sent to a drug source city; it was shipped standard overnight; it was dropped off at a Packing shipping company; it was paid for in cash; and it was labeled "Hold at Fed Ex location" so that it could be retrieved in person. The affidavit explained how the use of each of these techniques helps narcotics traffickers to conceal their identities. Most notably, the affidavit explained that a certified narcotic-detecting canine had alerted to the presence of a controlled substance within the parcel.

In summary, the search warrant was issued by the magistrate based on probable cause and Defendant has failed to demonstrate that a *Franks* hearing is warranted or justified. In accordance with the foregoing, the motion to suppress the October 6, 2011 seizure of the Fed Ex package (Criminal No. 12–93, ECF # 685) is **DENIED.**

9. Motion to Suppress Search of 226 Hooks Lane

Defendant Frederick Ellis moves to suppress the results of a search of his primary residence at 226 Hooks Lane, Canonsburg, Pennsylvania on March 26, 2012. The search was conducted pursuant to a search warrant issued by United States Magistrate Judge Robert C. Mitchell. The Application and Affidavit by DEA Special Agent Kevin Black was 96 pages in length. [7]

7 The application covered eight residences, including Hooks Lane, a self-storage unit, and a UPS envelope.

Defendant Ellis has asserted a laundry list from (a) to (l) of boilerplate objections to the validity of the search warrant. Unfortunately, Defendant has not provided any specific discussion to apply these objections to the facts and circumstances of this case. As best the Court can determine, the gravamen of Defendant's argument is that the affidavit fails to provide sufficient details to support the government's belief that Ellis was one of the most significant customers of Lamont Wright; that Ellis purchased kilogram quantities of cocaine; or that there was probable cause to believe that evidence of drug trafficking would be found at 226 Hooks Lane. In addition, Defendant may be contending that the government's information was stale because it references intercepted phone conversations on February 8–9, 2012 and the search was not conducted until March 16, 2012.

The government asserts, first, that Ellis has not met his burden to establish standing to challenge the search. In addition, the government contends that the search warrant was supported by an affidavit which set forth probable cause. The Court will assume, arguendo, that Ellis can establish standing because his motion to suppress fails on its merits.

***12** As an initial matter, the United States Court of Appeals for the Third Circuit has recognized that evidence of drug dealing may be found in a drug dealer's home even if no actual trafficking was observed to have occurred there. *United States v. Whitner,* 219 F.3d 289, 297–98 (3d Cir.2000) (and cases cited therein). Thus, if the affidavit set forth probable cause to believe that Defendant Ellis was engaged in cocaine trafficking, direct linkage to 226 Hooks Lane is not required. *Id. Accord United States v. Stearn,* 597 F.3d 540, 558

(3d Cir.2010) (criticizing District Court's unduly restrictive parsing of *Whitner*).

The information contained within the four corners of the affidavit in this case provides probable cause to believe that 226 Hooks Lane is the primary residence of Defendant Ellis (and Jonice Kushenberry), based on information from a confidential source, property database records and surveillance of Ms. Kushenberry's car parked at that location. The affidavit also provides probable cause to believe that Defendant Ellis is engaged in large-scale cocaine trafficking, including: a description of a three-year investigation that began in February 2009; transcripts of intercepted phone calls and surveillance regarding a cocaine transaction between Ellis and Lamont Wright on February 8, 2012 and Ellis' efforts to evade agents (affidavit pp. 6773); and transcripts of intercepted phone calls between Ellis and Lamont Wright regarding another purchase of cocaine the next day, on February 9, 2012, regarding another cocaine transaction (affidavit pp. 73–77). In sum, there was a substantial basis for Magistrate Judge Mitchell to issue the search warrant for 226 Hooks Lane and for agents to rely on that search warrant.

The government did not directly address the staleness argument. If the information in an affidavit is too old (i.e., becomes stale), probable cause may no longer exist. *United States v. Zimmerman,* 277 F.3d 426, 434 (3d Cir.2002). However, there are no "bright line rules" delineating a length of time to determine staleness. Instead, courts must examine the nature of the crime and the type of evidence. *Id.* at 435. Staleness generally requires time periods much greater than two weeks. *United States v. Gorny,* 2014 WL 2860637, at *7 (W.D. Pa. June 23, 2014). The nature of the crime at issue in this case is a large-scale, ongoing cocaine conspiracy that had been under investigation for over three years. Ellis was asserted to be one of Lamont Wright's "most significant customers" in that he purchased "kilogram quantities of cocaine." In that context, the several week gap in time between the intercepted phone calls and surveillance in February 2012 and the execution of the search warrant in March 2012 did not constitute staleness which would defeat the existence of probable cause.

In accordance with the foregoing, the motion to suppress the results of the search at 226 Hooks Lane (Criminal No. 12–93, ECF # 546) is **DENIED.**

10. Motion to Suppress "Statements"

***13** In Section G of his Omnibus Motion, Lamont Wright "by and through her attorney" [sic] seeks to suppress all statements made by the Defendant as violative of *Miranda.* Defense counsel has not provided any recitation of facts or legal analysis in support of this motion. Given the incorrect reference to "her," this motion appears to be a boilerplate "cut and paste" insertion from some other case. Such conduct by counsel falls well below the standards of professionalism expected by this Court. It is counsel's duty to ensure that each motion has a legitimate basis in law and fact.

In accordance with the foregoing, this portion of Wright's omnibus motion (Criminal No. 12–93, ECF # 389, § G) is summarily **DENIED.**

11. Motions to Suppress Wiretap Evidence

There were five Court-ordered Title III wiretap intercepts in this case, involving a total of six target telephones. Defendants seek to suppress all of the evidence obtained by the government through use of the Court-ordered wiretap intercepts at Miscellaneous Nos. 12–4, 124(a), (b), (c) and (d).

The government's initial Application for a wiretap was presented to Judge David S. Cercone of this Court on December 30, 2011. The government sought to intercept communications of John Anthony Saban, Randee Gilliam, Todd Griffin, Toni Griffin, Gregory Lomax, Lamont Wright, and others, on a cellular telephone subscribed to and used by Lamont Wright (Target Phone # 1) for a period of thirty (30) days. The Application was supported by a 49–page Affidavit prepared by DEA Task Force Officer William J. Flaherty. Judge Cercone granted the Application on December 30, 2011 at Misc. No. 12–4.

The Court[8] issued four additional Orders on January 20, 2012, January 31, 2012, February 16, 2012 and March 8, 2012 (Misc.Nos.12–4(a)–(d), respectively) to authorize extensions/expansions of the wiretaps based on followup Applications/Affidavits.[9] By these Orders, the government was authorized to intercept communications with a cellular telephone subscribed to by Frances Saban and used by John Saban (Target Phone # 2), a cellular telephone subscribed to and used by Louis Gilliam (Target Phone # 3), a cellular telephone subscribed to by Ronald Smith and used by John Saban (Target Phone # 4), a prepaid T–Mobile cellular telephone with no subscriber information used by Lamont Wright (Target Phone # 5), and a cellular telephone subscribed to and used by Dorain Gilliam (Target Phone #

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6). The Applications, Affidavits and Court Orders have been provided to Defendants.

8 The January 20, 2012 Order at Misc. # 12–4(a) was issued by Judge Cathy Bissoon.

9 The Affidavit at Misc. No. 12–4(d) was prepared by DEA Special Agent Kevin William Black.

Defendants contend that the wiretaps were obtained in violation of 18 U.S.C. § 2518 and were issued without probable cause, in violation of the Fourth Amendment. In particular, Defendants argue that the Affidavits failed to satisfy the "necessity" requirement because they did not establish a sufficient factual predicate as to why other traditional, less-intrusive law enforcement techniques were not sufficient. Defendants contend that traditional techniques, such as GPS tracking devices, controlled purchases of drugs by confidential informants, interception of packages, surveillance and pen registers had proven effective in this very investigation (as recognized in the Affidavits), while other methods, such as trash pulls, search warrants, offers of immunity, grand jury subpoenas and offers of leniency in exchange for cooperation, were not tried. Defendant Gilliam argues that agents chose to discontinue the use of a confidential source, even though continuation would have led to additional information. Defendants also contend that the "necessity" element was not independently satisfied for each of the successive wiretaps. In addition, Defendants contend that the Applications did not establish probable cause because they contained stale information, relied heavily on the affiant's past experience and contained only vague and conclusory allegations as to the events of this case.

***14** The government contends that its Applications and the underlying Affidavits properly complied with the requirements of the wiretap statute and circuit precedent. *See United States v. Williams,* 124 F.3d 411, 418 (3d Cir.1997). The government points out, correctly, that it is not required to restrict itself to limited goals (such as the conviction of a single defendant), but instead may ambitiously attempt to expand its investigation in an effort to dismantle an entire drug organization. The government contends that this is exactly what happened in this case, as the information obtained by the initial wiretaps enabled agents to expand their investigation and obtain additional evidence and identify other members of the conspiracy. The government further notes that Defendants' challenges to the "necessity" element (on the basis that traditional methods of investigation were effective) is entirely contradictory to Defendants' argument that the affidavits failed to articulate probable cause.

As an initial matter, the Court concludes that it need not conduct an evidentiary hearing on the motions to suppress wiretap evidence. The motions challenge the sufficiency of the information contained within the four corners of the Applications and Affidavits and have been thoroughly briefed. The Court will now address the substance of the parties' respective arguments.

The federal wiretap law, 18 U.S.C. § 2518(1)(c), requires that the affidavit in support of a wiretap application contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." The Court must then determine, on the basis of the application, that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *Id.* § (3)(c). *Williams* outlines a practical and commonsense review, in which the Court may consider affirmations founded in part on the experiences of trained agents. 124 F.3d at 418. In each Order, the Judge expressly concluded that the probable cause and necessity elements were met. The issuing Judge found that the government had adequately demonstrated that normal investigative procedures had been tried with limited success, appeared unlikely to succeed further and/or were too dangerous to attempt.

When a warrant is later challenged, a deferential standard of review is applied in determining whether the issuing judge had a "substantial basis" for issuing the warrant. *United States v. Conley,* 4 F.3d 1200, 1205 (3d Cir.1993); *Illinois v. Gates,* 462 U.S. 213, 237 (1983). Upon review of the Affidavits of DEA Task Force Officer Flaherty and DEA Special Agent Black, this Court concludes that they contain sufficient averments regarding the effectiveness and limitations of traditional techniques during this investigation. The Affidavits explained that traditional techniques had provided considerable intelligence of a wide-spread, ongoing narcotics operation, but had been unsuccessful in discovering the full scope of the operation and the identities of all of the individuals involved. The Affidavits discuss, in reasonable detail, the pros and cons of alternative investigative techniques, including telephone toll/pen register, search warrants, physical surveillance, trash pulls, informants and undercover agents, and grand jury subpoenas. Each of the subsequent Affidavits contained a similarly comprehensive

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discussion of alternative investigative techniques and the need for continued interception and/or initiation of intercepts on additional phones. For example, the original confidential source ("CS") was able to purchase cocaine only from Lamont Wright, but not other suspected members of the conspiracy. In addition, this CS was subsequently arrested in a separate matter and was unable to make addtional purchases because the CS owed Wright a substantial sum of money. Because the group was tight-knit, it was believed that it would be dangerous to attempt to introduce an undercover agent. On numerous occasions, surveillance was evaded and/or provoked suspicion among the targets of the investigation. To evade detection, the targets used coded language and also used multiple different telephones. Thus, the goverment has satisfied the necessity and probable cause prerequisites. In sum, the Court has no difficulty in concluding that each of the wiretap Applications, Affidavits and Court Orders complied with the statutory requirements.

***15** Defendants Randee Gilliam and Lamont Wright challenge the authorization for the wiretaps. Defendant Lamont Wright's motion attached a Declaration of Peter Sprung, an attorney at the Department of Justice ("DOJ"), apparently to support the proposition that the government failed to attach the appropriate Attorney General delegation order and Assistant Attorney General memorandum of authorization to intercept calls from Target Phone # 2 from February 18 to March 8, 2012. These contentions are without merit. From a review of the applications and attachments thereto, it is clear that the government obtained the approvals of the appropriate officials from the Department of Justice and that each wiretap warrant was authorized by an Article III United States District Court Judge. Contrary to Defendant Wright's specific contention, Miscellaneous Order 12–4(c) authorized the interception of calls from Target Phone # 2 for thirty days commencing on February 16, 2012 and the application contained the relevant delegation order and memorandum of authorization. *See* Government Exhibit C.4.

Defendant Randee Gilliam challenges the jurisdiction of the Court to issue the order at Misc. No. 12–4(d) because the phone was not located within the Western District of Pennsylvania. As Defendant recognizes, this Court has jurisdiction if either: (1) the phone is located in this district; or (2) the interception of calls occurs within this district. *United States v. Denman,* 100 F.3d 399, 403 (5th Cir.1996) ("interception includes both the location of a tapped telephone and the original listening post, and [ ] judges in either jurisdiction have authority under Title III to issue wiretap orders.") The four corners of the application and affidavit at Misc. No. 12–4(d) make it clear that the investigation was conducted by law enforcement agents in the Western District of Pennsylvania. *See, e.g.* Affidavit ¶ 3 ("In connection with my work for the DEA, I have worked with federal, state, and local law enforcement officers in the Western District of Pennsylvania."); Affidavit ¶ 6 ("This case is being investigated by the DEA, the Internal Revenue Service (IRS) Criminal Investigations Division, Allegheny County District Attorney's Narcotics Enforcement Team (DANET), Pennsylvania State Police (PSP) and the Pittsburgh Bureau of Police.") The government has represented that the "listening post" was located within the Western District of Pennsylvania at the DEA office in McKees Rocks, Pennsylvania. Defendants have not disputed this representation nor requested an evidentiary hearing on this issue. In any event, the application specifically sought authorization pursuant to 18 U.S.C. § 2518(3) to intercept communications outside of Western Pennsylvania and such authority was expressly granted by Judge Cercone.

Finally, Defendant Wright seeks further wiretap discovery, to wit: (1) copies of all calls recorded pursuant to the wiretaps during the investigation; (2) all "wiretap progress reports"; (3) copies of wiretap recordings placed under seal; and (4) all PEN register and trap and trace orders. In response, the government represents that: as to item (1), all such calls were provided shortly after arraignment; as to (3), there are no recordings under seal; and as to (4), such orders will be made available for review. As to item (2), the government objects that wiretap progress reports are not discoverable. The Court agrees. *See* Fed.R.Crim.P. 16(a)(2); 18 U.S.C. § 2518(9) (Defendant is entitled to the court order(s) and application(s)). Any concerns regarding the sufficiency of the progress reports would not warrant suppression of evidence and should be addressed to the issuing judge. *United States v. Iannelli,* 477 F.2d 999, 1002 (3d Cir.1973), aff'd 420 U.S. 770 (1975).

***16** In accordance with the foregoing, Defendants' motions to suppress the wiretap evidence (Criminal Case No. 12–93, ECF Nos. 428, 431, 545, 547, 614, 615, 669, 671, 680, 682, 689; Criminal Case No. 13–235, ECF No. 29) are **DENIED.**

12. Government's Cross–Motion

The government has made a request for reciprocal discovery subject to disclosure pursuant to Federal Rule of Criminal Procedure 16(b)(1). **The Court ORDERS Defendants to provide the government with the requested reciprocal discovery at least seven (7) days prior to trial.**

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So **ORDERED.**

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Not Reported in F.Supp.3d, 2015 WL 5178197

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United States District Court, E.D. Wisconsin.

UNITED STATES of America Plaintiff,
v.
Orvin KAY Defendant.

Case No. 17-CR-16
|
Signed 08/21/2018

Attorneys and Law Firms

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Edward J. Hunt, The Hunt Law Group SC, Milwaukee, WI, for Defendant.

DECISION AND ORDER

LYNN ADELMAN, District Judge

***1** The government charged defendant Orvin Kay with distribution of Oxycodone. Defendant moved to suppress evidence obtained from a pole camera. The magistrate judge handling pre-trial proceedings recommended that the motion be denied. Defendant objects. My review is de novo. Fed. R. Crim. P. 59(b).

I.

The facts set forth in the magistrate judge's recommendation, which I adopt, are undisputed. As part of their investigation into defendant's alleged drug trafficking activities, agents installed a hidden camera on a utility pole located on a neighbor's property, which they used to monitor defendant's driveway and front yard for 87 days. Agents did not obtain a warrant to install the pole camera. Agents had the ability to zoom and pan the camera, but they rarely did so. Rather, the camera primarily captured defendant's driveway and front yard; his residence was barely visible. The camera did not have infrared capabilities.

Based in part on the information obtained from the pole camera, agents obtained a warrant to search defendant's residence and a criminal complaint and warrant for his arrest. On execution of the search warrant, agents recovered distribution quantities of Oxycodone, and following his arrest defendant made incriminating statements.

II.

Defendant moves to suppress all evidence – direct and derivative – obtained from the pole camera. He argues that use of the camera to continuously surveil his residence constituted a search, for which agents needed a warrant. He analogizes use of the camera to installation of a GPS tracking device, United States v. Jones, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), or the collection of cell-site location information ("CSLI"), Carpenter v. United States, —— U.S. ——, 138 S.Ct. 2206, —— L.Ed.2d —— (2018), which the Supreme Court has held does constitute a search under the Fourth Amendment. See also Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

As the magistrate judge noted, nearly every federal court which has addressed the issue has held that pole camera surveillance of a person's driveway or the exterior of his residence does not violate the person's reasonable expectation of privacy. (R. 149 at 6-7.) As these courts have explained, a person does not have a reasonable expectation of privacy in what he knowingly exposes to the public, even at his own home. California v. Greenwood, 486 U.S. 35, 41, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); see, e.g., United States v. Evans, 27 F.3d 1219, 1228-29 (7th Cir. 1994) (collecting cases finding no legitimate expectation of privacy in driveways and porches visible from a public street); see also California v. Ciraolo, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) ("That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."). Further, the Supreme Court has held that police may use technology to substitute for surveillance they could lawfully conduct themselves. See, e.g., United States v. Knotts, 460 U.S. 276, 282, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in

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this case."). There is accordingly no impediment, courts have concluded, to the police using a camera to make the same kinds of observations as could an officer standing on a public street. [1]

1 Defendant makes no claim that the agents trespassed on his property when they installed the camera. Nor does he claim that the camera recorded events inside his home or otherwise hidden from public view.

***2** Defendant argues that citizens have a reasonable expectation that their homes will not be subject to continuous, long-term video monitoring by law enforcement. He notes Carpenter's admonition against "a too permeating police surveillance," 138 S.Ct. at 2214; the Court's recognition that use of advanced technology to facilitate long-term monitoring may distinguish cases like Knotts, which involved a beeper monitoring a single trip, id. at 2215; and the Court's statement that a "person does not surrender all Fourth Amendment protection by venturing into the public sphere." Id. at 2217 (citing Katz, 389 U.S. at 351-52, 88 S.Ct. 507).

Carpenter was a limited decision, as the Court itself stressed. Id. at 2220. The Court noted that it was confronting "a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals." Id. at 2216. The Court stressed that the technology at issue there permitted law enforcement to track the whole of a person's physical movements, secretly and with little cost and effort. Id. at 2217.

> Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations. These location records hold for many Americans the privacies of life. And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.

Id. at 2217-18 (internal citations and quote marks omitted). The Court further noted that "[w]hile individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." Id. at 2218. Finally, the Court noted:

> [T]he retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States – not just those belonging to persons who might happen to come under investigation – this newfound tracking capacity runs against everyone. Unlike with the GPS device in Jones, police need not even know in advance whether they want to follow a particular individual, or when.
>
> Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may – in the Government's view – call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

Id. After explaining why cell-site data raised these particular privacy concerns, which distinguished prior cases like Knotts, the Court concluded: "Our decision today is a narrow one.... We do not ... call into question conventional surveillance techniques and tools, such as security cameras." Id. at 2220.

***3** Unlike the new technology addressed in Carpenter, "the surveillance here used ordinary video cameras that have been around for decades." United States v. Tuggle, No. 16-cr-20070, 2018 WL 3631881, at *3, 2018 U.S. Dist. LEXIS 127333, at *9 (C.D. Ill. July 31, 2018). Defendant stresses that pole cameras allow constant surveillance over an extended period of time, something agents likely could not accomplish

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physically. It is true that Carpenter distinguished the short-term public tracking approved in previous cases from the long-term surveillance of a person's every move allowed by new technologies like GPS or CSLI. However, "[p]ole cameras are limited to a fixed location and capture only activities in camera view, as opposed to GPS, which can track an individual's movement anywhere in the world." Id. at *10. Pole camera surveillance is thus unlikely to provide the same "intimate window" into the person's life, revealing his "political, professional, religious, and sexual associations." Carpenter, 138 S.Ct. at 2217 (internal quote marks omitted); see United States v. Houston, 813 F.3d 282, 290 (6th Cir. 2016). [2] I accordingly see no basis for revising my previous view that pole camera surveillance of the sort conducted here does not constitute a Fourth Amendment search. See United States v. Tirado, No. 16-CR-168, 2018 WL 1806056, at *4, 2018 U.S. Dist. LEXIS 64379 at *10-12 (E.D. Wis. Apr. 16, 2018); United States v. Aguilera, No. 06-CR-336, 2008 WL 375210, at *1, 2008 U.S. Dist. LEXIS 10103 at *3-5 (E.D. Wis. Feb. 11, 2008). [3] Given this conclusion, I need not address the government's good faith and inevitable discovery arguments.

2 Defendant appears to overstate the nature of the surveillance in this case when he contends that the camera captured "the aggregate of all activities associated with the curtilage of his house over 87 days." (R. 168 at 10.) As the magistrate judge noted, the camera primarily captured defendant's driveway; agents used it to corroborate cell phone records that placed known suspects at the residence, but given the placement and limitations of the camera they were unable to read the license plates of vehicles parked in defendant's driveway. (R. 149 at 2-3.) There is no indication that the camera recorded all activities occurring within the curtilage of defendant's home. In reply, defendant contends that resolution of his motion should not turn on the quality of the results of the surveillance. (R. 170 at 2.) However, the scope of the surveillance permitted by the camera is surely relevant to the Fourth Amendment analysis.

3 Defendant also relies on United States v. Vargas, No. 13-cr-6025, 2014 U.S. Dist. LEXIS 184672 (E.D. Wash. Dec. 15, 2014), but that decision is distinguishable on its facts. The Vargas court stressed that the camera in that case recorded the activities in the defendant's partially fenced, rural front yard; "this is not a public or urban setting." Id. at *34. The camera in this case recorded activities in an urban area in the City of Milwaukee.

III.

THEREFORE, IT IS ORDERED that the magistrate judge's recommendation (R. 149) is adopted, and defendant's motion to suppress (R. 113) is denied.

All Citations

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Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

UNITED STATES of America, Plaintiff,
v.
Dariusz KRAWCZYK, Defendant.

No. CR12–01384–PHX–DGC.
|
July 25, 2013.

ORDER

DAVID G. CAMPBELL, District Judge.

***1** On June 10, 2013, the Court issued an order denying in part and granting in part the motion to suppress filed by Defendant Dariusz Krawczyk. Doc. 82. Defendant has filed a motion requesting that the Court reconsider its order with respect to the constitutionality of the pole camera surveillance and the independence of the magistrates who issued the tracking device warrants. Doc. 85. The Court will deny the motion.

Motions for reconsideration "are disfavored and will be granted only upon a showing of manifest error or new facts or legal authority which could not have been raised earlier with reasonable diligence." *In re Rosson,* 545 F.3d 764, 769 (9th Cir.2008) (quotation marks, brackets, and citations omitted); *see also S.E.C. v. Kuipers,* 399 Fed. Appx. 167, 170 (9th Cir.2010); LRCiv 7.2(g) (1). Mere disagreement with an order is an insufficient basis for reconsideration. *See Ross v. Arpaio,* No. CV 05–4177–PHX–MHM (ECV), 2008 WL 1776502, at *2 (D.Ariz. Apr.15, 2008). Nor should a motion for reconsideration be used to ask the Court to rethink its analysis. *Id.; Nw. Acceptance Corp. v. Lynnwood Equip., Inc.,* 841 F.2d 918, 925–26 (9th Cir.1988.)

Defendant argues that the placement of the pole cameras in places where persons could not sit or stand, in combination with the long-time duration of the surveillance, constitutes a Fourth Amendment violation. Doc. 85 at 2–4. Defendant does not address the high standard governing motions for reconsideration. Defendant raised the argument about the long-term surveillance in his supplement to his motion to suppress (Doc. 55 at 4–5), and the Court addressed and rejected the argument (Doc. 82 at 7). The Court declines to reconsider this argument. *See Motorola, Inc. v. J.B. Rogers Mech. Contractors, Inc.,* 215 F.R.D. 581, 586 (D.Ariz.2003) ("No motion for reconsideration shall repeat in any manner any oral or written argument made in support of or in opposition to the original motion.").

As to the first part of the argument, Defendant contends that the pole camera surveillance in his case is distinguishable from the surveillance in *United States v. Brooks,* 911 F.Supp.2d 836, 841–42 (D.Ariz.2012), and *United States v. McIver,* 186 F.3d 1119, 1125 (9th Cir.1999), and thus the Court erred in relying on those cases. Defendant submits that a person "could not comfortably stand or sit" (Doc. 85 at 4) on the top of a 10 to 12 foot pole or on a roof that has no place for a person to stand (*id* . at 2–3)—the location of the pole cameras in this investigation—but that a person could have stood where cameras were placed in *Brooks* and *McIver.* The Court does not find that *Brooks* and *McIver* are distinguishable on this basis.

Defendant asserts that in *Brooks* "the pole camera was apparently placed in a position where a person could have stood if they chose to" (Doc. 85 at 3), but the Court notes that the pole camera in *Brooks* was "affixed ... to a service pole on theJobing.com Arena." 911 F.Supp.2d at 838. The Court doubts that a person's ability to stand on the service pole in *Brooks* differed in any relevant way from a person's ability to stand where the cameras were located in this investigation, and, in any event, the court in *Brooks* did not consider whether a person could stand where the camera was located.

***2** McIver, as even Defendant acknowledges (Doc. 85 at 3), also did not consider whether a person could stand where the cameras were installed. The location of surveillance cameras is not significant under the *Katz* reasonable expectation analysis in the same way that location matters under the trespass analysis used in *United States v. Jones,* —— U.S. ——, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). *See id.* at 953 (noting that situations involving the transmission of electronic signals without trespass remain subject to the *Katz* reasonable expectation of privacy analysis). Under *Katz,* "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Thus, what was crucial in both *Brooks* and *McIver* was that the activities observed by the cameras were "visible to any passerby [.]" *Brooks,* 911 F.Supp.2d at 843; *see also McIver,* 186 F.3d at 1125–26 ("Illegal activities conducted on government land open to the public which

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may be viewed by any passing visitor or law enforcement officer are not protected by the Fourth Amendment because there can be no reasonable expectation of privacy under such circumstances."). Testimony from the evidentiary hearing established that the pole cameras viewed activities that a person standing at a different vantage point could have also observed. *See* Doc. 81 at 70–72, 74, 77. Accordingly, any expectation of privacy in the areas observed by the pole cameras was not reasonable. *See Florida v. Riley,* 488 U.S. 445, 449–50, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989) ("As a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be[.]' " (quoting *California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986))). [1]

1 The Court agrees with Defendant that the order mistakenly described the fifth pole camera as being "installed at a second residence" (Doc. 82 at 7) as opposed to being installed at a second warehouse location (Doc. 85 at 1–2). The Court's ruling on the pole cameras is unaffected by this error.

In his second argument, Defendant relies on *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), to assert that the magistrates' failure to look at Federal Rule of Criminal Procedure 41 "demonstrates conclusively that there was no independence by the magistrates in granting these warrants." Doc. 85 at 4. The Court does not agree. The fact that a magistrate judge fails to note a timing error in a warrant does not show that the magistrate lacks independence or is biased. This is particularly where, as here, the warrant is supported by probable cause. Nor does this argument provide a basis for the suppression of evidence. *See Leon,* 468 U.S. at 917, 104 S.Ct. 3405 ("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them.").

IT IS ORDERED that Defendant's motion for reconsideration (Doc. 85) is **denied.**

Excludable delay pursuant to U.S.C. § 18:3161(h)(1)(D) is found to run from 6/20/2013.

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Only the Westlaw citation is currently available.
United States District Court, E.D. Wisconsin.

UNITED STATES of America, Plaintiff,
v.
Jordan A. KUBASIAK, Defendant.

Case No. 18-cr-120-pp
|
Signed 10/05/2018

Attorneys and Law Firms

Carol L. Kraft, United States Department of Justice (ED-WI) Office of the US Attorney, Milwaukee, WI, for Plaintiff.

Craig W. Albee, Ronnie V. Murray, Federal Defender Services of Wisconsin Inc., Milwaukee, WI, for Defendant.

ORDER OVERRULING DEFENDANT'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION (DKT. NO. 40), ADOPTING REPORT AND RECOMMENDATION (DKT. NO. 39) AND DENYING DEFENDANT'S MOTION TO SUPPRESS (DKT. NO. 31)

PAMELA PEPPER, United States District Judge

***1** The defendant moved to suppress evidence, arguing that video surveillance from his neighbor's video camera constituted a warrantless search violating the Fourth Amendment. Dkt. No. 31. The defendant did not request an evidentiary hearing on the motion; he provided the court with a Google map aerial photo of his neighborhood and a copy of the search warrant that referenced the surveillance. Dkt. No. 31-1. Magistrate Judge Joseph issued a report, recommending that this court deny the motion. Dkt. No. 39. The defendant's brief objection to that recommendation "preserves the issue for appeal whether the warrantless surveillance in this case was a search implicating a reasonable expectation of privacy." Dkt. No. 40. The court will adopt the recommendation, overrule the objection and deny the motion to suppress.

I. Background

A. Video Surveillance

The defendant's motion to suppress stated that "[a]t some point during October 2017, the Wisconsin Department of Justice, Criminal Division, installed cameras to monitor [the defendant's residence], 208 S. Judge Dr. in Saukville, WI." Dkt. No. 31 at 1. The officers placed one of the cameras inside the home of the defendant's neighbor, "whose house is directly behind Kabasiak's at 229 S. Claremont Rd." Id. The camera faced toward the defendant's home, "and captured the view of his back yard." Id. The defendant provided the court with a Google maps satellite view his residence. Dkt. No. 31-1. In a footnote referencing the map, the defendant asserted that his "yard is partially fenced in (on the south side), and otherwise lined with shrubs or trees (on the east and north), and the home and garage obstruct view of the back yard from the front of the home." Dkt. No. 31 at 1, n.1. "In other words, the yard would not be observable by a casual passerby." Id.

The government does not appear to have contested these facts; in its response, it stated only that the defendant's motion "fail[ed] to establish how or why the surveillance camera was installed or provide any facts from which the court can find that either its installation or the resulting video constitute[d] an unreasonable search." Dkt. No. 32 at 2.

B. Procedural History

On June 5, 2018, a grand jury returned a one-count indictment against the defendant, charging him with arson to a building used in interstate commerce. Dkt. No. 1. The week before the deadline for filing pretrial motions was to expire, the defendant moved for extension of time to file pretrial motions. Dkt. No. 23. Judge Joseph granted the motion, and extended the deadline to July 25, 2018; the defendant timely filed his motion to suppress the fruits of the surveillance video. Dkt. No. 31.

In the motion, the defendant argued that the surveillance footage of his backyard taken from the camera installed at his neighbor's home infringed his expectation of privacy in the activities viewable by the camera. Id. at 3. In addition, the defendant argued that the duration of the surveillance (four months) further "exacerbate[d] law enforcement's intrusion into that private domain." Id. In support of these arguments, he cited two Supreme Court cases—United States v. Jones, 565 U.S. 400, 414-415, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) and Carpenter v. United States, —— U.S. ——, 138 S.Ct. 2206, 2216, 201 L.Ed.2d 507 (2018).

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***2** The government responded that the defendant had not provided any legal analysis to show how the two Supreme Court cases he'd cited supported his arguments. Dkt. No. 32 at 2. In reply, the defendant argued that it was not his burden to lay the foundation for evidence that the government intended to use at trial. Id. at 2. Nonetheless, he provided the court with a copy of a search warrant he'd received from the government in discovery, which indicated that law enforcement had installed the camera as part of their investigation of an October 2017 garage fire, in which the defendant was a potential suspect. Id. The excerpt of the warrant quoted in the reply brief indicated that the camera, which monitored "the rear of [the defendant's] residence/garage," had "found no activity consistent with [the defendant] returning home around 920pm." Id. The camera footage did reflect "that at 9:52pm a sweep of lights entered the camera view, which would be consistent with a vehicle pulling into [the defendant's] driveway and several minutes later persons were observed in the backyard area." Dkt. No. 38-1 at 5, ¶ 24.

The defendant's reply brief contained a more detailed analysis of Jones and Carpenter, as well as discussion of two other decisions, Oliver v. United States, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) and United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987).

Judge Joseph issued her report and recommendation on August 23, 2018. Dkt. No. 39. She relied on the brief facts the defendant had stated in his motion. Id. at 1-2. After discussing the Fourth Amendment case law governing searches and a person's reasonable expectation of privacy, Judge Joseph rejected the defendant's argument that the surveillance violated his reasonable expectation of privacy in the curtilage of his home. Id. at 3. She concluded that the defendant had failed to support his motion with any evidence on which Judge Joseph could find that the video camera captured anything that was not exposed to public view. Id. She pointed out that the only evidence the defendant had provided was the Google map photo, which did not provide any information about things like the height of the fence, what a passerby could see from the street, the capabilities of the surveillance camera ("whether the camera could zoom, record audio, record in color etc."), or what one could see from the neighbor's property. Id. at 4.

Judge Joseph acknowledged that in Jones and Carpenter, the Supreme Court had "expressed concerns about the evolving reach of technology in law enforcement surveillance and the aggregate information emerging technologies allow the government to collect." Id. at 5. She pointed out, however, that neither case addressed surveillance from a video camera mounted on a neighbor's property. Id. Indeed, Judge Joseph concluded that the technology involved in the defendant's case—a video camera—was "rather low technology, conventional surveillance, compared to the GPS in *Jones* and cell phones in *Carpenter*." Id. She observed that in Carpenter, the Supreme Court had emphasized that it did not call into question conventional surveillance techniques and tools, such as security cameras. Id. at 6. Judge Joseph also noted that she could not locate any Seventh Circuit authority that supported the mosaic or aggregate theory asserted by the defendant. Id. Finally, she pointed to the Supreme Court's holding "that police may use technology to enhance or substitute for surveillance what they could lawfully conduct themselves." Id. (citing United States v. Knotts, 460 U.S. 276, 282, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)).

On September 6, 2018, the defendant filed a timely objection to Judge Joseph's report and recommendation. Dkt. No. 40. In its entirety, the objection stated,

> Jordan Kubasiak objects to the Magistrate Judge's Recommendation to deny his motion to suppress the fruits of the surveillance camera recording his back yard for several months. Given the evolving nature of technology and its interplay with Fourth Amendment protections, Kubasiak preserves the issue for appeal whether the warrantless surveillance in this case was a search implicating a reasonable expectation of privacy. Id. at 1.

***3** The government's response began by pointing out that a district court must review *de novo* a magistrate judge's ruling on a dispositive motion to the extent that the defendant has filed specific written objections to the proposed findings and recommendation. Dkt. No. 42 at 6-7. The government argued that the defendant's cursory, one-paragraph objection did not meet that standard. Id. at 7. The government further argued that Judge Joseph's analysis of the cases the defendant had cited was correct, and that her distinction between GPS and cell site location information technology and a surveillance camera was of critical relevance. Id. The

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government also pointed to several decisions where courts had analyzed the Fourth Amendment implications of a more analogous technology—pole cameras—and had found that that technology did not violate the Fourth Amendment. Id. at 8.

The final pretrial conference is scheduled for October 10, 2018 at 1:30 p.m., and the trial will begin October 15, 2018 at 8:30 a.m.

II. Analysis

A. Standard of Review

Federal Rule of Criminal Procedure 59(b) governs dispositive motion practice initiated before magistrate judges. Parties have fourteen days to file "specific written objections" to a magistrate judge's report and recommendation on a dispositive motion. Fed. R. Crim. P. 59(b)(2). When reviewing a magistrate's recommendation, the district judge reviews *de novo* the recommendations of the magistrate judge to which a party timely objects. 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59(b)(2), (3). The court can "accept, reject, or modify, in whole or in part, the findings or the recommendations made by the magistrate." 28 U.S.C. § 636(b)(1).

B. Discussion

The defendant filed a one-paragraph, general objection to the report and recommendation. Dkt. No. 40. In that paragraph, defense counsel indicated that he was preserving for appeal the question of whether "the warrantless surveillance in this case was a search implicating a reasonable expectation of privacy." Id. This is not the specific written objection contemplated by Rule 59(b)(2). The defendant did not identify any factual findings with which he disagreed; he could hardly do so, given that Judge Joseph relied on his own (brief and cursory) facts. Nor did he identify which of the several legal bases Judge Joseph provided he challenged. Despite that fact, the court will review Judge Joseph's entire decision *de novo*.

"The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Carpenter, 138 S.Ct. at 2213. "For much of our history, Fourth Amendment search doctrine was 'tied to common-law trespass' and focused on whether the Government 'obtains information by physically intruding on a constitutionally protected area.' " Id. (quoting Jones, 565 U.S. at 406 n.3, 132 S.Ct. 945). Over time, the Supreme Court began to recognize that 'property rights are not the sole measure of Fourth Amendment violations," id. (quoting Soldal v. Cook C'nty, 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1991)), and held that "the Fourth Amendment protects people, not places," id. (quoting Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). When an individual " 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' [the Supreme Court] has held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." Id. (citing Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)).

In the motion to suppress, the defendant argued that he had "a reasonable expectation of privacy in his back yard," and that he had a reasonable expectation of privacy "in the 'aggregate' of his activities viewable within that area throughout the surveillance period." Dkt. No. 31 at 2. He argued that the collection of surveillance footage "infringed upon [his] expectation of privacy in his historical record of activities viewable by the camera recording his back yard." Id. at 2-3. The Supreme Court has explained that "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." California v. Ciraolo, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986). "Nor does the mere fact that an individual has taken measures to restrict some view of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." Id. (citing cases).

***4** Judge Joseph rightly noted that the Google map photo the defendant submitted with his motion provides little information about what a law enforcement officer might have been able to see of the defendant's back yard when passing by on a public thoroughfare, or what that officer might have observed from a public vantage point where he had a right to be. The motion indicated that the camera was inside the house "directly behind [the defendant's] at 229 S. Claremont Rd." Dkt. No. 31 at 1. The Google map shows that between the house where the camera was installed and the defendant's back yard, there are two or three large trees (in the neighbor's back yard), three shrubs or bushes (dividing the two back yards from each other) and one large tree (at the corner of the defendant's garage). Dkt. No. 31-1. The trees in the neighbor's yard appear to be between the neighbor's garage

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and the defendant's back yard; for the most part, it does not appear that they block the view from the neighbor's house into the back yard. It is impossible to tell the height of the shrubs/bushes/trees that divide the two yards, although from the shadows they cast, they appear to be much shorter than the trees. The tree in the defendant's back yard appears to block part of the view from the neighbor's house to the defendant's garage and to part of the defendant's *house*, but depending on where the camera was set up in the neighbor's house, it would not necessarily block all views of the back yard. It appears that a law enforcement officer standing on the sidewalk in front of the defendant's house and to the left (when facing the house) would be able to see into part of the back yard with the naked eye. It also appears that a law enforcement officer standing in the *neighbor's* yard would be able to see most of the back yard with the naked eye: there are spaces between the bushes/shrubs and trees that divide the two properties.

These facts contradict the defendant's claim that he had a reasonable expectation of privacy in the back yard. In support of his assertion that he did have such a reasonable expectation, the defendant cited United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987). Dkt. No. 31 at 2. In that case, police mounted a surveillance camera on "a power pole overlooking the appellant's 10-foot-high fence bordering the back of the yard." Id. at 250. The Fifth Circuit concluded that the defendant had an expectation to be free from that kind of video surveillance in his back yard, and that society was willing to recognize that expectation as reasonable. Id. at 251.

The defendant's reliance on Cuevas-Sanchez is misplaced. First, the decision is not binding on courts in the Seventh Circuit. Second, the defendant in that case had a ten-foot high fence which arguably would have prevented passersby from seeing into the yard from a public thoroughfare or vantage point. Third, as the court discusses below, it is not clear that the Fifth Circuit's 1987 decision in Cuevas-Sanchez would withstand scrutiny under the law as it has developed over the thirty years since.

In his reply brief in support of the motion, the defendant raised a technology argument for the first time. He asserted that twenty-four-hour, months-long surveillance technology "reveals patterns and activities beyond merely looking at someone's home while passing by ...." Dkt. No. 38 at 3. He also asserted in his objection to Judge Joseph's report and recommendation that "[g]iven the evolving nature of technology and its interplay with Fourth Amendment protections," he was trying to preserve his arguments for appeal. Dkt. No. 40.

It is true that, "[a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, [the Supreme] Court has sought to 'assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' " Carpenter, 138 S.Ct. at 2214 (quoting Kyllo v. United States, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)). Fourth Amendment jurisprudence has evolved as technology has evolved. For example, in Kyllo, the Supreme Court held that a thermal imager used to detect heat radiating from the side of a home was a search under the Fourth Amendment and required a warrant. Kyllo, 533 U.S. at 34, 121 S.Ct. 2038. The Court reasoned that the government could not have obtained the information without physical intrusion into a constitutional protected area. Id. More recently, the Supreme Court held that the government's use of a GPS tracking device attached to a vehicle registered to the defendant's wife constituted a search for Fourth Amendment purposes. Jones, 565 U.S. at 404, 132 S.Ct. 945. Three months ago, the Supreme Court held that the government's acquisition of cell-site location information (CSLI) violated the Fourth Amendment. Carpenter, 138 S.Ct. at 2217. The Court reasoned that mapping a cell phone's location over the course of 127 days provided an "intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.' " Id. (quoting Jones, 565 U.S. at 415, 132 S.Ct. 945). The Court explained that its decision was a "narrow one" that did not call into question "conventional surveillance techniques and tools, such as security cameras." Id., 128 S.Ct. at 2220.

***5** As Judge Joseph found, however, the video camera surveillance that law enforcement employed in the defendant's case was less advanced than a GPS device or the technology that maps CSLI. As Judge Adelman has recently noted, "ordinary video cameras ... have been around for decades." United States v. Kay, Case No. 17-cr-16, 2018 WL 3995902, *3 (E.D. Wis. Aug. 21, 2018) (quoting United States v. Tuggle, Case No. 16-cr-20070, 2018 WL 3631881, at *3 (C.D. Ill. July 31, 2018)). Even if mounted on a pole, video cameras are "limited to a fixed location and capture only activities in camera view, as opposed to GPS, which can track an individual's movement anywhere in the world." Id.

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Judge Joseph also noted that the defendant had provided no information about whether the camera that surveilled his back yard had enhanced technological capabilities—whether it could zoom in, or record audio. If the defendant had provided information showing that the camera could zoom in, or record audio, or capture infrared, or allow the officers to see *inside* the defendant's house, the defendant's "evolving technology" argument might have more influence. See United States v. Tirado, Case No. 16-cr-168, 2018 WL 1806056, *3 (E.D. Wis. Apr. 16, 2018); but see, Knotts, 260 U.S. at 282, 103 S.Ct. 1081 ("nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them ...."). But the defendant's implication that a stationary video camera is some form of advanced technology that requires an evolved view of Fourth Amendment jurisprudence has no merit.

The issue is not whether a video camera is a piece of technology that allows law enforcement to see into places where defendants have a reasonable expectation of privacy. A video camera—assuming no enhanced capabilities—can see only what the officer can see. If the camera is in a place where the officer lawfully could have been, then it does nothing more than see what the officer could have seen. If the neighbor had allowed law enforcement to sit in the house and look out the window twenty-four hours a day for several months, they could have done so without violating the Fourth Amendment, because the surveilling officers would have been observing from a vantage point where they had a right to be, and would have been observing that which was clearly visible.

What a video camera can do that law enforcement officers cannot is to "observe" for extended periods at relatively little cost. The defendant's core argument appears to relate to this fact—to the fact that, by using a video camera to surveil his back yard, law enforcement was able to monitor every single event that took place in his back yard for a long time. This is his "aggregate," or "mosaic," argument. He points first to the concurrence in Jones, authored by Justice Alito and joined by Justices Ginsberg, Breyer and Kagan. In that concurrence, Justice Alito wrote:

> ... [R]elatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's care for a very long period. In this case, for four weeks, law enforcement agents tracked every movement the respondent made in the vehicle he was driving.

***6** Jones, 565 U.S. at 430, 132 S.Ct. 945. The concurring authors concluded that this ability to track a person's every movement over a long period of time, unanticipated by society, constituted a search under the Fourth Amendment. Id. at 431, 132 S.Ct. 945.

The defendant also pointed to the Supreme Court's decision in Carpenter, where it had to apply the Fourth Amendment "to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals." Carpenter, 138 S. Ct. 2216. In concluding that accessing a person's cell phone data through cell-site location information violated that person's reasonable expectation of privacy, the Court reasoned that cell phones "faithfully follow[ ] [their] owner[s] beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." Id. at 2218. For this reason,

> [m]aping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." These location records "hold for many Americans the 'privacies of life.' " And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical information at practically no expense.

Id. at 2217.

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The defendant employs this reasoning to assert that using a video camera to record a person's back yard for twenty-four hours a day over several months violates that person's reasonable expectation of privacy. This argument ignores a critical element of the Supreme Court's reasoning in Jones and Carpenter.

Because the surveillance camera was fixed, it could observe the defendant in only one location—his back yard. It could not track him around the neighborhood. It could not follow him into his doctor's office, or a political headquarters, or a place of worship. It could not follow him inside his home (a place where he had a reasonable expectation of privacy). Even for twenty-four hours a day over several months, it could "observe" the defendant only when he was in his backyard, within view of the camera. It might, in that process, capture certain information about the defendant. If he was in the back yard with other people, it would observe those people, and thus provide information about with whom the defendant associated. If he was doing something in his back yard that he would have preferred other people not to see, it would have captured that activity. But the defendant's neighbor, or a law enforcement officer standing in the neighbor's house, would have been able to see those some things, without a video camera.

Other courts have considered the argument the defendant is making in the context of pole cameras, and have rejected it. Tirado, 2018 WL 1806056, at *4 (citing United States v. Houston, 813 F.3d 282, 285 (6th Cir. 2016); United States v. Bucci, 582 F.3d 108, 116-17 (1st Cir. 2009); United States v. Jackson, 213 F.3d 1269, 1281 (10th Cir. 2000)). Judge Adelman himself has rejected the argument in two recent cases. In United States v. Kay, Judge Adelman rejected the defendant's argument that because pole cameras allowed constant surveillance over an extended time, their use violated the Fourth Amendment. 2018 WL 3995902 at *3. Pointing out that pole cameras were fixed, and recorded only activities in their view, he concluded that "[p]ole camera surveillance is thus unlikely to provide the same 'intimate window' into the person's life, revealing his 'political, professional, religious, and sexual associations.' " Id. (quoting Carpenter, 138 S.Ct. at 2217).

***7** Similarly, in denying the defendants' motion to reconsider his denial of their motion to suppress in Tirado, Judge Adelman noted that the defendants had failed to demonstrate "how [pole camera] surveillance provides the same aggregate account of a person's life" as the one the Supreme Court had described in Carpenter. United States v. Tirado, Case No. 16-cr-168, 2018 WL 3995901, *2 (E.D. Wis. Aug. 21, 2018) (citations omitted). Because it was "undisputed that the cameras" used in Tirado "did not record events inside the homes or otherwise permit the police to see things an officer standing on the street could not see," Judge Adelman denied the defendants' motion to reconsider his denial of their motion to suppress. Id.

The same analysis applies here. The camera in the neighbor's house was in a fixed location, and recorded only what the neighbor, or a police officer standing in the neighbor's house, could have seen. The surveillance did not present the kind of aggregate view of intimate details of the defendant's every movement that concerned the concurrence in Jones, or the majority in Carpenter.

Finally, in his reply brief in support of the motion to suppress, the defendant argued that his back yard was "curtilage," which he argued meant that he had an automatic reasonable expectation of privacy there. In support of this assertion, he cited United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). In Dunn, the Supreme Court noted that the concept of "curtilage" originated "at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." Id. at 300, 107 S.Ct. 1134. The Court noted that it previously had held that the Fourth Amendment "protects the curtilage of a house and that the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." Id. (citing Oliver, 466 U.S. at 180, 104 S.Ct. 1735). It laid out a four-factor test for courts to use to determine the extent of a home's curtilage: "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 the area from observation by people passing by." Id. at 301, 107 S.Ct. 1134 (citations omitted).

The defendant asserted in his response that his back yard met all these requirements: "it is immediately proximate to his home; is fenced on one side, lined with trees on two others, and obstructed from street view by the home and garage; would only be accessible or used by residents of the home; and (as with the second factor) is surrounded on each side by something obstructing visibility." Dkt. No. 38 at 3 n.1.

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The court has dealt with this argument in its discussion of whether the defendant had a reasonable expectation of privacy in his back yard. The defendant argues that his back yard meets the definition of curtilage, but the only evidence he provided in support of that assertion was the Google map. From what the court can tell of that map, it either does not support the defendant's assertions, or does not contain information sufficient to allow the court to make a conclusion one way or the other. The court already has noted that it appears that one can see parts of the defendant's back yard from the sidewalk in front of his house, and from the neighbor's house. The map does show a fence to the right of the defendant's house (when one is facing the house), but gives no indication of the height of that fence, or whether someone on the other side could see over it. The court has noted that the map provides no information about the height of the shrubs or bushes dividing the two yards. It appears that the yard is accessible to people other than the residents —someone could walk from the sidewalk along the left-hand side of the house into the yard, or walk between the bushes from the neighbor's back yard to the defendant's. The map does not show an enclosure around the entire back yard. The record is silent as to the uses to which the back yard is put, or to any steps the defendant may have taken to protect it from view.

***8** For all of these reasons, the court will adopt Judge Joseph's report and recommendation, and will deny the defendant's motion to suppress.

III. Conclusion

The court **OVERRULES** the defendant's objection to Magistrate Judge Joseph's report and recommendation. Dkt. No. 40.

The court **ADOPTS** Judge Joseph's report and recommendation. Dkt. No. 39.

The court **DENIES** the defendant's motion to suppress. Dkt. No. 31.

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UNITED STATES of America
v.
Michael MAZZARA, Charles Kerrigan, a/k/a "Duke", Anthony Mascuzzio and Christopher Kerrigan, Defendants.

16 Cr. 576 (KBF)
|
Signed 10/27/2017

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OPINION & ORDER

KATHERINE B. FORREST, United States District Judge

***1** On July 26, 2016, Michael Mazzara ("Mazzara"), Charles Kerrigan (a/k/a "Duke"), and Anthony Mascuzzio ("Mascuzzio") were arrested pursuant to a sealed complaint charging them with one count of conspiracy to commit bank burglary and two counts of bank burglary. (Mem. of Law of the U.S. in Opp'n to the Defs.' Pretrial Mots. ("Govt. Mem.") at 2, ECF No. 130.) At that time, Mascuzzio was on federal supervised release after having pled guilty to transporting stolen property across state lines. (Id. at 2, 18.) Mazzara, Charles Kerrigan, and Mascuzzio were indicted on August 25, 2016; that indictment was twice superseded. The operative indictment charges each defendant, along with a fourth, Christopher Kerrigan (collectively, "defendants"), with conspiracy to commit bank burglary, bank burglary, and bank theft. [1] (See generally Sealed Superseding Indictment ("S2 Indictment"), ECF No. 65.)

Pending before the Court are a series of pretrial motions, two of which seek suppression of evidence (Mazzara and Mascuzzio have each brought their own independent suppression motion), and others seeking routine pretrial disclosures. (See generally ECF Nos. 115, 120, 122, 124, 125, 129, 140, 141, 142, and 143). Because none of the motions require resolution of a disputed issue of fact, the Court has not held an evidentiary hearing. All defendants purport to join in all motions.

Mazzara's principle contention is that a nineteen to twenty-one-month period of warrantless, uninterrupted video surveillance from a camera mounted on a utility pole across the street from his residence violated his reasonable expectation of privacy under the Fourth Amendment. (See generally Mem. of Law ("Mazzara Mem."), ECF No. 118.) He seeks to suppress all video footage and investigative fruits related thereto. Mazzara's motion presents a difficult, non-frivolous question of if and when extended video surveillance of public conduct impinges upon the personal and societal values protected by the Fourth Amendment. The Court concludes that the Fourth Amendment does not prohibit extended video surveillance of the type at issue here. Additionally, the Court concludes that the officers conducting the surveillance were acting in good faith, and therefore the motion to suppress should also be denied on that basis.

Mascuzzio separately seeks to suppress evidence recovered from a search of his residence at the time of his arrest that was conducted jointly by the U.S. Probation Department and other federal agents. (See generally Mem. of Law in Support of Anthony Mascuzzio's Pretrial Mots. ("Mascuzzio Mem."), ECF No. 123.) It is clear to the Court that a condition of Mascuzzio's supervised release provided for such searches by the U.S. Probation Department. Neither this motion, nor Mascuzzio's remaining applications for pretrial disclosures present any difficult legal issues.

***2** For these reasons and the others set forth below, the Court DENIES each of the pending pretrial motions.

I. BACKGROUND

A. The Pole Camera Surveillance

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The following facts are taken from the parties' submissions concerning the pretrial motions at issue here, and are undisputed unless otherwise noted.

On or about November 6, 2014, the Federal Bureau of Investigation ("FBI") and New York City Police Department ("NYPD") (collectively, the "police") installed a video camera on a utility pole (the "Pole Camera") across the street from the shared residence of defendants Mazzara and Charles Kerrigan at 1849 West 10th Street in Brooklyn, New York. (Mazzara Mem. at 2; Govt. Mem. at 4.) The Pole Camera, which was mounted approximately 12 feet above the ground, "captured views of the street and sidewalk in front of 1845 and 1849 West 10th Street" as well as "the driveway to the left" (the "Driveway") (collectively, the "Surveilled Area"). (Govt. Mem. at 4.)

The Pole Camera recorded the Surveilled Area continuously [2] for approximately twenty-one months, from on or about November 6, 2014 until August 6, 2016 (the "Surveillance Period"). (Mazzara Mem. at 2; Govt. Mem. at 5.) All together, the Pole Camera collected somewhere between eighteen to nineteen months of footage. [3] (Mazzara Mem. at 2; Govt. Mem. at 11.) Initially, the Camera's view of the Surveilled Area was "largely unobstructed." (Govt. Mem. at 5.) However, on May 18, 2016, a wooden fence was erected that partially obstructed the view of the Driveway and the front of 1845 West 10th Street. (Id.)

During the Surveillance Period, the Pole Camera captured footage that, according to the Government, depicts "all four defendants making preparations for and disposing of proceeds of two bank burglaries." (Govt. Mem. at 5.) According to Mazzara, the Pole Camera also captured footage of "all the monumental and mundane experiences and details of [his] personal life," including his "outdoor interactions with his new born child, his girlfriend, his ex-girlfriend, his friends, his family, and his acquaintances." (Mazzara Mem. at 2-3.) The police installed the Pole Camera without a warrant and did not obtain a warrant at any point during the Surveillance Period. (Mazzara Mem. at 3.)

B. The Search of Mascuzzio's Residence

On November 4, 2011, Mascuzzio pled guilty to an indictment charging him with conspiracy to distribute narcotics and conspiracy to transport stolen property across state lines. (Govt. Mem. at 18.) As a result, Mascuzzio was sentenced to fifty-seven months of incarceration and three years of supervised release. (Id.) One of the conditions of Mascuzzio's supervised release stated:

> ***3** [Mascuzzio] shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. [Mascuzzio] shall inform any other residents that the premises may be subject to search pursuant to this condition.

(Id.; Mascuzzio Mem. at 4-5.) Mascuzzio was released from custody on or about March 12, 2015, and his period of supervised release began the same day. (Govt. Mem. at 18.)

On July 22, 2016, Magistrate Judge Netburn signed a sealed complaint charging Mascuzzio, Mazzara, and Charles Kerrigan with one count of conspiracy to commit bank burglary and two counts of bank burglary. (Govt. Mem. at 18-19; Mascuzzio Mem. at 4.) Subsequently, the Government obtained warrants to conduct searches at, inter alia, the homes of Mazzara and Charles Kerrigan. (Mascuzzio Mem. at 4.) The Government did not obtain a warrant to search Mascuzzio's home at 192 Bay 25th Street in Brooklyn, New York. Nonetheless, a joint team of federal agents and officers from the U.S. Probation Department executed a search at that address on July 26, 2016, and removed numerous items from the residence. (Govt. Mem. at 19; Mascuzzio Mem. at 4.) Mascuzzio was taken into custody the same day. (Govt. Mem. at 19.)

II. LEGAL PRINCIPLES—SUPPRESSION MOTIONS

Mazzara's suppression motion is principally directed at the duration of the Pole Camera surveillance. He argues that the duration of the surveillance transforms what might otherwise be lawful surveillance of public conduct into an unlawful search into the intimacies of his private life. The motion thus

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directly presents the question of whether long-term video surveillance runs afoul of the Fourth Amendment. This is not an easy question, and the answer is not found directly in precedential case law. This Court therefore looks to the key underlying principles applicable to answering this question.

A. Supreme Court Jurisprudence Relevant to Surveillance

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Kentucky v. King, 563 U.S. 452, 459 (2011).[4] Over the past forty years, the scope of protection conferred by the Fourth Amendment has evolved greatly, from its narrow roots in concepts of property and trespass, to a more expansive person-based protection, and eventually back again. What follows is a brief review of the Supreme Court's shifting jurisprudence.

In 1967, the Supreme Court explicitly moved away from a property-based Fourth Amendment jurisprudence in Katz v. United States, 389 U.S. 347, 351 (1967). There, the Court held that the interception of a telephone conversation by an electronic listening device placed on the exterior of a closed telephone booth violated a person's reasonable expectation of privacy. Although the interception did not involve a trespass (that is, a physical penetration of the telephone booth), the Court rejected the premise that property interests alone control the right of the Government to engage in warrantless search and seizure. Id. at 351-53. Instead, the Court concluded that the "Fourth Amendment protects people, not places." Id. at 351 (emphasis added). Accordingly, "[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 351-52 (citations omitted).

***4** In 1983 and 1984, the Supreme Court expanded upon this person-based concept of Fourth Amendment protection in a pair of cases regarding the warrantless monitoring of electronic surveillance devices. First, in United States v. Knotts, 460 U.S. 276, 285 (1983), the Court held that police monitoring of an electronic "beeper" placed into a container of chloroform sold to the respondent did not invade any legitimate expectation of privacy, and thus was neither a "search" nor a "seizure" under the Fourth Amendment. Although the police could have located the respondent's remote drug laboratory by visually following his public movements, the Court held that "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." Id. at 282. "Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now."[5] Id. at 284.

One year later, the Supreme Court addressed two questions left open by Knotts: (1) whether placement of a beeper by the original owner of the container, but without the knowledge of the buyer, constituted a search or seizure; and (2) whether monitoring the beeper falls within the scope of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance. See United States v. Karo, 468 U.S. 705, 707 (1984). The Court concluded that installation of the beeper did not infringe any Fourth Amendment interest, but monitoring the beeper signal inside a residence did. Id. at 713-14. In so holding, the Court reiterated the longstanding principle that private residences are places in which individuals reasonably expect privacy free from governmental intrusion, and that those same principles are applicable in situations where the government "surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house." Id. at 715. Unlike in Knotts, where the beeper provided no information about the interior of the cabin, the beeper in Karo revealed "a critical fact about the interior of the premises that the Government [was] extremely interested in knowing and that it could not have otherwise obtained without a warrant." Id. Together, Knotts and Karo stand for the proposition that "a search of a house should be conducted pursuant to a warrant," but that surveillance of public movement, even with the aid of electronic devices, need not be. Id. at 718.

In 1986, the boundary of acceptable public surveillance was expanded yet again in a case involving intentional aerial flight over an enclosed yard. See California v. Ciraolo, 476 U.S. 207 (1986). There, the Supreme Court reaffirmed its approach in Katz, describing the "touchstone of Fourth Amendment analysis" as "whether a person has a 'constitutionally protected reasonable expectation of privacy.' " Id. at 211 (citing Katz, 389 U.S. at 360). The Court further described Katz as establishing a "two-part" inquiry: "first, has the individual manifested a subjective expectation of privacy in

the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" Id. (citing Smith v. Maryland, 442 U.S. 735, 740 (1979)).

In Ciraolo, the Supreme Court held that the respondent had "[c]learly ... met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits" by encircling his yard with a 10-foot fence. Id. But because the police surveillance occurred in a "navigable airspace," the Court concluded that "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed," and therefore "respondent's expectation that his garden was protected from such observation [was] unreasonable and is not an expectation that society is prepared to honor." Id. at 213-14. Even though the surveilled area was within the curtilage of the home, the Court held that "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." Id. at 213. The Court also rejected respondent's argument that the investigative purpose of the aerial surveillance rendered it unlawful. Id. at 213-14.

***5** In 1989, the Supreme Court decided another aerial surveillance case, Florida v. Riley, 488 U.S. 445 (1989). There, the surveillance involved a helicopter twice flying over a targeted property at 400 feet, looking into a greenhouse on respondent's property. Id. at 448. The Supreme Court relied on Ciraolo in holding that the targeted aerial surveillance did not run afoul of the Fourth Amendment, stating that although respondent "no doubt intended and expected that his greenhouse would not be open to public inspection", "[a]ny member of the public could legally have been flying over [the] property in a helicopter at the altitude of 400 feet and could have observed [the] greenhouse. The police officer did no more." Id. at 449-51. Because "no intimate details connected with the use of the home or curtilage were observed ... there was no violation of the Fourth Amendment." Id. at 452.

In a concurring opinion, Justice Sandra Day O'Connor agreed that observation of the curtilage of a home from a helicopter 400 above ground "did not violate an expectation of privacy 'that society is prepared to recognize as reasonable.' " Id. at 452 (citing Katz, 389 U.S. at 361.) She noted that the defendant bears the burden of proving that his expectation of privacy is a reasonable one, and therefore that a "search" has occurred within the meaning of the Fourth Amendment. Id. at 455. In a dissenting opinion, Justices Brennan, Marshall, and Stevens expressed concern that "[t]he plurality undertakes no inquiry into whether low-level helicopter surveillance by police of activities in an enclosed backyard is consistent with 'aims of a free and open society.' " Id. at 456-57.

Fast forward to 2012. In United States v. Jones, 565 U.S. 400 (2012), the Supreme Court held that warrantless placement of a tracking device on a motor vehicle is an unconstitutional search under the Fourth Amendment. But although the Court was unanimous in outcome, it was sharply divided in reasoning. The majority, applying pre-Katz, trespass-based principles of Fourth Amendment analysis, concluded that placing a tracking device on a car constitutes a common-law trespass, and that the Fourth Amendment "must provide at a minimum the degree of protection it afforded when it was adopted."[6] Id. at 412 (emphasis in original). Writing for the majority, Justice Scalia stated that the principles set forth in Katz did not replace the "common-law trespassory test", but merely expanded upon it. Id. at 409. As a result, "[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to Katz analysis." Id. at 411 (emphasis in original).

In a concurring opinion, Justice Alito (joined by Justices Ginsburg, Breyer, and Kagan) stated that the majority's reliance on principles of trespass "strains the language of the Fourth Amendment ... has little if any support in current Fourth Amendment case law[,] and [ ] is highly artificial." Id. at 419. Justice Alito relied on the Katz "reasonable expectation of privacy" test to conclude that while "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable", "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." Id. at 430 (internal citation omitted). Justice Alito took issue with the fact that "for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving," and held that "the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment."[7] Id.

***6** In a separate concurrence, Justice Sotomayor, who joined the majority's trespass-based analysis, agreed with Justice Alito's conclusion that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy" because "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.[8] Id. at 415

(citation omitted). But Justice Sotomayor noted, as did Justice Alito, that "technological advances that have made possible nontrespassory surveillance techniques ... affect the Katz test by shaping the evolution of societal privacy expectations." Id. Justice Sotomayor stated that these competing considerations would play a role in her Fourth Amendment analysis if a trespass had not occurred.

Trespass-based principles featured again in the Supreme Court's 2013 decision in Florida v. Jardines, 569 U.S. 1 (2013). In Jardines, the Court held that bringing a drug-sniffing dog onto a front porch without a warrant constituted a trespassory invasion of the curtilage in which a resident had an expectation of privacy, and therefore constituted a "search" under the Fourth Amendment. Id. at 7-8. In so holding, the Supreme Court found that traditional, trespass-based Fourth Amendment principles were easily applied, and that "when it comes to the Fourth Amendment, the home is first among equals." Id. at 6. Writing again for the majority, Justice Scalia reiterated that "the area immediately surrounding and associated with the home—what our cases call curtilage—[is regarded] as part of the home itself for Fourth Amendment purposes." Id. (internal quotation omitted).

B. Second Circuit Jurisprudence Relevant to Surveillance

A number of cases in the Second Circuit also address the scope of permissible surveillance under the Fourth Amendment. A few, highlighted below, are particularly useful to the question posed by Mazzara's motion.

First, in United States v. Lace, 669 F.2d 46 (2d Cir. 1982), the Second Circuit considered whether telescopic observation (by binoculars), into a defendant's yard violated his expectation of privacy. In holding that it did not, the Court relied on the basic principle that "people generally do not have a legitimate expectation of privacy in open and accessible areas that the public is prepared to recognize as reasonable." Id. at 50 (citations omitted). The court concluded that "[a]lthough some of the observations of the outdoor area were made with binoculars or other visual aids, this did not make such observations unlawful." Id. at 51. In a colorful example, the court noted that had the defendant run around his backyard naked, it would have been unreasonable for him to have expected such act to have been private, and that there is no reason why the judiciary should "clothe similarly located drug traffickers in cloaks of invisibility." Id.

In United States v. Hayes, 551 F.3d 138, 143 (2d Cir. 2008), the Second Circuit reaffirmed that the Fourth Amendment applies only to spaces in which an individual has a reasonable expectation of privacy. And in United States v. Gori, 230 F.3d 44, 50 (2d Cir. 2000) (citing Riley, 488 U.S. at 450), the Second Circuit held that "[n]o reasonable expectation of privacy inheres in what is left 'visible to the naked eye.' "

In Gori, the police set up surveillance in the lobby of a building, then followed a delivery person to the door of the apartment. Id. at 47. When the defendant opened his apartment door for the delivery person, the officer was able to see five people inside the apartment from his position in the hallway. Id. The officer subsequently directed everyone inside the apartment to step into the hallway, at which point the owner of the apartment (who was not the defendant) provided consent to search the apartment, where narcotics were found. Id. at 47-49. While acknowledging that " 'searches and seizures inside a home without a warrant are presumptively unreasonable' ", id. at 51 (citing Payton v. New York, 445 U.S. 573, 588-90 (1980)), the Second Circuit held that rule is "directed primarily at warrantless physical intrusions into the home." Id. at 51 (citation omitted). Because the apartment door was opened voluntarily, and therefore the interior of the apartment "was exposed to public view", id. at 52, "there was no expectation of privacy as to what could be seen from the hall." Id. at 53. And "[a]bsent a reasonable expectation of privacy ... the warrant requirement is inapplicable and the legitimacy of the challenged police conduct is tested solely by the Fourth Amendment's requirement that any search or seizure be reasonable." Id. at 50 (citations omitted). The Second Circuit then concluded that the officers "acted reasonably at every stage of the 'swiftly developing situation' presented on [the] record." Id. at 54-55.

***7** The Second Circuit has expanded upon this principle —that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"—in a series of other opinions. Katz, 389 U.S. at 351. For instance, in United States v. Holland, 755 F.2d 253, 255-56 (2d Cir. 1985), the Second Circuit held that a person does not have a reasonable expectation of privacy in the common areas of a multi-unit building. Additionally, in United States v. Simmonds, 641 Fed. Appx. 99, 104 (2d Cir. 2016), the Second Circuit held that there is no reasonable expectation of privacy in those portions of a hallway that are accessible to the public. Further, in United States v. Taborda, 635 F.2d 131, 139 (1980), the Second Circuit held that unaided visual observation of the inside of defendant's apartment from an apartment across the street did not constitute a search within the meaning

of the Fourth Amendment. And finally, in United States v. Fields, 113 F.3d 313, 321-22 (1997), the Second Circuit held that police officers' observation of defendants through an uncovered first-floor apartment window did not violate the Fourth Amendment, stating "[g]enerally, the police are free to observe whatever may be seen from a place where they are entitled to be." (citing Riley, 488 U.S. at 449).

C. The Exclusionary Rule

While evidence seized in violation of the Fourth Amendment is subject to exclusion at trial under Terry v. Ohio, 392 U.S. 1 (1968), exclusion is not automatic. See Davis v. United States, 564 U.S. 229, 248 (2011); see also Herring v. United States, 555 U.S. 135, 140 (2009) ("The fact that a Fourth Amendment violation occurred ... does not necessarily mean that the exclusionary rule applies."). At its core, the exclusionary rule is "a 'judicially created remedy' of [the Supreme Court's] own making." Davis, 564 U.S. at 238 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). And although the Court once "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule", Arizona v. Evans, 514 U.S. 1, 13 (1995), the Court has since "abandoned the old, reflexive application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits." Davis, 564 at 238 (quotation and citations omitted).

The purpose of excluding evidence seized in violation of the Fourth Amendment is to ensure judicial integrity and protect courts from being made a party to "lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasion." Terry, 329 U.S. at 13. Exclusion is not, however, a personal constitutional right. Davis, 564 U.S. at 248 (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)). As the Supreme Court has noted, "[t]he rule's sole purpose ... is to deter future Fourth Amendment violations." Id. at 236-37 (citing Herring v. United States, 555 U.S. 135, 141 (2009); United States v. Leon, 468 U.S. 897, 909, 921, n.22 (1984); Elkins v. United States, 364 U.S. 206, 217 (1960)). The rule's operation has thus been limited to "situations in which this purpose is 'thought most efficaciously served.' " Id. at 236 (quoting Calandra, 414 U.S. at 348). "Where suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly ... unwarranted.' " Id. (quoting United States v. Janis, 428 U.S. 433, 454 (1976)).

For exclusion to be appropriate, the deterrence benefits of suppression must outweigh the rule's heavy costs. Davis, 564 U.S. at 240 ("Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningful' deterrence, and culpable enough to be 'worth the price paid by the justice system.' " (quoting Herring, 555 U.S. at 144); see also Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("The exclusionary rule generates 'substantial social costs.' ") (quoting Leon, 468 U.S. at 907)). The Supreme Court has "rejected '[i]ndiscriminate application' of the rule" and has "held it to be applicable only 'where its remedial objectives are thought most efficaciously served.' " Hudson, 547 U.S. at 591 (quoting Leon, 468 U.S. at 909, and Calandra, 414 U.S. at 348).

***8** The Supreme Court has held that evidence should only be suppressed "if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Leon, 468 U.S. at 919 (quoting United States v. Peltier, 422 U.S. 531, 542 (1975)). Accordingly, the Supreme Court has held that the exclusionary rule does not apply when a search is conducted in good-faith, reasonable reliance on: (1) a judicially issued warrant later held to be invalid (See Leon, 468 U.S. at 922); (2) a subsequently invalidated statute (See Illinois v. Krull, 480 U.S. 340, 349-50 (1987)); (3) erroneous information concerning an arrest warrant in a database maintained by judicial employees (See Evans, 514 U.S. at 14); (4) erroneous records maintained by police employees (See Herring, 555 U.S. at 137); and (5) binding judicial precedent (See Davis, 564 U.S. at 239-40).

D. Search as a Condition of Supervised Release

In United States v. Knights, 534 U.S. 112 (2001), the Supreme Court addressed the constitutionality of a warrantless search conducted subject to a condition of probation. There, respondent was sentenced to probation for a drug offense, and the probation order included a condition that he would "[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." Id. at 114. Shortly after respondent was placed on probation, the police developed a "reasonable suspicion" that he had vandalized a power transformer, causing approximately $1.5 million in damage. Id. at 114-15. Subject to that reasonable suspicion and respondent's probation order, the police conducted a warrantless search of respondent's apartment, which revealed several items of incriminating evidence. Id. During the ensuing criminal trial, respondent moved to suppress the

evidence obtained during the warrantless search of his apartment.

Reiterating the longstanding principle that "[t]he touchstone of the Fourth Amendment is reasonableness", the Supreme Court held that "the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." Id. at 123. In doing so, the Court explicitly rejected respondent's argument that the investigatory (as opposed to probationary) purpose of the search caused it to fall outside the scope of the probation order. Id. at 117-18. Because the respondent had a reduced "reasonable expectation of privacy" as a result of the probation order, id. at 119, and because the government has a strong interest in monitoring probationers for potential violations of criminal law, id. at 120-21, the warrantless search was "reasonable" and thus constitutional under the Fourth Amendment.

III. DISCUSSION—SUPRESSION MOTIONS

A. The Pole Camera Surveillance

As previously stated, Mazzara's suppression motion raises a number of complex and difficult questions regarding the scope of the Fourth Amendment and what constitutes a "reasonable" expectation of privacy in an increasingly digital age. However, for the reasons stated below, this Court concludes that the warrantless video surveillance at issue here did not violate the Fourth Amendment, and therefore Mazzara's motion is DENIED. Furthermore, even if this Court were to find that a constitutional violation did occur, the Court concludes that the officers conducting the surveillance acted in good faith, reasonable reliance on binding judicial precedent, and therefore the exclusionary rule does not apply.

i. Reasonable Expectation of Privacy

***9** Unlike in Jones and Jardines, the surveillance at issue here did not involve any physical trespass. The Pole Camera was not installed on Mazzara's property, nor did it monitor, provide a view, or record any activities occurring within Mazzara's residence. Indeed, it is undisputed that the Pole Camera was located in a place "where [the police] are entitled to be," Fields, 113 F.3d at 321 (citing Riley, 488 U.S. at 449), and recorded only what a normal passerby could have seen from that location.[9] As a result, this Court must apply the two-part Katz inquiry, asking (1) whether Mazzara manifested a subjective expectation of privacy, and (2) whether society is willing to recognize that expectation as reasonable. See Ciraolo, 476 U.S. at 211.

For purposes of this decision, the Court assumes that Mazzara manifested a subjective expectation of privacy under Katz. First, the record demonstrates that on May 18, 2016, a wooden fence was erected in front of the Driveway and 1845 West 10th Street. (Govt. Mem. at 5.) The Court may reasonably assume that the fence was erected to shield Mazzara's activities from at least street-level views, and therefore the fence serves as evidence of some subjective expectation of privacy, at least as of May 18, 2016.[10] See Ciraolo, 476 U.S. at 211-212. Second, Mazzara has specifically challenged the duration of the video surveillance, arguing that he had a subjective expectation that his public actions within the Surveilled Area would not be observed and recorded for as long as they were. (Mazzara Mem. at 12.) Even if Mazzara had no subjective expectation that isolated actions within the Surveilled Area were private, the Court has no reason to disbelieve Mazzara's proffer that he subjectively believed the aggregate of information revealed by his public conduct during the Surveillance Period was private. Accordingly, the Court must proceed to the second prong of Katz, asking whether society is willing to recognize Mazzara's subjective expectation of privacy as reasonable.

Generally, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351 (citations omitted). Accordingly, courts have routinely held that "people generally do not have a legitimate expectation of privacy in open and accessible areas that the public is prepared to recognize as reasonable", Lace, 669 F.2d at 50 (citations omitted), and "[n]o reasonable expectation of privacy inheres in what is left 'visible to the naked eye.' " Gori, 230 F.3d at 50 (citing Riley, 488 U.S. at 450). Here, the Pole Camera observed and recorded only those actions that were "expose[d] to the public." It did not provide any view into Mazzara's home, and did not track or record his movements through any other private spaces. Moreover, construction of the fence on May 18, 2016 does not affect the Fourth Amendment analysis here. As the Supreme Court has held, "the mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." Ciraolo, 476 U.S. at 213 (citing Knotts, 460 U.S. at 282). It is undisputed that the Pole Camera was installed in a lawful

location, and that the Surveilled Area was "clearly visible" from that location. As such, the fence does little more than evidence Mazzara's subjective expectation of privacy as of May 18, 2016.

***10** But that is not the end of the Court's inquiry. If the Pole Camera was only installed for one hour, or one day, or even one week, the Court would have no difficulty concluding that the surveillance did not violate any reasonable expectation of privacy under the Fourth Amendment. But the video surveillance here occurred continuously over the course of approximately twenty-one months. (Mazzara Mem. at 2; Govt. Mem. at 5.) Mazzara's suppression motion raises legitimate questions regarding whether that sort of continuous video surveillance is consistent with the "aims of a free and open society." Riley, 488 U.S. at 456-57. Nonetheless, the Court concludes that there was no Fourth Amendment violation here.

Mazzara's principal argument is that "the aggregate of information garnered by the police from the pole camera surveillance was not something [he] exposed to the public," even though "much ... of what was captured on video ... was incrementally visible to a passerby." (Mazzara Mem. at 13.) As a hypothetical, Mazzara argues that while a passerby might observe him meeting with a woman outside his residence on a single day, the surveillance here allowed police to observe him meeting with the same woman numerous times over the course of twenty-one months, thereby "deduc[ing] that they are in a romantic relationship." (Id.) According to Mazzara, that "very private fact is only available to the police by the cumulative view of many separate public and private observations" and "[t]he public ... was not in a position to arrive at the same conclusion as to the relationship." (Id. at 13-14.) But Mazzara's argument is unavailing for at least two reasons.

First, Mazzara is incorrect that the police here were uniquely positioned to collect an "aggregate of information" vis-à-vis the public. There are numerous people—a neighbor, mail carrier, student, or dog walker, just to name a few—that might be expected to pass by the Surveilled Area every day, perhaps even multiple times per day. Those members of the public have a routine and continuous opportunity to observe Mazzara's public conduct within the Surveilled Area, and thereby "arrive at the same conclusion[s]" as the police. Anyone who has ever had a "nosy neighbor" certainly knows that to be true.

Second, there is no controlling case law that suggests the quantum or type of information collected during otherwise lawful surveillance somehow renders that surveillance unconstitutional. Taking Mazzara's own example, if the Pole Camera had recorded him meeting with the same woman "dozens and dozens" of times during one particularly intense day, week, or month in his life, is the surveillance suddenly therefore unconstitutional? And at what point would the constitutional line be crossed? After one week, or two? After the camera happens to record six meetings with the same person, or perhaps ten?

There is no principled basis upon which this Court can conclude that the duration of otherwise lawful public video surveillance, standing alone, is of constitutional significance. Such a ruling would have dangerous and largely unknown consequences on law enforcement's ability to collect evidence regarding certain crimes, particularly those, like the ones charged in this case, that by their nature take place over an extended period of time. The ruling that Mazzara seeks would require law enforcement to make arbitrary decisions regarding when to turn off or disable surveillance cameras that are incrementally recording incriminating evidence. For example, consider a surveillance camera installed outside the known location of a group being investigated as a possible terrorist cell. Every day for a month, the camera records people coming in and out of the building with suspicious materials and new associates. The Fourth Amendment does not and cannot require the police to remove or otherwise disable the camera on day 20 (or 30, or 45, or 60 ...) merely because it has been recording "too long", especially if there are reasonable law enforcement reasons to leave it in place. Additionally, if a surveillance camera on a street corner records evidence of a drug deal, the dealer does not have a valid suppression claim just because the camera had been installed two, four, six months, a year, or two years prior and had filmed continuously since then, capturing repeated images of the dealer's use of the corner. These are but two simple examples of the worrying and unnecessary confusion that Mazzara's proposed ruling would inject into Fourth Amendment jurisprudence. There are undoubtedly many more.

***11** Nor does it matter that the Pole Camera here was specifically trained on the outside of Mazzara's residence. The Supreme Court has repeatedly held that the investigatory purpose of otherwise lawful observation does not render it unconstitutional. See Ciraolo, 476 U.S. at 213-14 (holding that "it was irrelevant that the [police] observation from the

airplane was directed at identifying the [marijuana] plants and that the officers were trained to recognize marijuana"); see also Bond v. United States, 529 U.S. 334, 338 n.2 (2000) ("the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment"). The relevant inquiry is whether Mazzara had a reasonable expectation that his public conduct would not be recorded for so long, not whether the police subjectively hoped to catch him in the act of committing a crime.

The reality is that society has come to accept a significant level of video surveillance. Security cameras are routinely installed in public parks, restaurants, stores, government buildings, schools, banks, gas stations, elevators, and all manner of public spaces. Additionally, security cameras are increasingly being installed on public streets, highways, and utility poles. On any given day, a person is almost certain to be recorded by at least one security camera, and likely many more. A routinized person might therefore be picked up on the same camera(s) day after day. It is simply unreasonable for any person to believe that their public conduct, as it might be and often is recorded by one of those security cameras, nonetheless should remain private from observation. See Katz, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.") (citations omitted); see also Lace, 669 F.2d at 50 ("[P]eople generally do not have a legitimate expectation of privacy in open and accessible areas that the public is prepared to recognize as reasonable."); Gori, 230 F.3d at 50 (holding that "[n]o reasonable expectation of privacy inheres in what is left 'visible to the naked eye' ") (citing Riley, 488 U.S. at 450). Mazzara protests that the Pole Camera recorded his "outdoor interactions with his new born child, his girlfriend, his ex-girlfriend, his friends, his family, and his acquaintances." (Mazzara Mem. at 2-3.) But Mazzara ignores the obvious risk of conducting such activities in public.

Mazzara's suppression motion relies in large part on dicta from two concurring opinions in United States v. Jones, 565 U.S. 400 (2012). (Mazzara Mem. at 7-9.) In his Jones concurrence, Justice Alito (joined by Justices Ginsburg, Breyer, and Kagan) concludes that while "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable", "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." 565 U.S. at 430. Justice Sotomayor explicitly agreed with that conclusion, id. at 416, and even the majority left open the possibility that four weeks of continuous surveillance achieved through electronic means "is an unconstitutional invasion of privacy." Id. at 412. Put together, it certainly appears as though a majority of the Court, at least as of 2012, was prepared to hold that four weeks of warrantless GPS tracking violated the Fourth Amendment.

But the implication of Jones is not easily applied to the facts of this case. First, this Court cannot base its decision on what effectively amounts to a guess regarding how the Supreme Court might decide an issue of first impression. Not only has the composition of the Supreme Court changed since 2012, so has the nature and ubiquity of technology in our everyday lives. In Jones, Justice Alito wrote (and Justice Sotomayor agreed) that "the same technological advances that have made possible nontrespassory surveillance techniques will also affect the Katz test by shaping the evolution of societal privacy expectations." Id. at 415. Accordingly, it may be that the Supreme Court's opinion regarding "societal privacy expectations" has changed in the intervening years. Additionally, the Jones majority noted that Fourth Amendment jurisprudence based on the nature of the crime and/or the duration of surveillance creates "thorny problems," for instance, is there a constitutional difference between "2-day monitoring of a suspected purveyor of stolen electronics" versus "6-month monitoring of a suspected terrorist?" Id. at 412-13. The Supreme Court may have to address and decide those questions in the future, but it has not done so yet. This Court views the questions as—today—answered in favor of allowing such surveillance rather than drawing arbitrary lines.

***12** Second, the video surveillance at issue here is categorically distinct from the type of warrantless GPS tracking addressed in Jones. Unlike a GPS tracker, which "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations", id. at 415, a stationary video camera only observes and records whatever happens to cross its fixed line of sight. While it is true that the Pole Camera here recorded all of Mazzara's public activities within the Surveilled Area, it did not record any of his activities outside the camera's narrow field of view. Considering that the "Fourth Amendment protects people, not places", Katz, 389 U.S. at 351 (emphasis added), many of the concerns expressed by the concurring justices in Jones—for instance, that extended GPS monitoring "enables the Government to ascertain, more or less at will, [a person's] political and religious beliefs, sexual habits, and so on"—don't apply with equal force here.

For those reasons, the Court concludes that the video surveillance at issue here did not violate any expectation of privacy that modern society is prepared to recognize as reasonable under Katz and its progeny. Accordingly, the video surveillance did not violate the Fourth Amendment, and Mazzara's suppression motion must be DENIED.

ii. Good Faith Exception to the Exclusionary Rule

Even if this Court were to find that the video surveillance at issue here violated the Fourth Amendment, it would still deny Mazzara's suppression motion. That is because the officers here had no "knowledge", and cannot "properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Leon, 468 U.S. at 919. Accordingly, the "deterrence benefits of suppression" do not outweigh the heavy costs of the exclusionary rule, and Mazzara's suppression motion must be denied on that basis alone. Davis, 564 U.S. at 240.

The Supreme Court has held that the exclusionary rule does not apply when a search is conducted in good-faith, objectively reasonable reliance on binding judicial precedent. See Davis, 564 U.S. at 239-40; see also United States v. Aguiar, 737 F.3d 251, 259 (2d Cir. 2013). In such circumstances, "police conduct [is not] sufficiently deliberate that exclusion can deter it, and [is not] sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 141. Here, the relevant precedent at the time of surveillance established that:

- "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351.
- Police surveillance of a person's public movements, even with the aid of electronic tracking devices, is permissible under the Fourth Amendment (absent a common-law trespass). See Knotts, 460 U.S. at 285; Karo, 468 U.S. at 707.
- In the context of electronic beepers, "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." Knotts, 460 U.S. at 282 (citation omitted).
- Law enforcement officers are permitted to engage in aerial observation of the curtilage of a home, even when the purpose of that observation is investigatory. See Ciraolo, 476 U.S. at 213-14; Riley, 488 U.S. at 449-51.
- "[T]he mere fact that an individual has taken measures to restrict some views of his activities" does not "preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." Ciraolo, 476 U.S. at 213.
- "[P]eople generally do not have a legitimate expectation of privacy in open and accessible areas that the public is prepared to recognize as reasonable", Lace, 669 F.2d at 50 (citations omitted), and "[n]o reasonable expectation of privacy inheres in what is left 'visible to the naked eye.' " Gori, 230 F.3d at 50 (citing Riley, 488 U.S. at 450).

***13** • "Generally, the police are free to observe whatever may be seen from a place where they are entitled to be." Fields, 113 F.3d at 321-22 (citing Riley, 488 U.S. at 449).

Based on that and other precedent, the police officers here had every reason to believe that the video surveillance they engaged in was lawful. As discussed infra, there is no controlling precedent that holds the duration of otherwise lawful surveillance is of constitutional significance. If this Court were to hold that twenty-one months of continuous video surveillance is unlawful, it would be the first to do so. Even though the dicta from Jones may have raised some red flags, the concurrences in that case address significantly different facts, and do not serve as binding precedent.

The officers in this case did not engage in any culpable conduct—they "acted as a reasonable officer would and should act" under the circumstances. Leon, 468 U.S. at 920. Because the exclusionary rule is not "a strict-liability regime", it should not and does not apply in this case. The law may someday change, and "responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth amendment precedent." Davis, 564 U.S. at 241 (quoting Hudson, 547 U.S. at 599). But in this case, the Court concludes that the officers were acting in good faith and objectively reasonable reliance on binding precedent that authorized the video surveillance they engaged in.

Accordingly, Mazzara's motion to suppress is independently and alternatively DENIED on that basis.

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B. The Search of Mascuzzio's Residence

Mascuzzio's motion to suppress evidence recovered from the warrantless search of his residence does not raise any difficult legal questions. For the reasons stated below, Mascuzzio's motion is DENIED.

It is undisputed that, as a condition of his supervised release, Mascuzzio was required to "submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of release may be found." (Mascuzzio Mem. at 4-5.) In Knights, the Supreme Court held that a near identical condition, paired with reasonable suspicion of a crime, supported a warrantless search of respondent's apartment under the Fourth Amendment. See 534 U.S. at 123. Knights controls here.

It is undisputed that on July 26, 2016, a team of U.S. Probation Officers and other federal agents searched Mascuzzio's apartment without a warrant. (Mascuzzio Mem. at 4.) And, based on the record, it is clear that the law enforcement team had the requisite "reasonable suspicion" to conduct the search. Magistrate Judge Netburn signed a sealed complaint against Mascuzzio on July 22, 2016, charging him with one count of conspiracy to commit bank burglary and two counts of bank burglary. (Mascuzzio Mem. at 4.) Probable cause is a more demanding standard than reasonable suspicion, therefore there can be no doubt that element is satisfied here. Furthermore, it makes absolutely no difference that the purpose of the search was investigatory, or that the joint search team included non-probationary officers. As the Supreme Court held in Knights and the Second Circuit reaffirmed in United States v. Lifshitz, 369 F.3d 173, 181 (2004), warrantless searches conducted pursuant to a condition of release, "whether for law enforcement or probationary purposes—are acceptable ... if based upon reasonable suspicion." Here, the joint search team (1) had reasonable suspicion to conduct the search, and (2) contained officers from the U.S. Probation Department. The presence of other federal agents does not render the otherwise lawful search unconstitutional.

***14** The Court's resolution of Mascuzzio's suppression motion is therefore a straightforward application of existing law. Because Mascuzzio was subject to a condition of release allowing for warrantless searches, and because the officers had reasonable suspicion that their search would reveal evidence of a crime, the search was reasonable under the Fourth Amendment. Accordingly, Mascuzzio's motion to suppress is DENIED.

IV. DEFENDANTS' DISCOVERY MOTIONS

The defendants have additionally filed a number of pre-trial motions seeking discovery of routine material, including: (1) evidence the Government intends to use at trial; (2) all evidence the Government intends to introduce under Fed. R. Evid. 404(b); (3) all exculpatory and impeachment material under Brady v. Maryland, 373 U.S. 83, 87 (1963); (4) a list of interviewed individuals and corresponding interview notes; (5) notice of the Government's intended expert testimony; (6) a Government witness list; and (7) copies of any agreements made pursuant to United States v. Giglio, 405 U.S. 150 (1972). (ECF Nos. 120, 122.) For the reasons stated below, those motions are hereby DENIED as premature.

To the extent defendants are requesting production of Brady and Giglio materials, the Government has represented that it understands its discovery obligations, and that it intends to comply with such obligations. (Govt. Mem. at 27-29.) The defendants have not proffered any evidence to suggest that the Government is delinquent in fulfilling its obligations, or that the Government is actively concealing evidence under Brady, Giglio, or any other rule. Accordingly, defendants have not provided any basis upon which the Court can grant the requested relief, and there is no need to issue an order directing the Government to comply with its discovery obligations at this time.

To the extent defendants are challenging the timing of the Government's discovery (e.g., by requesting certain evidence immediately, or between forty-five to sixty days before trial), the Court notes that the Governments is under no legal obligation to provide the requested material so early. This Court declines to impose on the Government any additional discovery obligations not already contemplated by the applicable rules, absent some showing of delinquency or bad faith. The defendants have proffered no evidence to suggest that the Government will not comply with its discovery obligations in due course.

V. CONCLUSION

For the reasons stated above, the Court DENIES each of the pending pretrial motions.

The Clerk of Court is accordingly directed to terminate the motions at ECF Nos. 115, 120, 122, 124, 125, 129, 140, 141, 142, and 143.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 4862793

Footnotes

1 All four defendants are charged with participating in the conspiracy charged in Count One, as well as Counts Four (Bank Burglary) and Five (Bank Theft) concerning the alleged burglary of a Maspeth Federal Savings Bank branch in Queens, New York in May 2016. All but Christopher Kerrigan are charged in Counts Two (Bank Burglary) and Three (Bank Theft) concerning the alleged burglary of an HSBC Bank branch in Brooklyn, New York in April 2016.

2 The Government asserts that the Pole Camera recorded "24 hours per day, seven days a week, with the exception of brief periods when the Pole Camera did not transmit any footage." (Govt. Mem. at 5.) Those "brief periods" are irrelevant to the Court's decision herein.

3 It is undisputed that the Pole Camera was in place for approximately twenty-one months, from on or about November 6, 2014 until August 6, 2016. While it is unclear precisely how much footage was ultimately recorded by the Pole Camera, it does not alter the Court's Fourth Amendment analysis.

4 "Our fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances." United States v. Chadwick, 433 U.S. 1, 9 (1977) (citation omitted); see also United States v. Bailey, 743 F.3d 322, 331 (2d Cir. 2014) ("[T]he ultimate measure of the constitutionality of a government search or seizure is reasonableness.") (internal quotations and citation omitted). In most instances, the touchstone of a constitutional search is one conducted pursuant to a judicially authorized warrant resulting from probable cause. See Chambers v. Maroney, 399 U.S. 42, 51 (1970).

5 In his briefing, respondent argued that "the result of the holding sought by the government would be that 'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.' " Id. at 283 (citation omitted). The Court rejected that argument as premature, holding that "if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." Id. at 284.

6 In Jones, Justice Scalia attempted to reconcile his rationale therein with Katz by describing Katz as merely expanding upon the trespass-based case law that preceded it. But as Justice Alito points out in his concurring opinion, this interpretation is not well supported by the text of Katz or the subsequent case law. Indeed, it did appear prior to Jones that "Katz ... finally did away with the old approach," and that "an actual trespass is neither necessary nor sufficient to establish a constitutional violation." Id. at 422-23 (emphasis added by J. Alito). Jones is in fact a sharp departure from the Katz line of Fourth Amendment cases.

7 The majority acknowledged Justice Alito's argument that " 'traditional surveillance' of Jones for a 4-week period 'would have required a large team of agents, multiple vehicles, and perhaps aerial assistance,' " but concluded that "our cases suggest that such visual observation is constitutionally permissible." Id. at 412.

8 Even the majority noted, in dicta, that "[i]t may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question." Id. at 412.

9 Although the Pole Camera was mounted approximately 12 feet above the ground, (Mazzara Mem. at 2), that does not pose any difficult complications for purposes of this Court's Fourth Amendment analysis. The Supreme Court has permitted aerial surveillance in Ciraolo and Riley, and the Second Circuit has held that unaided visual observation from an apartment across the street does not constitute a search. See Taborda, 635 F.2d at 139. Certainly, if police are permitted to hover above a yard in a helicopter, they must be permitted to mount a camera above eye level.

10 An argument could be made that Mazzara did not manifest a subjective expectation of privacy in the Surveilled Area prior to May 18, 2016. Before that date, the Surveilled Area was completely exposed to the public. It could be the case that, prior to erecting the fence, Mazzara did not subjectively believe his conduct within the Surveilled Area—which any passerby could have observed at any time—would remain private. However, because the Court assumes that Mazzara had at least a subjective expectation that the aggregate of information collected would remain private, it need not confront this issue directly.

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United States District Court,
N.D. Alabama,
Northeastern Division.

UNITED STATES of America, Plaintiff,
v.
Craig Rowland NOWKA, Defendant.

No. 5:11–CR–474–VEH–HGD.
|
Dec. 17, 2012.

Attorneys and Law Firms

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MEMORANDUM OF OPINION AND ORDER

VIRGINIA EMERSON HOPKINS, District Judge.

I. Background and Procedural History

***1** The Government suspected that the Defendant, Craig Rowland Nowka ("Nowka"), was dealing in firearms without the license required by Title 18, United States Code, Section 922(a)(1)(A). [1] As part of their investigation, ATF decided to conduct surveillance on Nowka. At their request, and without any court order or warrant, Hartselle Utilities Company attached a surveillance camera to a utility pole located in the right-of-way of Nowka's home. The surveillance camera was left on the utility pole, recording "24/7," for about eight months. The surveillance camera showed Nowka's back yard and the side of Nowka's residence, including his driveway and, when the garage door was open and no car blocked the view, the inside of at least a portion of his garage. This was the very same view, although from a higher angle, that any person could have from the public road that ran beside Nowka's house.

1 For a more complete recitation of the facts underlying the Government's suspicion, see the Report and Recommendation, doc. 26, reported at 2012 WL 2862139, at *1–7 (N.D.Ala., May 14, 2012).

ATF eventually obtained a warrant to search Nowka's house. In it, they found multiple firearms. Additionally, despite being advised about his *Miranda* rights, which Nowka acknowledged in writing that he understood, and despite being repeatedly warned that his statements could be used against him, Nowka spoke at length to the ATF agents about his gun collecting "hobby," how often he participated in gun shows, whom he bought guns from, whom he sold guns to, how much money was involved, his knowledge that he did not have a federal firearms license to deal in firearms, his concerns that he might need such a license, and which guns he planned to take to an upcoming gun show to sell at that show.

Nowka now faces a thirteen-count [superseding] indictment. (Superseding Indictment, doc. 22). In Count One, Nowka is charged with willfully engaging in the business of dealing in firearms without a license, in violation of Title 18, United States Code, Section 922(a)(1)(A). In Count Two, Nowka is charged with being an Alabama resident who was not a licensed importer, manufacturer, dealer, or collector of firearms and who willfully transferred, sold, traded, gave, transported, and delivered a firearm to an individual, who also was not a licensed importer, manufacturer, dealer, or collector of firearms and who Nowka knew or had reason to know was not a resident of the State of Alabama, in violation of Title 18, United States Code, Section 922(a)(5). In Counts Three through Thirteen, Nowka is charged with knowingly making false statements with regard to information required to be kept by federally-licensed firearm dealers in that he stated, on ATF Forms 4473 [2], that he was the actual buyer of the firearms with respect to which the form was submitted, when, in fact, he was purchasing the firearms for resale.

2 Each date on which a Form 4473 allegedly containing the false statement was delivered to the federally-licensed firearms dealer at issue is the subject of a separate count.

The case is now before the court on Nowka's Motion To Suppress Evidence and Statements ("Motion," doc. 16), to which the Government has responded (doc. 21), and Nowka's Supplemental Motion To Suppress ("Supplemental Motion," doc. 24), to which the Government has also responded (doc. 25). At the April 25, 2012, evidentiary hearing on the Motion, counsel for Nowka moved to be allowed to supplement his motion to suppress in light of the recent Supreme Court ruling in *United States v. Jones,* —— U.S. ——, 132 S.Ct. 945 (2012). Magistrate Judge Davis granted that motion. The

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Supplemental Motion was filed on May 5, 2012, challenging the search warrant on that ground as well. (Order, doc. 30).

***2** In his Supplemental Motion, Nowka complained of the lack of an evidentiary hearing, held "*after* " the Supplemental Motion was filed, on the issue of whether the "pole upon which the surveillance equipment was installed was in fact on Defendant's property." (Objections, doc. 29, par. 6.) (emphasis in original). Nowka asked this court to "remand this issue and require the Magistrate conduct an evidentiary hearing on the issue of whether the pole camera installation and surveillance violated Defendant's Fourth Amendment right to be free of unwarranted searches and seizures." (*Id.*).

On July 11, 2012, the undersigned granted Nowka's request. Specifically, the undersigned stated:

> Assuming without deciding that an evidentiary hearing should have been held, in the interest of developing a full and complete record, the court **GRANTS** Nowka's request and hereby **REMANDS** this case to Judge Davis to hold an evidentiary hearing, *limited to "the issue of whether the pole camera installation and surveillance violated Defendant's Fourth Amendment right to be free of unwarranted searches and seizures."*

(Doc. 30, p. 3.) (emphasis in original).

On August 21, 2012, Judge Davis held that evidentiary hearing. (Court docket entry dated 8/21/2012). On August 31, 2012, Judge Davis entered his Report and Recommendation that the Motion, as supplemented on the issue of the pole camera installation and surveillance, be denied. (Second R & R, doc. 39). On September 10, 2012, Nowka again objected. (Objections, doc. 40). The Government responded. (Response, doc. 40).

The court has reviewed the pleadings, the First and Second R & Rs, the Objections, and the Response, and sets out its findings of fact and conclusions of law below. Based on those findings of fact and conclusions of law, the Motion and the Supplemental Motion are due to be, and hereby are, **DENIED.**

II. ***Standard of Review***

Under the Federal Magistrates Act, Congress vested Article III judges with the power to authorize a magistrate judge to conduct evidentiary hearings. The relevant portion of the Act is found at 28 U.S.C. § 636. A district court judge may designate a magistrate judge to conduct hearings, including evidentiary hearings, in order to submit proposed findings of fact and recommendations for the disposition of motions. This district has generally referred certain criminal proceedings, including motions to suppress, to its magistrate judges.

Within fourteen days after being served with a copy of the report and recommendation, any party may file written objections to the proposed findings and recommendations. 28 U.S.C. § 636(b)(1)(C). After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject, or modify the magistrate judge's report and recommendation. *Id.; Williams v. Wainwright,* 681 F.2d 732 (11th Cir.1982) (per curiam). A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). This requires that the district judge "give fresh consideration to those issues to which specific objection has been made by a party." *Jeffrey S. By Ernest S. v. State Bd. of Educ of State of Ga.,* 896 F.2d 507, 512 (11th Cir.1990) (citation omitted). A district judge must review legal conclusions *de novo,* even in the absence of an objection. *See Cooper–Houston v. Southern Ry.,* 37 F.3d 603, 604 (11th Cir.1994); *Castro Bobadilla v. Reno,* 826 F.Supp. 1428, 1432 (S.D.Fla.1993), *aff'd,* 28 F.3d 116 (11th Cir.1994). That said, the court also acknowledges the principle that "[n]either the Constitution nor the statute requires a district judge to review, *de novo,* findings and recommendations that the parties themselves accept as correct." *United States v. Woodard,* 387 F .3d 1329, 1334 (11th Cir.2004) (citation omitted). Moreover, absent specific objections, there is no requirement that a district judge review factual findings de novo. *See Garvey v. Vaughn,* 993 F.2d 776, 779 n. 9 (11th Cir.1993) (noting that when a party "did not file specific objections to *factual findings* by the magistrate judge, there was no requirement that the district court *de novo* review those findings") (emphasis in original) (citations omitted).

III. ***Issues before the Court***

A. Objections

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***3** The only "fact" found by Judge Davis, in either the First R & R or the Second R & R, to which Nowka has objected is Judge Davis's "not making findings of fact and law consistent with his Motions and Objections and the additional facts and points of law therein." (Objections, doc. 40, pp. 1–2; *see also* Objections, Doc. 28. p. 10). Further, Nowka "objects to the ... R & R's legal findings and conclusions within the [Second] R & R, (Doc. 39)." (Doc. 40, p. 2.). Thus, it appears that Nowka's objections to legal conclusions are limited to the Second R & R.

B. Objections to Findings of Fact

First, Nowka appears to object to Judge Davis's failure to find that the "utility pole was located on and within [Nowka's] property ." (*Id.).* Second, he appears to object to Judge Davis's failure to find that Hartselle Utilities company had only an easement "to have access to [Nowka's] property **for the specific, sole purpose of maintaining the utility pole.**" (*Id.,* p. 2.) (emphasis in original).

The undersigned has reviewed the transcript of the August 21, 2012, evidentiary hearing, as well as the exhibits introduced by the Government and Nowka at that hearing. While the utility pole undeniably "was located on and within" Nowka's property, it was undisputed that the utility pole: (1) belonged to Hartselle Utilities Company; and (2) was within the 50–foot right-of-way [3] which Hartselle Utilities Company permissibly uses to access its utility pole and any items on that pole. Further, it is undisputed that the subdivision plat for the subdivision in which Nowka's residence is located contains dedicated rights-of-way for "streets, alleys, and public places," and that that right-of-way, at the point where the utility pole at issue was located, was 25 feet from the center of the adjacent public road. Finally, it is undisputed that the utility pole at issue was located less than 21 feet from the center of the public road adjacent to Nowka's home. Thus, the undersigned finds no reasons to sustain Nowka's objections to Judge Davis's findings of fact, and those objections are hereby **OVERRULED.**

3 Interchangeably referred to in the hearing as a right-of-way and as an easement, but undeniably established to be a right of way.

C. Objections to Conclusions of Law

As stated above, Nowka's objections to legal conclusions are limited to the Second R & R. That R & R was itself limited to "the sole issue of whether the installation and use of a pole camera ("polecam") on a utility pole outside of defendant's residence involved an illegal search in violation of *United States v. Jones,* —— U.S. ——, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012)." (Second R & R, doc. 39, p. 1; *see also* Order, doc. 30, p. 3.). Thus, to the extent that Nowka now seeks to expand the scope of his legal arguments, such an expansion is untimely. Further, even considering such untimely arguments on their merits, they are due to be overruled. [4]

4 The undersigned will only address the legal arguments that are actually set out in Nowka's objections. Specifically, the undersigned finds that Nowka's objections "to the Magistrate denying his Motions, and ... to the R & R's legal findings and conclusions within the R & R, (Doc. 39)" are wholly insufficient to put the undersigned on notice of any particular error asserted by Nowka. The undersigned will not address such a conclusory and undeveloped "objection."

1. *Nowka's Argument Based on Trespass*

Nowka's first argument is that Hartselle Utilities Company trespassed on Nowka's property, "including the air space within the curtilage" of that property, and thus, pursuant to *Jones,* the Motion and the Supplemental Motion are due to be granted. This argument fails.

***4** Nowka argues:

> [T]he easement and usage of trade contemplate that the utility company's access to the property would be brief, and again, for the sole and limited purpose of maintaining utility equipment. The easement does not contemplate or authorize the installation and maintainance [sic] of "Big Brother's" continuous spying eye of Nowka's activities on his property. The tresspass [sic] of the pole camera video surveillance was investigatory in nature and fits squarely into the *Jones* analysis, constituting a "search" for Fourth Amendment purposes. *See United States v. Jones,* 132 S.Ct. 945 (2012).

(Doc. 40, p. 5.). Nowka further argues:

> [B]ecause the easement did not authorize the utility company (or law enforcement) to enter his property or curtilage (which includes the air above the ground) for any purpose other than maintaining utility equipment, the R & R should have found that the installation and surveillance of the surveillance camera on a utility pole located within the curtilage of Defendant's residence was a search for purposes of the Fourth Amendment. See discussion in Defendant's Objections (Doc. 29), of *Katz v. United States,* 389 U.S. 347 (1967) and *United States v. Jones,* 132 S.Ct. 945 (2012), regarding whether the installation of the pole camera on Defendant's property constituted a search within the meaning of the Fourth Amendement [sic].

(*Id.,* p. 6.). Finally, Nowka:

> ... objects to the [Second] R & R finding that there was no unauthorized physical trespass onto defendant's property, and that he did not have a legitimate expectation of privacy in the pole or the views which the surveillance camera afforded, because the utility truck was parked on a public road and used a "bucket truck" to install the surveillance camera on the pole. (Doc. 39, p. 2) Thus, the R & R improperly found that because the person installing the pole camera did not physically step onto the property grounds, but instead went through the air in a fork lift bucket, hovering over the property, some 20 to 30 feet, that there was no Fourth Amendment violation.

(*Id.*).

Code of Alabama 1975 Sections 35–2–50 and –51 provide the statutory mechanism for subdividing property in Alabama. Section 35–2–50 reads:

> Any person ... desiring to subdivide his lands into lots shall cause the same to be surveyed by a competent surveyor, if not already surveyed, and shall cause a plat or map thereof to be made, showing the subdivisions into which it is proposed to divide the same, giving the length and bearings of the boundaries of each lot and its number; and, if it is the purpose of the owner to divide the lands into town lots, such plat or map shall show the streets, alleys and public grounds and give the bearings, length, width and name of each street, as well as the number of each lot and block. Such plat or map must show the relation of the lands so platted or mapped to the government survey.

Section 35–2–51 reads:

> ***5** (a) The plat or map having been completed shall be certified by the surveyor, which certificate must also be signed by the owner ... and acknowledged by such owner ... in the same manner in which deeds are required to be acknowledged. The plat or map, together with the certificate of the surveyor and acknowledgment, shall be recorded in the office of the judge of probate in the county in which the lands are situated, in a suitable book to be kept for that purpose ...
>
> (b) The acknowledgment and recording of such plat or map shall be held to be a conveyance in fee simple of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public, and the premises intended for any street, alleyway, common or other public use, as shown in such plat or map, shall be held in trust for the uses and purposes intended or set forth in such plat or map.

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Government's Exhibit 19/Defendant's Exhibit 2 shows that the recording of the subdivision plat or map within which Nowka's residence is located was in substantial compliance with the requirements of these sections. Thus, the Government has shown that the property where the utility pole is located is within a portion of the subdivision that was validly dedicated to the public. *See Blair v. Fullmer,* 583 So.2d 1307 (Ala.1991); *Gaston v. Ames,* 514 So.2d 877 (Ala.1987). Nowka failed to show that the publicly-dedicated place where the utility pole was located had been altered or withdrawn. "After there has been a proper dedication to the public, that dedication is irrevocable and it cannot be altered or withdrawn except by statutory vacation proceedings." *Gaston,* 514 So.2d at 879 (citation omitted).

"[U]nless expressly restricted, the use of an easement appurtenant is not limited to the owners of the dominant estate, but also inures to the benefit of their tenants, 'servants, agents, or employees in conducting [their] business,' as well as social and business invitees, which includes use by utility workers and 'utility company service vehicles.' " *Bradshaw v. Enterprise Realty, Inc.,* —— So.3d ——, 2012 WL 1918430, at *6 (May 25, 2012) (Ala.Civ.App.2012) (internal citations omitted). The 50–foot right-of-way was dedicated, *without restriction or reservation,* to the *public.* Thus, although the use of the utility pole for surveillance purposes, as opposed to for the provision of utilities, is a change in kind that *might* support a theory of trespass if the dedication had been only for utilities, those simply are not the facts of this case. As the utility pole was on a publicly-dedicated space, and as the use of the pole was not shown to have been subject to any restriction, Nowka has failed to show any constitutional violation under his trespass theory.

2. *Nowka's Expectation of Privacy Argument*

Although beyond the scope of his initial objections, Nowka now argues that the installation of a 24/7 surveillance camera "interfered with [Nowka's] ... right to enjoy his property without his privacy being violated on a 24/7, uninterrupted basis." (*Id.,* p. 4.). However, the evidence is undisputed that what could be seen on the surveillance recording was in no way different (other than angle of view) from that which any person could see from the public street.[5] Nowka was not behind a fence or a gate or any other device which would have obstructed the view of his car in his driveway. There was no expectation of privacy in this area by Nowka. Such a search does not implicate the Fourth Amendment. *See Katz v. United States,* 389 U.S. 347 (1967); *see also Florida v. Riley,* 488 U.S. 445 (1989) (holding that there was no search when police observed marijuana in a partially covered building in the defendant's backyard from the vantage point of a helicopter). Simply put, there was no Fourth Amendment search here when officers used the pole camera to observe Nowka's actions in plain view in his driveway. Therefore, Nowka's objections based on his expectation-of-privacy arguments are due to be **OVERRULED.**

5 Nowka's argument is totally undeveloped, factually or legally. However, the court is aware that the surveillance camera allowed remote viewers to "zoom in" on what was taking place in public view. Nowka does not cite, and the court is not aware of, any case that holds that it is an invasion of privacy to make a public view clearer or larger.

D. Nowka's Arguments Are Futile

***6** As accurately pointed out by Judge Davis in the First R & R, doc. 27:

> ... even if the evidence obtained from the pole camera were stricken, there was ample evidence to provide probable cause that Nowka was involved in unlicensed sales of firearms in violation of federal law. As noted above, the warrant is sufficiently detailed that a reasonable officer would have believed, in good faith, that the warrant was valid. Therefore, the search is also valid pursuant to *United States v. Leon* [468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)].

(Doc. 27, p. 11.).

IV. CONCLUSION

For the reasons set out above, Nowka's Objections are due to be, and hereby are, **OVERRULED.** His Motion and Supplemental Motion are hereby **DENIED.**

DONE and **ORDERED.**

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United States District Court,
E.D. Missouri, Eastern Division.

UNITED STATES of America, Plaintiff,
v.
ROBERT RENO-1, Defendant.

No. 4:16CR380 CDP (SPM)
|
Signed 11/07/2018

Attorneys and Law Firms

Edward Lawrence Dowd, III., Stephen R. Casey, Sirena M. Wissler, Michael A. Reilly, Office of U.S. Attorney, St. Louis, MO, for Plaintiff.

REPORT AND RECOMMENDATION AND ORDER OF UNITED STATES MAGISTRATE JUDGE

SHIRLEY PADMORE MENSAH, UNITED STATES MAGISTRATE JUDGE

***1** In accordance with the Memorandum filed herein,

IT IS HEREBY RECOMMENDED that Defendant's Motion to Suppress Electronic Surveillance Evidence (Doc. 317) be **DENIED.**

IT IS FURTHER RECOMMENDED that Defendant's Motion to Suppress Evidence (Doc. 318) be **DENIED.**

The parties are advised that they have **fourteen (14)** days in which to file written objections to this report and recommendation pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in a waiver of the right to appeal questions of fact. *See Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

Trial in this case has been set before the **Honorable Catherine D. Perry** on **Monday, December 17, 2018, at 8:30 a.m.**

MEMORANDUM

All pretrial motions in the above cause were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b).

I. BACKGROUND AND PROCEDURAL HISTORY

On August 25, 2016, Defendant Robert Reno was charged in an indictment with conspiracy to distribute a mixture or substance containing a detectable amount of methamphetamine, felon in possession of a firearm, and distribution of a mixture or substance containing a detectable amount of methamphetamine. (Doc. 1). The United States subsequently filed a motion to designate the case as complex and to set trial date beyond limits set by the Speedy Trial Act. (Doc. 58). That motion was granted. After several extensions at the request of defendant, the deadline for filing pretrial motions was set for May 4, 2017. On May 4, 2017, in compliance with the Court's deadlines, Defendant Reno (through previously retained counsel) filed a motion to suppress the contents of any and all electronic surveillance evidence (Doc. 134) and a motion to suppress physical evidence (Doc. 135). The undersigned set an evidentiary hearing on Defendant Reno's pretrial motions for May 24, 2017.

However, before the scheduled evidentiary hearing, on May 11, 2017, Defendant Reno's former retained counsel filed a motion for psychiatric examination and a motion for leave to withdraw as counsel for Defendant Reno. Following a hearing held on May 24, 2017, the undersigned granted the motion for a psychiatric examination, and deferred ruling on counsel's motion to withdraw until after the psychiatric examination. On June 28, 2017, a federal grand jury returned a superseding indictment in which Defendant Reno was charged with conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine (Count One), distribution of methamphetamine (Count Two), possession of a firearm in furtherance of a drug trafficking crime (Count Three), felon in possession of a firearm (Count Four), and possession with intent to distribute 500 grams or more of methamphetamine (Count 6). (Doc. 179).

Due to a delay in transportation, Defendant did not arrive at the designated facility for psychiatric evaluation until August 21, 2017. As such, the facility requested an extension through October 27, 2017 to complete the evaluation and submit

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a report. (Doc. 247). On October 31, 2017, a psychiatric report reflecting the results of the psychiatric examination was submitted; and, on November 9, 2017, the undersigned held a competency hearing, at which it was determined that Defendant was competent to proceed. At the time of the competency hearing, Reno's then-retained counsel was granted leave to withdraw due to conflicts that had arisen between Reno and his attorneys. Reno represented that he was indigent and requested court-appointed counsel. CJA panel attorney Talmadge Newton was appointed and, at Mr. Newton's request, the pretrial motion deadline was extended three times to March 21, 2018.

***2** Mr. Newton withdrew the previously filed pretrial motions and, on March 21, 2018, filed the instant motion to suppress evidence obtained by the United States from court authorized electronic surveillance (Doc. 317) and motion to suppress physical evidence (Doc. 318). Specifically, the motion to suppress physical evidence sought suppression of (i) evidence seized during a traffic stop in Audrain County on March 15, 2015; (ii) records and location information for a cellular telephone registered to Reno obtained via an April 3, 2015 order; (iii) recordings from a monitored pole camera installed on May 20, 2015; (iv) electronic identifying numbers of any cellular telephones used by Reno obtained through a September 8, 2015, search warrant for a cell-site simulator; and (v) evidence seized pursuant to a December 10, 2015 search warrant executed at Defendant's home and a shop address. (Doc. 318). The United States opposed Defendant's motions (Doc. 322); and the undersigned scheduled an evidentiary hearing for April 30, 2018.

On April 25, 2018, attorney Beau Brindley filed a motion on behalf of Reno requesting that the Court "withdraw" Mr. Newton and "substitute attorney Beau B. Brindley to represent him for the remainder of the case." Because it was unclear whether Mr. Brindley had been retained or was requesting that he be appointed by the Court, the undersigned held a telephone status hearing with the parties on April 27, 2018. During the status hearing, Mr. Brindley clarified that he had been retained by Mr. Reno's family. Based on the discussion held on the record, Mr. Brindley indicated that he would enter his appearance and request a continuance of the evidentiary hearing for a period of thirty (30) days. The undersigned continued the evidentiary hearing to May 31, 2018, and subsequently granted defendant additional time until May 25, 2018, to decide whether to proceed on the existing pretrial motions or to file new motions. On May 22, 2018, defendant requested and was subsequently granted an extension of the pretrial motion deadline to June 4, 2018. The evidentiary hearing was continued to June 20, 2018.

On June 4, 2018, in compliance with this Court's order, defense counsel advised in a written status report that Defendant Reno intended to proceed with the pretrial motions previously filed by court-appointed counsel Talmage Newton. (Doc. 347). Counsel noted in the report that he would be prepared to proceed at the June 20th evidentiary hearing. *Id.* However, the day before the scheduled evidentiary hearing, on June 19th, defense counsel filed a motion to continue the scheduled evidentiary hearing, citing an emergency involving his pet. Due to a number of scheduling conflicts with both the Court's docket and defense counsel's trial schedule, the evidentiary hearing was reset for August 30, 2018.

However, on August 29, 2018, Reno's retained counsel filed an "Agreed Motion to Strike Evidentiary Hearing and Withdraw Motions" (Doc. 358). On August 30, 2018, the Court held a hearing on the "Agreed Motion" to withdraw filed by retained counsel. At the time of the hearing, Reno was present with retained counsel, Michael Thompson. The United States was represented by Assistant United States Attorney Edward Dowd. Mr. Thompson stated on the record that, after more closely reviewing the pending pretrial motions, which were filed by Reno's prior court-appointed counsel, the current defense team did not believe the motions are meritorious and did not believe that a hearing on the motions would benefit the defendant.

However, Reno stated on the record that he had not been in contact with his attorneys prior to the hearing and did not agree with the decision to withdraw the pending pretrial motions. Given the apparent lack of communication between defense counsel and the defendant, the undersigned denied the motion to withdraw Reno's pretrial motions, without prejudice, and directed defense counsel to confer with Reno and, if necessary, explain their reasons for withdrawing pretrial motions.

***3** The Court rescheduled the evidentiary hearing for September 12, 2018, and directed defense counsel to notify the Court by no later than September 10, 2018, if defense counsel intended to reassert the motion to withdraw pretrial motions. Shortly after the hearing on August 30, 2018, the Court rescheduled the evidentiary hearing for September 18, 2018, due to a scheduling conflict with one or more government witnesses.

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On September 18, 2018, this matter came before the Court for the evidentiary hearing on Reno's pending pretrial motion to suppress electronic surveillance evidence (Doc. 317) and motion to suppress physical evidence (Doc. 318). Reno was present, in custody, and the United States was represented by Assistant United States Attorneys Edward Dowd and Sirena Wissler. Witnesses for the United States also appeared for the hearing. However, neither of Reno's retained attorneys of record—Beau Brindley and Michael Thompson—appeared.

Upon inquiry by the Court, Mr. Reno indicated that he and his family had unsuccessfully attempted to contact his retained attorneys. Mr. Reno further indicated that he had no contact with his counsel since his last appearance before this Court on August 30, 2018. AUSA Dowd also indicated that his office had made multiple attempts to contact counsel and counsel's office, without success. The Court also indicated its lack of success in reaching even a receptionist at the offices of defense counsel. Given the circumstances, as set out on the record in open court, Defendant requested that the Court appoint counsel to represent him in future proceedings. That request was granted. The undersigned reappointed CJA panel attorney, Talmage Newton to represent Reno and set the case for a status hearing on September 26, 2018.

On September 26, 2018, the undersigned held a status hearing at which Assistant United States Attorney Ed Dowd, Defendant's attorney, Talmage Newton, and Defendant were present. At the status hearing, the Court and counsel discussed Defendant's pretrial motion to suppress electronic surveillance evidence (Doc. 317) and motion to suppress physical evidence (Doc. 318). Based on the discussion held on the record in open court, the undersigned set the matter for an evidentiary hearing on October 5, 2018 at 9:30 AM.

Two days before the scheduled evidentiary hearing, on October 3, 2018, Reno's court-appointed counsel, Talmage Newton filed a motion for leave to withdraw as appointed counsel so that Reno could proceed with his previously retained counsel (Brindley and Thompson). Citing a scheduling conflict for Brindley and Thompson, Newton's motion also sought a continuance of the evidentiary hearing set for October 5, 2018. (Doc. 375). The undersigned denied the motion in a written order entered on October 4 th and held the evidentiary hearing as scheduled on October 5, 2018. [1]

1 The hearing proceeded subject to Reno's objection to proceeding without his retained counsel. However, for the reasons set out in the undersigned's order dated October 4, 2018 (Doc. 376), I found the objection was not well taken.

At the hearing, the United States conceded that it did not intend to offer any evidence seized from the Audrain County traffic stop. As such, the defense conceded that, to the extent the motion to suppress physical evidence seeks to suppress evidence seized during the Audrain County traffic stop, the motion is moot. The United States also argued, and the defense conceded, that the motion to suppress is moot to the extent it seeks suppression of evidence seized pursuant to a search warrant executed at 117 South Olive, a business investigators believed was associated with Reno. Specifically, Reno denied any ownership interest in, and any association with, the address. As such, Reno denied that he has standing to challenge the search or seizure at that address. Based on the record made at the evidentiary hearing and for the reasons set out above, there are no issues for the undersigned to resolve with respect to the Audrain County traffic stop and with respect to the search of, and seizures from, 117 South Olive. As such, this Report and Recommendation will not address those previously challenged searches/seizures relative to the Audrain County traffic stop and the business at 117 South Olive.

***4** The United States offered the testimony of DEA Special Agent Ryan Lawyer and documentary and photographic evidence. Defense counsel cross examined Agent Lawyer but did not present any additional witnesses or exhibits at the evidentiary hearing. I found the testimony of Agent Lawyer to be credible and reliable.

Based upon the evidence adduced at the hearing on the motions to suppress, as well as a review of the rough transcript of the hearing in this matter, and the briefs of the parties, the undersigned makes the following findings of fact and conclusions of law:

II. FINDINGS OF FACT

At the time of the evidentiary hearing, Special Agent Ryan Lawyer was a 14-year veteran agent of the Drug Enforcement Administration (DEA), who began his career in law enforcement in 1999. During his time with DEA, Agent Lawyer had a long working relationship with the local drug task force in Audrain County. In the Spring of 2014, the Audrain County drug task force advised Agent Lawyer of Reno and his methamphetamine distribution activities. Lawyer indicated he would be willing to assist them with the case at some point and told them to contact him once they had

developed a good confidential source. The Audrain County drug task force developed such a source and contacted Agent Lawyer in February 2015.

A. April 3, 2015, PLI Warrant for Records and Precision Location Information from Reno's Cellular Telephone

A review of the Court's own files reveals that, on April 3, 2015, the United States sought and obtained a Warrant and Order for "records and location information, including precision location information, cell site location information, and other signaling information" for a cellular telephone registered to Defendant Reno (the "PLI Warrant"). The warrant application was supported by an affidavit attested to by Agent Lawyer, which set out in detail the basis for probable cause. Specifically, the information provided in support of a finding of probable cause included information from toll analysis, interviews of confidential sources and other sources of information, and physical surveillance by a task force officer. *See In Re: Application of the United States of America for A Warrant to Obtain Records, Location Information, and Other Signaling Info.,* Case No. 4:15MJ6092PLC Doc. Nos. 1, 1-1 & 2.

B. September 8, 2015, Cell-Site Warrant Authorizing Use of a Cell-Site Simulator and for Records Related to Reno's Telephones

A review of the Court's own files reveals that on September 8, 2015, the United States sought and obtained a search warrant to use a cell-site simulator to determine the electronic identifying numbers of any cellular telephones used by Reno (the "Cell-Site Warrant"). The warrant application was supported by an affidavit attested to by Agent Lawyer, which set out in detail the basis for probable cause. Specifically, the information provided in support of a finding of probable cause included information from toll analysis, interviews of confidential sources and other sources of information, and Title III intercepts of Reno and other members of the suspected drug trafficking organization. *See In Re: Application of the United States of America for A Warrant to Authorize Use of A Cell-Site Simulator,* Case No. 4:15MJ7252SPM Doc. Nos. 1, 1-1 & 2.

C. Warrantless Pole Camera (May 2015 & October 2015)

***5** Agent Lawyer testified that during the pendency of the investigation into the Robert Reno drug trafficking organization ("DTO"), investigators used internet-based pole cameras to conduct surveillance of two locations: the business near the 100 block of South Olive in Mexico, Missouri, which they believed was associated with Reno (the "South Olive pole camera") and Reno's residence located at 1311 Ringo, in Mexico, Missouri (the "Ringo pole camera"). Investigators did not obtain a warrant for either camera. The South Olive pole camera was installed on or about May 20, 2015, and operated continuously until on or about December 31, 2015. The South Olive pole camera captured the entire 100 block of South Olive, including the business located at 117 South Olive that was a target of the investigation. *See* Govt Exh. 27. The area of 117 South Olive captured by the South Olive pole camera appears to have been a purely public area that anyone walking or driving down the street would be able to see. *See id*.

Agents installed the Ringo pole camera on or about October 22, 2015. It was covertly installed on the outside of Reno's next door neighbor's garage with the neighbor's consent. Reno's street appears to be located in a suburban neighborhood where the houses were relatively close to each other. *See* Govt Exh. 28. Reno's house was approximately 50 feet from his neighbor's house, and there appears to have been no visible fence separating Reno's driveway from the neighbor's house. *See id.* The Ringo pole camera was not on a pole at all. It was about a foot or two off the ground and was trained on Reno's driveway. It ran 24 hours a day, and agents had the ability to monitor the feed in real time, rewind, fast forward, and take still shots (although Agent Lawyer testified they never took still shots). The Ringo pole camera remained in place for about six weeks until approximately December 12, 2015.

Although the portion of Reno's driveway captured by the pole camera could also be viewed from the street, the Ringo pole camera captured a view of Reno's driveway from an angle that only someone standing on the neighbor's property would have had. Agents did not encroach on Reno's property to install the Ringo pole camera and the camera did not appear to capture Reno's house at all. Instead, it captured only cars parked on Reno's driveway and the street that ran in front of the house. *See id.*

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D. August 2015 Title III Authorization

The evidence adduced at the evidentiary hearing shows that the United States conducted court ordered electronic surveillance during the investigation of the matters alleged in the indictment. On August 28, 2015, acting on behalf of Special Assistant United States Attorney Edward Dowd, Assistant United States Attorney Stephen R. Casey appeared before United States District Judge Ronnie L. White and made an application for interception of wire communications over telephone number (573) 230-5277, International Mobile Subscriber Identity ("IMSI") 310410505507136 (referred to in the applications, affidavits, and orders as Target Telephone #2). *See* Govt. Exhs. 3, 4 & 5. The application was accompanied by, and referenced, an affidavit of Agent Lawyer, which was also signed and sworn to before Judge White on August 28, 2015. *See* Govt. Exh. 4.

Agent Lawyer's affidavit established that, at the time he applied for an order authorizing the initial interception of wire and other electronic communications, Reno was the primary target of an investigation into a suspected methamphetamine organization and for violations of various drug trafficking, firearm, money laundering, and other federal laws. The affidavit indicated that Agent Lawyer expected that the communications of the identified individuals, including Reno, would be intercepted on Target Telephone #2, which was subscribed to and used by Reno. The communications expected to be intercepted and sought to be intercepted concerned the details of offenses committed by the subjects of the investigation as well as the nature, extent, and methods of operation of the narcotic distribution of the target subjects and others yet unknown; the identities and roles of accomplices, aiders and abettors, co-conspirators, and participants in their illegal activities; the distribution and transfer of the contraband and money involved in those activities; the existence and location of records pertaining to those activities; the location and sources of resources used to finance the suspects' illegal activities; the location and disposition of proceeds from the suspects' illegal activities; and the locations of items used in furtherance of the suspects' illegal activities.

***6** The affidavit sets out that in March 2014, DEA St. Louis conducted two separate controlled purchases of crystal methamphetamine from an individual in Vandalia, Missouri, who was eventually arrested. As a result of that individual's cooperation and the subsequent cooperation of other sources of information, investigators were ultimately able to identify Reno as a significant methamphetamine distributor in the Mexico, Missouri area. Through the use of a variety of investigative techniques—all detailed in the affidavit—including review of police reports and records; analysis of phone toll records; air time summaries; pen register data; Title III intercepts on a different phone (Target Telephone #1); law enforcement surveillance; intelligence and proactive efforts from cooperating sources of information, cooperating defendants, and confidential sources--investigators concluded that conversations and other communication between the targets identified in the affidavit, including Reno, and others yet unknown would be obtained through the interception of wire and electronic communications over Target Telephone #2.

The affidavit set out in detail the investigative tools and methods used in the investigation to date, including visual surveillance, pen registers, telephone toll records analysis, witness interviews, confidential informants, undercover officers, search warrants and trash pulls, interviews with target witnesses and use of grand jury proceedings, review of police records, use of electronic surveillance cellular location data, tracking devices and Title III intercepts of Target Telephone #1. *See* Govt. Exh. 4, ¶¶ 76-114. The affidavit recited in detail how each of the investigative tools had been used in the investigation and why each tool had not been successful or was unlikely to be successful. *Id.* Agent Lawyer's hearing testimony, which was not disputed by defendant, both confirmed and elaborated on the information contained in the affidavit regarding the investigative team's use and consideration of alternative investigative tools.

On August 28, 2015, Judge White signed an Order authorizing the interception of wire communications of Target Telephone #2. *See* Govt. Exh. 5. The Order states that the Court found probable cause to believe that the listed individuals were committing violations of 21 U.S.C. §§ 841(a)(1), 843(b), 846 and 18 U.S.C. §§ 924(c), 1956 & 1957 and that communications concerning the offenses were likely to be intercepted. The Order further found that normal investigative techniques had been tried and had failed, reasonably appeared to be unlikely to succeed if tried, or were too dangerous to be employed. The order authorized the wiretap interception for thirty (30) days.

The evidence presented at the hearing reflected that safeguards were put in place with respect to minimization.

On the same date the wiretap was authorized, August 28, 2015, Agent Lawyer and his fellow investigators met with the prosecutor and discussed the appropriate restrictions and minimization techniques to be used on a Title III case. Agent Lawyer and his colleagues signed the letter and took steps throughout the investigation to adhere to the restrictions set out in the Court's order and in the minimization letter. *See* Govt. Exh. 6. In addition, Agent Lawyer's testimony and related ten-day reports reflect that the investigating agents' wiretap activities were monitored by district judges who reviewed the ten-day reports including the intercepts the subject matter being intercepted, and the type of minimization occurring throughout the case. *See* Govt. Exhs. 7, 8, 9, 13, 14, 15, 19, 20 & 21.

On September 25, 2015, Special Assistant United States Attorney Edward Dowd appeared before United States District Judge Rodney W. Sippel and made an Application for Continued Interception of Wire Communication over Target Telephone #2. *See* Govt. Exh. 10. The application was again accompanied by and referenced an affidavit of Special Agent Lawyer. *See* Govt. Exh. 11. The affidavit set out information learned by investigators since the first application, including some of the information learned as a result of the first 30-day interception period. The affidavit noted that the information learned during the first interception had been helpful but did not reveal the entire scope of the organization, its activities, and/or its members, including higher level members. *See id.*

***7** On September 25, 2015, Judge Sippel signed an Order Authorizing the Continued Interception of Wire Communications over Target Telephone #2. *See* Govt. Exh. 12. The Order states the Court found probable cause to believe that the listed individuals were committing violations of 21 U.S.C. §§ 841(a)(1), 843(b), 846 and 18 U.S.C. §§ 924(c), 1956 & 1957 and that communications concerning the offenses were likely to be intercepted. The order further found that normal investigative techniques had been tried and had failed, reasonably appeared to be unlikely to succeed if tried, or were too dangerous to be employed. The order authorized the continued wiretap interception for thirty (30) days.

On October 23, 2015, Special Assistant United States Attorney Edward Dowd appeared before United States District Judge Audrey G. Fleissig and made a second Application for Continued Interception of Wire Communication over Target Telephone #2. *See* Govt. Exh. 16. The application was again accompanied by and referenced an affidavit of Special Agent Lawyer. *See* Govt. Exh. 17. The affidavit reiterated and incorporated the information set out in Agent Lawyer's previous affidavits accompanying the first and second applications. The affidavit further set out some of the information learned as a result of the second 30-day interception period. The affidavit noted that the information learned during the first and second interceptions had been helpful but had not revealed the entire scope of the organization, its activities and/or its members. *See id.*

On October 23, 2015, Judge Fleissig signed an Order Authorizing the Continued Interception of Wire Communications over Target Telephone #2. *See* Govt. Exh. 18. The Order states the Court found probable cause to believe that the listed individuals were committing violations of 21 U.S.C. §§ 841(a)(1), 843(b), 846 and 18 U.S.C. §§ 924(c), 1956 & 1957 and that communications concerning the offenses were likely to be intercepted. The order once again found that normal investigative techniques had been tried and had failed; reasonably appeared to be unlikely to succeed if tried; or were too dangerous to be employed. The order authorized the continued wiretap interception for thirty (30) days.

E. December 10, 2015, Search Warrant

On December 10, 2015, Agent Lawyer appeared before United States Magistrate Judge Thomas C. Mummert and applied for search warrants for 1311 Ringo Street in Mexico, Missouri (Govt. Exh. 1) and 117 South Olive in Mexico, Missouri (Govt. Exh. 2). Each search warrant application was accompanied by and referenced an affidavit by Agent Lawyer. The affidavit indicated that the search warrant application was made in connection with the DEA's ongoing investigation into the Robert Reno drug trafficking organization which, as referenced above, began sometime in March 2014. The affidavit stated that the DEA's long-term investigation of the Reno DTO was concluding and explained that the investigation had involved interviews of numerous cooperating individuals, confidential sources, controlled drug purchases, extensive surveillance, and Title III intercepts of telephones used by Reno and another member of the DTO.

The affidavit attests that 1311 Ringo is Reno's residence and sets out corroborating information investigators obtained from utilities and local government offices that link Reno to the residence. The affidavit details the investigation to date and sets out the investigators' collective belief that Reno is a major distributor of methamphetamines in Mexico,

Missouri. The affidavit also described information provided from a confidential source ("CS") who was familiar with Reno and was able to provide significant details about his operations. The affidavit also provides information from a second CS indicating that one of the locations targeted in the affidavit (location #2) was a shop utilized by Reno for drug trafficking activities, although it was registered in someone else's name. *See* Govt. Exh. 2, at ¶60. The affidavit further describes information from a concerned citizen; a source of information; a co-conspirator (Josh Evans) and additional sources of information. The affidavit also details intercepted communications between Reno and others that, coupled with physical surveillance, indicated to investigators that methamphetamine was being stored, weighed, and repackaged (for distribution) at Reno's residence and that evidence of Reno's drug trafficking activities would be found there.

***8** The search warrant details Agent Lawyer's experience and credentials, which include his participation in over 500 controlled substances investigations involving the use of confidential informants, Title III intercepts, and the execution of arrest and search warrants. Govt. Ex. 2, at ¶ 2. The affidavit further outlines the background of the confidential sources referenced in the affidavit. Govt. Exh. 2, at ¶¶ 8-11 & 17-26. It also describes past criminal activity by the confidential sources and describes how the investigative team corroborated information provided by the confidential sources and why the investigative team believed those sources to be reliable. *See id.* Paragraph 100 (including all subparts) of the affidavit further outlines the documents and other evidence agents expected to find if authorized to conduct the search; paragraph 100 also explains why, based on the collective experience of the investigative team, they expected to find those items.

On December 10, 2015, Judge Mummert issued a search warrant finding probable cause to search Reno's residence and to seize a number of documents and other objects such as proceeds of illegal drug sales, records of such proceeds, address and telephone numbers of drug trafficking associates, computer equipment, media storage, firearms and ammunition, wire transfer records and receipts, packaging materials, tax forms, drug paraphernalia, and so on. *See id*. Agents executed the search warrant on December 17, 2015, seized documents and other items, and submitted a return listing the items seized. *See id.*

III. CONCLUSIONS OF LAW

A. Motion to Suppress Evidence (Doc. 318)

At the time of the evidentiary hearing, Reno sought suppression of (i) records and location information for a cellular telephone registered to Reno obtained via an April 3, 2015 order; (ii) recordings from a monitored pole camera installed near Reno's home at 1311 Ringo; (iii) electronic identifying numbers of any cellular telephones used by Reno obtained through a September 8, 2015, search warrant for a cell-site simulator; and (iv) evidence seized pursuant to a December 10, 2015 search warrant executed at Defendant's home at 1311 Ringo in Mexico, Missouri. (Doc. 318). [2]

2 As set out above, although Reno's written suppression motion sought suppression of other items such as items seized from the Audrain County traffic stop and from 117 South Olive, at the start of the evidentiary hearing, the United States advised that it would not seek to admit any evidence or statements obtained during the traffic stop in Audrain County on March 15, 2015 and Reno conceded that he lacked standing to challenge any pole camera recordings or other evidence seized from the business at 117 South Olive Street. As such this Report and Recommendation does not address any of those issues.

1. Evidence Seized Pursuant to the PLI Warrant and the Cell-Site Warrant Should Not Be Suppressed

Reno seeks to suppress evidence and information seized pursuant to the April 3, 2015 PLI Warrant and the September 8, 2015 Cell-Site Warrant. The Fourth Amendment requires that search warrants be based on probable cause. *United States v. Montes-Medina,* 570 F.3d 1052, 1059 (8th Cir. 2009). Probable cause exists when "there are sufficient facts to justify the belief by a prudent person that contraband or evidence of a crime will be found in the place to be searched." *United States v. Bieri*, 21 F.3d 811, 815 (8th Cir. 1994); *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "Probable cause requires only a showing of fair probability, not hard certainties." *United States v. Tripp*, 370 F. App'x. 753, 757 (8th Cir. 2010) (quoting *United States v. Hudspeth*, 525 F.3d 667, 676 (8th Cir. 2008)).

Affidavits for search warrants are reviewed using the "totality-of-the-circumstances" analysis. *Gates*, 462 U.S. at 238. The task of the issuing judge is to make "a practical, common-sense decision whether, given all the circumstances

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set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the [judge] had a substantial basis for ... concluding that probable cause existed." *Id.* at 238-39 (internal quotation marks omitted); *see also Massachusetts v. Upton*, 466 U.S. 727, 728 (1984). When the judge relied solely on the affidavit presented to him or her, "only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause." *United States v. Gladney*, 48 F.3d 309, 312 (8th Cir. 1995) (quoting *United States v. Leichtling*, 684 F.2d 553, 555 (8th Cir. 1982)). Affidavits must be read in "a commonsense and realistic fashion." *United States v. Caldwell*, 864 F.2d 71, 74 (8th Cir. 1988) (citation omitted). "Deference is accorded an issuing [judge's] probable cause determination ...." *United States v. Brown*, 584 F.2d 252, 256 (8th Cir. 1978).

***9** In this case, Reno's motion to suppress fails to articulate any basis why information and evidence seized pursuant to these warrants should be suppressed. A review of both warrant applications and supporting affidavits reveals that the warrants were properly issued and supported by probable cause. As such, Reno's motion to suppress evidence seized pursuant to the PLI Warrant and Cell-Site Warrant should be denied.

2. Agents' Extended Use of a Warrantless Pole Camera at 1311 Ringo Did Not Violate the Fourth Amendment

Reno contends investigators' warrantless use of a pole camera to surveil his residence violated the Fourth Amendment. Reno cites *United States v. Jones,* 565 U.S. 400 (2012), in support of this contention. As the United States correctly notes, *Jones* did not involve a warrantless pole camera; it involved the warrantless installation and use of a GPS tracking device on an automobile. *Id. Jones* is nevertheless instructive, because the majority opinion clarified that in determining whether a search by law enforcement violates the Fourth Amendment, courts must consider (1) whether law enforcement violated the Fourth Amendment by committing a physical trespass onto private property and (2) whether, under the "reasonable-expectation-of-privacy test" articulated in *Katz v. United States*, 389 U.S. 347, 361 (1967), law enforcement violated an individual's reasonable expectation of privacy. *Id.* at 408-09. Under *Katz,* A legitimate expectation of privacy exists when (1) an individual has a subjective (actual) expectation of privacy and (2) the individual's expectation of privacy "is one that society is prepared to recognize as reasonable." *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

Jones is also instructive because although *Jones* was ultimately decided under the first prong—i.e., a Fourth Amendment violation via trespass— two concurring opinions, in which five Justices joined, highlighted unique privacy issues under the *Katz* reasonable-expectation-of-privacy test that can arise from law enforcement's use of evolving technology to conduct electronic surveillance. In one concurring opinion, Justice Sotomayor noted electronic surveillance such as GPS monitoring "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* at 415 (Sotomayor, J., concurring). In a separate concurring opinion, Justice Alito recognized that "in the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical." *Id.* at 429 (Alito, J., concurring) (observing that the kind of surveillance law enforcement was able to accomplish with GPS tracking would have been difficult and costly using traditional surveillance and "[o]nly an investigation of unusual importance could have justified such an expenditure of law enforcement resources."). In the post-computer era, however, new technology makes long-term monitoring relatively easy and cheap. *Id.* As such, new technology, like GPS tracking, enhances the ability of law enforcement to fight and prevent crime, but at the same time permits law enforcement to impinge on privacy in ways society would not have expected. *Id.* at 429-30. As Justice Alito reasoned, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.* at 430.

***10** Both concurring opinions concluded that "the lengthy monitoring that occurred in [*Jones*] constituted a search under the Fourth Amendment" for which a warrant was required. *Id.* at 431. *See also id.* at 415 (Sotomayor, J., concurring) ("As Justice Alito incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of privacy expectations. [...] Under that rubric, I agree with Justice Alito that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.' ").

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By implication, the concurring opinions conclude that, in addition to the physical trespass Fourth Amendment violation espoused in the majority opinion, the facts in *Jones* also may have constituted a Fourth Amendment violation under the *Katz* reasonable-expectation-of-privacy test.

Post-*Jones,* courts have applied the reasoning from the concurring opinions in *Jones* when deciding whether the warrantless use of pole cameras, like the one at issue in this case, violated the Fourth Amendment under the *Katz* reasonable-expectation-of-privacy test. The parties do not cite, and I have not found, any Eighth Circuit decisions on point. It appears that post-*Jones* the Sixth Circuit may be the only Circuit Court of Appeals to have considered the issue in *United States v. Houston*, 813 F.3d 282, 285 (6th Cir. 2016). In *Houston*, law enforcement installed cameras on top of a public utility pole that recorded the defendant's property for ten weeks. 813 F.3d at 285. As in this case, the defendant challenged the video evidence because the camera was installed without a warrant. *Id.* at 286. In finding no Fourth Amendment violation, the court concluded Houston had no actual or subjective expectation of privacy because the video surveillance only captured the same view that a passerby would have on public roads. *Id.* at 288. In so holding, the court rejected Houston's argument that the presence of blue tarps and foliage obstructing a clear view of his home by passersby gave rise to an actual subjective expectation of privacy. *Id.* The court noted that the Supreme Court had previously upheld warrantless aerial observations of curtilage, finding that " 'the mere fact that an individual has taken measures to restrict some views of his activities' does not 'preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.' " *Houston*, 813 F.3d at 288 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). The court further reasoned that agents could have been stationed round-the-clock to monitor the property from the public road, and thus their use of technology to accomplish what they could have accomplished without technology did not make the surveillance unconstitutional. *Id.*

The Sixth Circuit also considered the concerns expressed by the Justices in the concurring opinions in *Jones*, including the length of time the pole camera surveillance had lasted. *Id.* at 289. The Sixth Circuit distinguished the nature of the surveillance conducted via the stationery pole camera used in *Houston* from the nature of the surveillance conducted via the GPS tracker in *Jones*. *Id.* at 289-90. Specifically, the *Houston* court reasoned that surveillance using a stationary pole camera was "not so comprehensive as to monitor Houston's every move; instead, the camera was stationary and only recorded activities outdoors on the [property.]" *Id.* The court in *Houston* further reasoned that "[b]ecause the camera did not track Houston's movements away from the [property], the camera did not do what Justice Sotomayor expressed concern about with respect to GPS tracking: 'generate[ ] a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.' " *Id.* at 290 (quoting *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring)). Although the *Houston* court did not say so explicitly, it appeared to hold that even if Houston had a subjective or actual expectation of privacy in the areas captured by the pole camera, because law enforcement used a stationary pole camera trained only on those parts of the residence that are subject to public view, such an expectation by Houston is not one that "society is prepared to recognize as reasonable." *Katz*, 389 U.S. at 361.

***11** Other courts, such as the district courts whose decisions are cited in Reno's Motion to Suppress, have expressed significant concerns about law enforcement's warrantless use of pole cameras for extended periods but, for various reasons, have declined to order suppression. *See* Doc. 318, at p. 7 (citing *United States v. Garcia-Gonzalez*, No. CR 14-10296-LTS, 2015 WL 5145537, at *9 (D. Mass. Sept. 1, 2015) (denying suppression based on existing circuit authority); *United States v. Houston*, 965 F. Supp. 2d 855, 871-72 (E.D. Tenn. 2013) (concluding that ten weeks of use of a pole camera was unreasonable, but denying suppression on other grounds); *United States v. Wymer*, 40 F. Supp. 3d 933, 942 (N.D. Ohio 2014) (denying suppression based on existing circuit authority, but noting "[g]iven the uniquely intrusive nature of continuous and prolonged video surveillance, and the ease with it permits law enforcement to evade ordinary checks on their ability to observe the daily activities of citizens, the far better practice is to apply for a warrant.")); *see also United States v. Stefanyuk*, 4:17CR40042 KES, 2018 WL 3235569, *4-*8 (D. S.D. June 15, 2018) (rejecting the analysis in the Sixth Circuit decision in *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016), as "too facile" as it "fails to recognize that a pole camera in a very real sense enhances police officers' senses—it can zoom in and pan, it can stay awake and alert for 24 hours a day without respite, it costs next to nothing, and it allows data to be stored indefinitely, to be replayed again and again in the future, allowing mining of ever-more-detailed information" but denying suppression because defendant did not have

an actual or subjective expectation of privacy in the areas surveilled).

At least one district court has applied the principles articulated in the *Jones* concurring opinions and subsequent cases to suppress evidence obtained from a pole camera. In *United States v. Vargas*, law enforcement officers surveilled the defendant's rural eastern Washington home with a pole camera which continuously recorded activity in the front yard of the defendant's property for more than six weeks. No. CR-13-6025-EFS (E.D. Wash. Dec. 15, 2014), ECF No. 106, Order Granting Defendant's Motion to Suppress at 1, available at https://www.pacer.gov. The camera was installed on a utility pole over 100 yards away and had panning and zooming capabilities which could be used on the live feed, the live feed could be viewed remotely, and images could be transmitted to law enforcement computers. *Id.* at 5-6. Invoking *Jones* and analyzing under the *Katz* "reasonable-expectation-of-privacy approach," the court ruled that, without a warrant, such continuous use of a concealed camera did not pass constitutional muster because "society expects that law enforcement's continuous and covert video observation and recording of an individual's front yard must be judicially approved, and Mr. Vargas' conduct during the six weeks that his front yard was covertly observed and recorded indicates that he expected not to have his front yard covertly observed and recorded on a continuous basis by law enforcement." *Id.* at 1-2, 12-13.

Central to the holding in *Vargas* was the court's determination that Vargas had a subjective (actual) expectation of privacy. The court appeared to give particular weight to the fact that Vargas' home was located in a rural area and Vargas appeared to have taken measures to ensure a high degree of privacy by, for example, having a fenced in yard, a gated driveway, and shrubs that shielded his property from public view. *Id.* at 15, 26. The court considered Vargas' conduct while under surveillance, including the fact that he (or his guests) openly urinated on his fenced-in property, as further evidence that he had a subjective expectation that activity on his property would be private. *Id.* at 15-16. In concluding a warrant was required, the *Vargas* court also seemed to give significant weight to the fact that, because of where Vargas's home was situated, agents likely could not have used traditional (physical) surveillance to conduct the type of surveillance accomplished by the camera. *Id.* at 19-21. The court also emphasized the fact that the camera used to surveil Vargas' property allowed agents to remotely zoom in and pan the property. *Id.* at 21, 26.

In a recent decision, the district of South Dakota applied the analysis from *Vargas* in determining whether to suppress evidence from a warrantless pole camera. *United States v. Stefanyuk*, 4:17CR40042 KES, 2018 WL 3235569, * 4 (D. S.D. June 15, 2018), Report and Recommendation adopted, 2018 WL 3222556 (D. S.D. July 2, 2018). In *Stefanyuk*, law enforcement officers surveilled the defendant's home in suburban Sioux Falls with a pole camera that continuously recorded activity in the front yard of the defendant's property for two weeks. *Id.* at *1-*2. The camera was installed about 15 feet off the ground in a right-of-way directly across the street from defendant's home. *Id.* at *1. The camera had panning and zooming capabilities which could be used on the live feed, the live feed could be viewed remotely, and images could be transmitted to law enforcement computers. *Id.* at *2. Recorded footage could be reviewed with rewind and fast forward capabilities. *Id.* at *2. The view of the camera showed only the front of the house; agents could not see into the house or on either side of the house; however, if the garage door was up, agents could see a little ways into the garage. *Id.*

***12** Stefanyuk moved to suppress the pole camera evidence, and the parties agreed there was no binding precedent from the Eighth Circuit on the necessity of obtaining a search warrant prior to using a pole camera for surveillance. *Id.* at *3. The court considered *Jones* and subsequent cases and rejected as "too facile" decisions such as the Sixth Circuit decision in *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016), because they fail to recognize that a pole camera in a very real sense enhances police officers' senses—it can zoom in and pan, it can stay awake and alert for 24 hours a day without respite, it costs next to nothing, and it allows data to be stored indefinitely, to be replayed again and again in the future, allowing mining of ever-more-detailed information." *Stefanyuk*, 2018 WL 3235569, at *4. The court nevertheless denied suppression, appearing to find that defendant did not have an actual or subjective expectation of privacy in the areas surveilled. *Id.* at *6-*7.

In reaching this conclusion, the court in *Stefanyuk* found the analysis in *Vargas* to be "sound and well-supported," but nevertheless held that differences between the residential setting in *Vargas* and the residential setting in *Stefanyuk* compelled a different result on the question of what constitutes a reasonable expectation of privacy under *Katz*. *Id.* at *6. Specifically, the court noted that unlike the defendant in *Vargas,* Stefanyuk's home was in a suburban (not rural) setting, where there were many houses in close proximity to

the defendant's house. *Id.* One house sat facing the front of Stefanyuk's house with an unimpeded view of his front yard, garage and front door; another house sat immediately to the south of the defendant's house. *Id.* Also setting Stefanyuk's case apart from *Vargas* was the use of traditional means of surveillance by agents investigating Stefanyuk. *Id.* at *7. Based on those facts, the court concluded that unlike the defendant in *Vargas*, "literally every time Mr. Stefanyuk exited his home, he had to expect a passerby or neighbor might view him." *Id.* at *6. As such, the court in *Stefanyuk* appears to have concluded that Stefanyuk did not have an actual or subjective privacy interest in the area surveilled, not merely because it was exposed to public view but because of where his home was situated. *Id.* at *6-*7. [3]

3 A second factor, which appears to have been central to the court's holding, was that Stefanyuk was serving a term of federal supervised release during the time of the pole camera surveillance. Thus, the court concluded he had a diminished expectation of privacy and any subjective expectation of privacy he may have had in his comings and goings from his home would have been an expectation society is not "willing to recognize as legitimate given Mr. Stefanyuk's status as a federal supervisee." *Id.* at *8.

Applying the foregoing legal principles to the factual findings in this case, I find no Fourth Amendment violation. First, this case does not involve the first prong of the *Jones* analysis, because it is undisputed that there was no physical trespass by law enforcement onto Reno's property. As such, Reno cannot show, and does not assert, a Fourth Amendment violation under the *Jones* trespass approach.

Nor do I find a Fourth Amendment violation under the *Katz* reasonable-expectation-of-privacy test. Reno's contention appears to be that he had a right to be free from continuous 24-hour-a-day, seven days-a-week recorded surveillance of the driveway in the front of his home. Here, as in *Houston* and in *Stefanyuk*, the area of Reno's home surveilled by law enforcement—Reno's driveway—was readily accessible and visible to the public and Reno's next door neighbor. Like the home at issue in *Stefanyuk*, Reno's home was located in a suburban, not a rural, neighborhood. The photograph presented at the evidentiary hearing made clear that, given the proximity of Reno's home to the homes of his neighbors (both next door and across the street), Reno had a diminished expectation that activities conducted in or about his driveway (the area surveilled by the pole camera at issue) would be private. Given the proximity of Reno's home to the home of his next door neighbor, which Agent Lawyer estimated was a distance of only approximately 50 feet, Reno could not have reasonably expected that the identity of cars pulling up on his driveway would be private. There was no fence or shrubbery separating Reno's yard from that of his neighbor's yard, and passers-by on the street (one of whom is depicted on the photograph) would have a clear view of the area surveilled by the camera. Indeed, like the defendant in *Stefanyuk,* "literally every time Mr. [Reno] exited his home, he had to expect a passerby or neighbor might view him." *Stefanyuk*, 2018 WL 3235569 at *6. For these reasons, Reno has failed to establish that he meets the first prong of *Katz. Katz*, 389 U.S. at 361 (Harlan, J., concurring) (finding that a legitimate expectation of privacy exists when (1) an individual has a subjective (actual) expectation of privacy and (2) the individual's expectation of privacy "is one that society is prepared to recognize as reasonable).

***13** Admittedly, the question of whether the type of surveillance used in this case is one that society would not expect law enforcement to use without judicial approval is far more difficult to answer given the current state of the law. Although compelling, the potential Fourth Amendment concerns of long-term surveillance aided by ever-advancing technology articulated in the *Jones* concurring opinions did not undergird the ultimate holding by the majority opinion in *Jones.* Rather, the majority opinion identified an additional mode of analysis (inapplicable in this case) and reserved for another day the question of whether electronic surveillance of extensive duration violates the Fourth Amendment in the absence of a warrant. *See Jones*, 565 U.S. at 411-12 ("[U]nlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to Katz analysis.... It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.") (emphasis in original). And, as discussed above, following *Jones,* courts that have subsequently tackled concerns of long-term surveillance arising from pole camera use have been reluctant to suppress warrantless pole camera evidence absent clear facts such as those in *Vargas* suggesting the government had to invade an individual's privacy to conduct pole camera surveillance.

Notwithstanding the uncertain state of the law, even if Reno met the first prong of *Katz*, it is doubtful he would meet the

second prong given the facts of this case. Unlike the situation in *Vargas*, in which agents could not have obtained the information sought without covert pole camera surveillance, the agents in this case could have, and indeed did, obtain evidence from more traditional physical surveillance of Reno's residence. For example, Agent Lawyer's affidavit submitted in support of the PLI Warrant made clear that at least one drug task force officer personally observed extensive "short stay traffic" at Reno's residence that was consistent with drug trafficking before the pole camera was installed. As such, the "view" captured by the pole camera in this case is much more akin to the type of plain-view curtilage observations that courts have consistently held fall outside of the purview of a Fourth Amendment search. *See Vargas,* No. CR-13-6025-EFS at 19-20 (discussing cases).

To be sure, agents' use of an internet-based pole camera gave them the benefit of a digital eye that was continuous and unblinking for 24 hours a day, seven days a week, and that could record Reno's comings and goings and the comings of goings of others for a six-week period. This allowed for a level of surveillance that could not realistically have been accomplished by traditional means. On the other hand, however, evidence that the camera in this case either lacked surveillance enhancing features such as the ability to zoom in or pan (or those features were not used) and evidence that the camera appears to have been trained exclusively on areas that could have been seen unaided by a neighbor or a passerby suggests a level of intrusiveness well below that possible through other electronic surveillance such as the GPS tracker which can track movement away from the residence. As the court in *Houston* pointed out, the level of intrusiveness resulting from a continuously recording stationery pole camera trained exclusively on an area accessible to the public seems to be dramatically different from the level of intrusiveness resulting from the use of other types of surveillance like a GPS tracker that could, over time, "generate[ ] a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Houston,* 813 F.3d at 290 (citing *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring)). [4]

4 Of course, even when a covert pole camera is trained on an otherwise public area near a residence, if it is in use long enough, one can imagine any number of scenarios in which activity not intended for public consumption might be captured. For that reason, perhaps, as other courts have suggested, the better course for agents intending to use a pole camera in a residential area for any extended period would be to obtain a search warrant.

***14** In sum, for the reasons set out above, Reno could not have had an actual expectation that activity on his driveway would be private, and I am unable to conclude that, based solely on the continuous nature of the pole camera surveillance used by agents in this case, agents' use of the pole camera without a warrant violated the Fourth Amendment. For all of these reasons, Reno's motion to suppress pole camera evidence should be denied.

3. Evidence Seized Pursuant to the December 10, 2015 Search Warrant Should Not Be Suppressed

Based on the foregoing factual findings, the undersigned concludes the December 2015 search of Reno's residence and the seizure of documents and other physical evidence associated with drug distribution was lawful, because the search warrant affidavit provided a substantial basis on which Judge Mummert could find probable cause for the search and because the good faith exception permitted agents to rely on the warrant even if the warrant was not supported by probable cause.

i. The warrant was supported by probable cause

The search warrant affidavit details a long-term investigation by the DEA into the Robert Reno drug trafficking organization ("DTO"). At the time of the search warrant, the investigation was concluding. As such, agents had access to, and could rely upon, information obtained during the investigation, including interviews of numerous cooperating individuals, confidential sources, controlled drug purchases, extensive surveillance, and Title III intercepts of telephones used by Reno and other members of the DTO. The affidavit included and relied upon information gleaned from intercepted communications between Reno and others, which appear to involve the sale and distribution of methamphetamines. The affidavit also described detailed first-hand accounts from multiple confidential sources, concerned citizens, and sources of information linking Reno and his residence to drug trafficking activities. Information provided by these human sources was consistent with intercepted communications. In sum, given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay

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information, Judge Mummert had a "substantial basis for ... concluding that probable cause existed." *Gates*, 462 U.S. at 238-39.

Defendant's contention that the warrant lacked probable cause because it relied upon stale information is unavailing. The Eighth Circuit has declined to draw any bright line that would require a court reviewing a probable cause determination to categorically define information obtained outside of a particular time frame as "stale." Instead, "[t]ime factors must be examined in the context of a specific case and the nature of the crime under investigation." *United States v. Formaro,* 152 F.3d 768, 771 (8th Cir. 1998) (quoting *United States v. Koelling,* 992 F.2d 817, 822 (8th Cir. 1993)). "[W]here continuing criminal activity is suspected, the passage of time is less significant." *Id.* This is particularly true where, as in this case, "investigations of ongoing narcotics operations, intervals of weeks or months between the last described act and the application for a warrant [do] not necessarily make the information stale." *Id.* (quotation marks omitted). Given the extensive nature of the investigation here, any brief interval that elapsed between the last of the wire intercepts reflected in the warrant affidavit and the date investigators applied for a warrant is not sufficient to render the information in the search warrant affidavit stale.

***15** Defendant's contention that the CS and other informants were not reliable is also without merit. "When an affidavit is based in substantial part on information from an informant, the informant's reliability, veracity, and basis of knowledge are relevant considerations—but not independent, essential elements—in finding probable cause." *United States v. Revivich*, 793 F.2d 957, 959 (8th Cir. 1986) (citing *Gates*, 462 U.S. at 230, and *United States v. Ross*, 713 F.2d 389, 393 (8th Cir. 1983)); *see also United States v. McAtee*, 481 F.3d 1099, 1102 (8th Cir. 2007). "It is well settled that the statements of a reliable informant can provide, by themselves, a sufficient basis for the issuance of a warrant." *United States v. Pressley*, 978 F.2d 1026, 1027 (8th Cir. 1992) (citing *McCray v. Illinois*, 386 U.S. 300 (1967)).

Under Eighth Circuit precedent, there are several factors the court should consider in determining whether information is reliable. For example, "[a]n informant's tip can be sufficient to establish probable cause if the informant 'has a track record of supplying reliable information' or if the tip 'is corroborated by independent evidence.' " *United States v. Gabrio*, 295 F.3d 880, 883 (8th Cir. 2002) (quoting *United States v. Williams*, 10 F.3d 590, 593 (8th Cir. 1993)). Reliability may be found on the basis that past tips have led to seizures of contraband or other evidence. *Formaro*, 152 F.3d at 770; *Gladney*, 48 F.3d at 313; *Williams*, 10 F.3d at 594. The Eighth Circuit has also noted that "there are indicia of reliability in 'the richness and detail of a first-hand observation.' " *United States v. Buchanan*, 574 F.3d 554, 561 (8th Cir. 2009) (quoting *United States v. Jackson*, 898 F.2d 79, 81 (8th Cir. 1990)); *see also Gates*, 462 U.S. at 234 (finding that an informant's "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight"); *Williams*, 10 F.3d at 594 (noting that source's information was "based on the informant's first-hand observations, not merely from rumor or innuendo"). Furthermore, " '[s]tatements against the penal interest of an informant typically carry considerable weight' in establishing reliability." *Buchanan,* 574 F.3d at 561-62 (quoting *United States v. Tyler*, 238 F.3d 1036, 1039 (8th Cir. 2001)). "The circumstances of personal questioning may also enhance reliability and credibility." *Id.* at 562; *see also United States v. Robertson*, 39 F.3d 891, 893 (8th Cir. 1994) (stating the reliability of a tip is enhanced when a law enforcement officer meets personally with the informant to assess his credibility). Finally, "[p]robable cause can be established when information from one informant is consistent with that of a second, independent informant." *Buchanan*, 574 F.3d at 562. "Where the informant's information is at least partially corroborated, attacks upon credibility and reliability are not crucial to the findings of probable cause." *United States v. Humphreys*, 982 F.2d 254, 259 (8th Cir. 1992).

As the factual findings demonstrate, the affidavit outlines the background of the confidential sources referenced in the affidavit; describes how the investigative team corroborated information provided by the confidential sources; and explains why the investigative team believed those sources to be reliable. The reliability of the CS was further enhanced by first-hand accounts; intercepted communications and corroboration by multiple sources of the same information. In sum, the search warrant affidavit more than amply established the informants' reliability. As such, based on the totality of the circumstances presented in the search warrant affidavit, Judge Mummert had a substantial basis for concluding that there was probable cause for the search of Reno's residence.

ii. The good faith exception applies

***16** Even if the search warrant affidavit somehow fell short of supplying probable cause, the good faith exception under

United States v. Leon, 468 U.S. 897, 922 (1984), applies. In *Leon*, the Supreme Court held that evidence obtained in violation of the Fourth Amendment by officers acting in objectively reasonable reliance on the search warrant issued by a neutral and detached judge need not be excluded as a matter of law. *Id.* "In the absence of an allegation that the [issuing judge] abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 926.

Nothing in Reno's written submissions even hints that the agents involved in the preparation of the search warrant were dishonest in preparing the affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. In addition, nothing in Reno's submissions or the evidence of record suggests that the issuing judge, Judge Mummert, abandoned his detached and neutral role. In sum, neither Reno's written submissions nor evidence adduced at the hearing provide any basis for concluding that the good faith exception does not apply in this case. Because Reno's assertions fall far short of showing either that the issuing judge abandoned his detached and neutral role or that the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause, the good faith exception applies, and suppression is inappropriate.

For all of the foregoing reasons, Defendant's motion to suppress physical evidence should be denied.

B. Motion to Suppress Electronic Surveillance Evidence (Doc. 317)

Reno argues that all evidence obtained by means of the court authorized interceptions must be suppressed because the affidavits of Agent Lawyer submitted in support of the authorization failed to satisfy the necessity requirement set out in 18 U.S.C. §§ 2518(1)(c) & (3)(c) and failed to adhere to minimization requirements. Other than necessity and minimization, Reno does not challenge the propriety of the court authorized interceptions.

1. Necessity

Under § 2518(1)(c), each application for a wiretap authorization must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." *See United States v. Turner*, 781 F.3d 374, 382 (8th Cir. 2015) (quoting 18 U.S.C. § 2518(1)(c)). Section 2518(3)(c) similarly requires that in issuing a wiretap authorization order, the district court must determine whether "normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or to be too dangerous." *See United States v. West,* 589 F.3d 936, 939 (8th Cir. 2009) (quoting 18 U.S.C. § 2518(1)(c)). Together, these sections make up the necessity requirement for granting an order to receive wire intercepts from a phone.

It is well established that although wiretaps should not be "routinely used as the initial step in an investigation," the necessity requirement "does not require that law enforcement exhaust all possible techniques before applying for a wiretap." *Turner,* 781 F.3d at 383 (quotation marks omitted). "If law enforcement officers are able to establish that conventional investigatory techniques have not been successful in exposing the full extent of the conspiracy and the identity of each co-conspirator, the necessity requirement is satisfied." *Id.* at 382 (quoting *United States v. West*, 589 F.3d 936, 939 (8th Cir. 2009)). Indeed, the Eighth Circuit has interpreted the necessity requirement to "restrict wiretaps to situations in which they are necessary as well as reasonable, but not to require the government to show the exhaustion of specific or all possible investigative techniques before wiretap orders could be issued." *United States v. Thompson,* 690 F.3d 977, 986 (8th Cir. 2012) (internal quotations omitted) (quoting *United States v. Daly,* 535 F.2d 434, 438 (8th Cir. 1976)). Moreover, whether the statutory requirement is met is a question of fact to be determined by the issuing judge "in a commonsense manner." *Id.*

***17** Here, the undersigned previously heard testimony and received evidence regarding the necessity requirement in connection with a suppression motion filed by Reno's co-defendant Douglas Druger. The evidence consisted of testimony by Agent Lawyer and the same Title III wiretap application, affidavit and orders at issue in this case. On May 9, 2017, the undersigned entered a Report and Recommendation recommending that Druger's motion to suppress electronic surveillance evidence be denied. (Doc. 137). That Report and Recommendation was subsequently adopted and sustained by United States District Judge

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Catherine Perry. (Doc. 149). At the evidentiary hearing in this case, the parties agreed and stipulated that the evidence regarding the issue of necessity is identical to the evidence presented in connection with the Druger motion. As such, I hereby adopt and incorporate by this reference the findings and conclusions of law in my Report and Recommendation entered on May 9, 2017 and conclude, for the same reasons set out in the earlier Druger Report and Recommendation, that Defendant Reno's motion to suppress electronic surveillance evidence on necessity grounds should be denied.

2. Minimization

Title 18, United States Code, Section 2518(5) requires that court-authorized electronic surveillance "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." "Section 2518 'does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to minimize the interception of such conversations.' " *United States v. West*, 589 F.3d 936, 939 (8th Cir. 2009) (quoting *Scott v. United States*, 436 U.S. 128 (1978)).

Based on the foregoing factual findings and the evidence of record in this case, the minimization requirements of section 2518(f) were met. Agent Lawyer credibly testified that law enforcement personnel involved in monitoring conversations, pursuant to the court-ordered electronic surveillance, were instructed via letter and in person, prior to beginning their monitoring, as to the types of conversations to be intercepted, the types to be minimized, and methods of doing so. *See* Govt. Ex. 6. Each of the agents who monitored the wire in this case were required to read this letter and sign, indicating that they understood the terms and conditions of the judge's order. There was also a face-to-face meeting between the agents and the government attorney who signed the affidavit, at which the minimization requirements were further explained.

Agent Lawyer testified that targets of this investigation and their associates used coded or ambiguous language. As such, it is entirely possible investigators monitored some calls that may have ultimately turned out to be non-pertinent. Finally, the United States presented nine separate 10-day reports that were filed with the United States District Court Judges who authorized the interceptions. Those reports allowed the issuing Judge to specifically review the calls being monitored and determine if any remedies need to be employed to avoid unnecessary intrusion.

In sum, notwithstanding the defendant's suggestions to the contrary, there is no evidence of record that there were non-pertinent or privileged calls which should have been minimized but were not.

IV. CONCLUSION

For all of the foregoing reasons, Defendant Reno's motions to suppress evidence should be denied.

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Attorneys and Law Firms

Jeffrey C. Clapper, U.S. Attorney's Office, Sioux Falls, SD, for Plaintiff.

REPORT AND RECOMMENDATION

VERONICA L. DUFFY, United States Magistrate Judge

INTRODUCTION

***1** Defendant Maksim Stefanyuk is before the court on an indictment charging him with receipt and distribution of child pornography and with failure to register as a sex offender. See Docket No. 1. Mr. Stefanyuk has filed a motion to suppress certain evidence. See Docket No. 45. The United States ("government") resists the motion. See Docket No. 51. This matter has been referred to this magistrate judge for holding an evidentiary hearing and recommending a disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and the October 16, 2014, standing order of the Honorable Karen E. Schreier, district judge.

FACTS

An evidentiary hearing was held on June 14, 2018. Mr. Stefanyuk was there in person along with his lawyer, Jason Tupman. The government was represented by its Assistant United States Attorney, Jeffrey Clapper. Two witnesses testified and five exhibits were received into evidence. From this testimony and these exhibits, the court makes the following findings of fact.

Special Agent Charla Aramayo of the Department of Homeland Security received a referral on January 20, 2017, from a state police officer on the Internet Crimes Against Children Task Force. The officer forwarded to Agent Aramayo a disc containing his reports and evidence showing a person at a specified Internet Protocol ("IP") address was downloading child pornography. The street address the IP address was linked to was identified as a home in Sioux Falls. This same home had been Mr. Stefanyuk's home address at the time of a prior federal prosecution. Furthermore, the Internet Service Provider listed Mr. Stefanyuk as the customer for the suspect IP address. Finally, Mr. Stefanyuk had listed this same address in paperwork on file with his employer.

Agent Aramayo's office was approximately one mile from the suspected Stefanyuk home. During the investigation, Agent Aramayo would frequently drive past the subject home on her way to work and on her way home. On January 24, 2017, Agent Aramayo wrote down the license plate numbers of three vehicles at the subject home and later researched who were the registered owners of those vehicles. Agent Aramayo described the housing area as a residential "pocket" and stated people would likely not be found driving in the neighborhood unless their destination was one of the houses in the neighborhood. Agent Aramayo felt that physical surveillance was impractical because her presence would have been of note in the lightly-traveled neighborhood. The roads in this neighborhood had no curb and gutter and there were no sidewalks.

On February 8, 2017, Agent Aramayo applied for and received from the South Dakota Division of Criminal Investigation (DCI) a pole camera to aid her investigation. The main purpose she requested the camera was in order to verify that Mr. Stefanyuk was living at the subject house. The DCI mounted the disguised camera in an area approximately 15 feet off the ground in a right-of-way directly opposite the subject home.

DCI Special Agent Chad Carpenter testified to the camera's capabilities. The camera had approximately a 30–degree view and could pan slightly from side to side, tilt slightly up and down, zoom in up to 30x, and was high definition up to 1080 pixels. Footage from the camera could be viewed on a mobile device, on the internet, or through software installed on a computer. The image on the camera was somewhat grainy due to the camouflage that disguised the camera. The camera had limited ability to show images at night depending on the ambient lighting around the camera. This was, in turn,

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affected by factors such as whether there was a full moon, whether it was cloudy, and how many streetlights and other sources of light were nearby.

***2** The camera in question ran continuously for two weeks from February 8 to 22, 2017. The footage could be viewed live, or recorded footage could be reviewed with rewind and fast forward capabilities. Although the video footage was saved, it is no longer available due to a system upgrade by the DCI. After this upgrade, Agent Carpenter could no longer access the video footage.

The subject home was in a suburban part of Sioux Falls. The subject home was on a corner with a street running along its northern perimeter and another street running along its west perimeter. Another house sat directly across the street from the subject home, facing the subject house. The front door, garage, and driveway of the subject home were all in clear and open view from the house across the street to the west. Another house sat immediately to the south of the subject house.

Agent Aramayo accessed the video feed from the camera remotely via a laptop computer. A few times she watched footage live; approximately twice she reviewed previously-recorded footage. She testified she obtained Mr. Stefanyuk's work schedule and then reviewed footage from the camera from February 9 and 10 to see if Mr. Stefanyuk could be seen coming and going from the subject home at the approximate times he had to go to work and got off from work. Agent Aramayo described viewing a person who matched the general description of Mr. Stefanyuk drive into the driveway of the subject house and enter the house shortly after Mr. Stefanyuk's work schedule indicated he had just gotten off work. The image was recorded at approximately 5:30 a.m. (Mr. Stefanyuk had worked the night shift), which at that time of the year was still several hours before sunrise. It was, therefore, dark.

Another time, viewing live footage from the camera, Agent Aramayo observed a fourth vehicle parked at the subject home that she had not previously seen. She got in her own vehicle and physically drove to the subject house to obtain further description of this new vehicle. Upon arriving at the house, she viewed Mr. Stefanyuk with her own eyes in the yard along with another young man she assumed to be Mr. Stefanyuk's brother.

Agent Aramayo believed Mr. Stefanyuk was driving a Nissan vehicle. Armed with his work schedule, she drove by the house sometime between February 15 and 19 and observed the Nissan was gone from the house. She then went to Mr. Stefanyuk's place of employment and observed the Nissan parked in the employer's parking lot.

Agent Aramayo described the view from the camera as showing only the front of the house as in Government's Exhibit 1, but more of an angle from the north instead of head-on. She stated she could not see into the house or on either side of the house. If the garage door was up, she testified you could see a little ways into the garage.

The pole camera ceased filming on February 22, 2017. Agent Aramayo subsequently applied for a search warrant for the subject home and vehicles located there.

Mr. Stefanyuk now moves to suppress the evidence from the pole camera, arguing that it was a warrantless search prohibited by the Fourth Amendment. The government responded with three arguments: (1) no warrant was required by the Fourth Amendment for the pole camera; (2) if the pole camera did violate Mr. Stefanyuk's rights, the subsequent search warrant provided probable cause for the search of Mr. Stefanyuk's home even if the evidence from the pole camera is excised from the search warrant application; and (3) if the search warrant was not supported by probable cause, the fruits of the search should still be admissible pursuant to the Leon [1] good faith exception to the exclusionary rule. See Docket No. 52.

***3** In response, in oral argument before this court at the evidentiary hearing, Mr. Stefanyuk conceded the government's second and third arguments. To clarify, Mr. Stefanyuk only seeks to suppress the fact of the existence of the pole camera, any testimony or evidence as to views from the pole camera, and to suppress identification of the fourth motor vehicle observed initially via the camera at Mr. Stefanyuk's residence. Accordingly, the court addresses only the issue of whether the pole camera required Agent Aramayo to obtain a search warrant before installation of that device.

DISCUSSION

A. The Government Has the Burden of Proof

Where a warrantless search occurs, the burden is on the government to show by a preponderance of the evidence that

an exception to the warrant requirement applies. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); United States v. Kennedy, 427 F.3d 1136, 1140 (8th Cir. 2005). Because no search warrant supported the installation of the pole camera, the court places the burden on the government to show that the pole camera complied with the dictates of the Fourth Amendment.

B. Was a Search Warrant Required for the Pole Camera?

The parties agree there is no binding precedent from the Eighth Circuit on the necessity of obtaining a search warrant prior to using a pole camera for surveillance. Therefore, the court's decision is guided by general Fourth Amendment principles and persuasive authority from other jurisdictions.

1. United States v. Jones

The Fourth Amendment provides protection for people from unreasonable searches and seizures. See U.S. CONST. Art. IV. The amendment's purpose "reflects its close connection to property," and, thus, "Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." United States v. Jones, 565 U.S. 400, 405, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

But that trespass concept evolved as technology changed. For example, in 1928, the Court held wiretaps attached to telephone wires on the public streets were not a "search" within the purview of the Fourth Amendment because "[t]here was no entry of the houses or offices of the defendants." Id. at 405, 132 S.Ct. 945 (quoting Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) overruled in part by Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). Forty years later, in a departure from property-based analysis, the Court held an eavesdropping device on a public telephone booth violated the Fourth Amendment because it violated a person's "reasonable expectation of privacy." Jones, 565 U.S. at 405–06, 132 S.Ct. 945 (quoting Katz, 389 U.S. at 351, 360, 88 S.Ct. 507).

In the Jones case, the government sought to uphold the use of a GPS tracking device attached to the bottom of Jones' vehicle by arguing that Jones had no "reasonable expectation of privacy" in the undercarriage of his car or the public places the car traveled in and to. Jones, 565 U.S. at 406, 132 S.Ct. 945. The government emphasized that when Jones' vehicle was on the public roads, his presence was "visible to all." Id. Justice Scalia, writing for five of the nine justices, asserted that the "reasonable expectation of privacy" standard did not displace the earlier trespass standard, but "added to" it. Id. at 406–08, 132 S.Ct. 945. Here, because there was an uncontroverted trespass by police onto Jones' vehicle, there was a "search" within the meaning of the Fourth Amendment. Id. Justice Scalia pointed out that the Court's holding was not a deviation from its holding in prior cases "that mere visual observation does not constitute a search." Id. at 412, 132 S.Ct. 945 (citing Kyllo v. United States, 533 U.S. 27, 31–32, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)). Thus, the Court held a person travelling through public areas has no reasonable expectation of privacy and, if police had conducted surveillance of Jones through traditional surveillance without a trespass, it may very well have passed constitutional muster. Id. The Court also hinted that achieving the same result through the use of electronic means—without a trespass—may ***not*** pass constitutional muster. Id. But the Court declined to address that situation since the case before it *did* involve trespass. Id.

***4** Justice Sotomayer concurred in the majority opinion, but wrote separately to emphasize that, in addition to trespass, a search occurs where the suspect has "a subjective expectation of privacy that society recognizes as reasonable." Id. at 414, 132 S.Ct. 945 (citing Kyllo, 533 U.S. at 33, 121 S.Ct. 2038) (Sotomayer, J., concurring). She agreed with Justice Alito's concurring opinion that, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.' " Id. at 415, 132 S.Ct. 945 (quoting Alito, J, concurring opinion at 427–29). She also wrote that traditional police surveillance abuses are checked by "limited police resources and community hostility," which, because of their surreptitious and inexpensive nature, electronic surveillance methods evade. Id. at 416, 132 S.Ct. 945 (quoting Illinois v. Lidster, 540 U.S. 419, 426, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004)).

Justice Alito wrote a separate opinion concurring in the judgment and three other Justices joined his opinion. Id. at 418, 132 S.Ct. 945. The thrust of Justice Alito's opinion was that the Kyllo reasonable expectations of privacy test should apply because the trespass model—"18th-century tort law" according to Justice Alito—was ill-equipped to address "21st-century" electronic surveillance. Id. at 418–19, 132 S.Ct. 945. In his view, the reasonable expectation of privacy test completely eclipsed the former trespass test and should be the exclusive test applied. Id. at 422, 124 S.Ct. 885.

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Under that test, Justice Alito found the attachment of the GPS device to Jones' vehicle unconstitutional, in large part due to the long-term nature of the surveillance (4 weeks) and the continuous nature of the surveillance. Id. at 431, 124 S.Ct. 885. He noted that technology changes rapidly, and that may lead to changes in the public's expectations of privacy—it may make people *more* protective of their privacy, or they may find the trade-off between the advantages of the new technology and the infringement on their privacy to be acceptable or inevitable, thus *lowering* expectations of privacy. Id. at 427, 124 S.Ct. 885.

In Jones, a majority of the Court agreed that both the traditional trespass model and the reasonable expectation of privacy test were applicable to Fourth Amendment challenges. Here, the testimony at the evidentiary hearing established that no trespass occurred. The pole camera did not touch in any way Mr. Stefanyuk's property. It was installed on property across the street from Mr. Stefanyuk's home in a public right of way. If there is a Fourth Amendment violation in Mr. Stefanyuk's case, therefore, it must be premised on a violation of a reasonable expectation of privacy.

2. Reasonable Expectation of Privacy Test

The government in this case, as it did in the Jones case, asserts that everything the camera saw outside Mr. Stefanyuk's home took place in view of the public. Anyone who passed by would have been able to see what the camera recorded. Accordingly, the government argues even if Mr. Stefanyuk had a subjective expectation of privacy, it was not one that society recognizes as a reasonable expectation.

The government cites cases which apply this analysis to pole cameras and have held no constitutional infringement took place. See United States v. Houston, 813 F.3d 282, 288–90 (6th Cir. 2016); United States v. Jackson, 213 F.3d 1269, 1280 (10th Cir. 2000), vacated on other grounds, 531 U.S. 1033, 121 S.Ct. 621, 148 L.Ed.2d 531 (2000). However, with all due respect, this analysis appears too facile. It fails to recognize that a pole camera in a very real sense enhances police officers' senses—it can zoom in and pan, it can stay awake and alert for 24 hours a day without respite, it costs next to nothing, and it allows data to be stored indefinitely, to be replayed again and again in the future, allowing mining of ever-more-detailed information.

Mr. Stefanyuk cites State v. Jones, 903 N.W.2d 101 (S.D. 2017), in support of his argument that the use of the pole camera in his case violated the Fourth Amendment. In Jones, the state installed a warrantless pole camera on a public street light and recorded defendant's activities outside his home for two months, later using the information gained from the camera to apply for and receive a search warrant for defendant's home. Jones, 903 N.W.2d at 103–04. In that case, the defendant conceded that individual, discrete events in public view outside his home were not protected by the Fourth Amendment. Id. at 110. But, he argued, he had a subjective expectation of privacy in *the whole of his movements* and to be free from 24/7 targeted, long-term observation of his and his guests' coming and going from his home. Id. The court agreed. Id. at 111. The court also held this expectation of privacy was one society recognized as reasonable. Id. at 112–13. Thus, the court held police in that case were required to obtain a search warrant before installing the pole camera. Id.

***5** Mr. Stefanyuk also cites to United States v. Vargas, CR–13–6025–EFS, Docket No. 106 (E.D. Wash. Dec. 15, 2014) (unpub'd), in support of his motion to suppress. The court in that case found a pole camera violated the Fourth Amendment's prohibition on unreasonable searches. Id. at *29, 121 S.Ct. 2038. The facts of the case were important to the court's holding.

In Vargas, police mounted a pole camera which was focused on the defendant's house for six weeks. Id. at *5. The silent feed from the camera was recorded on a police detective's computer 20 miles away. Id. The detective could remotely view the footage, view recorded footage after the fact, could take still "photographs" from the video, and could rotate and zoom the video camera's view. Id. at **5–6. The camera was mounted on a utility pole at an elevation higher than the defendant's home. Id. The camera allowed viewing of anything in defendant's front yard, front door, an open parking structure, vehicles (including inside vehicles if doors or trunk lids were open), people and the surrounding area. Id. Although the camera had the ability to see inside defendant's house if a door were open or a window was unobstructed, there was no evidence the police in fact used the camera to access such views. Id. The camera operated 24 hours a day and continued for 6 continuous weeks except certain unexplained "jumps" in time on the video. Id. The camera did not have night vision or infrared/heat-sensing capabilities. Id.

The defendant's house was in a very rural area off a gravel road on which few vehicles traveled. Id. at **2–4. It was surrounded by undeveloped property covered in sagebrush and other native plants. Id. Defendant had erected a gate

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across his driveway along with a wire cyclone fence and a 20–foot strip of natural vegetation which separated defendant's front yard from the gravel road in front. Id. No other structures were visible from defendant's front yard. Id.

On May 2, the detective saw defendant apparently engaged in target practice with a pistol in his front yard. Id. at *6. On May 6, the detective viewed defendant and two other males socializing, drinking beer, and engaging in target practice in defendant's front yard. Id. at **6–7. The detective was able to zoom in and identify a silver semi-automatic pistol of unknown caliber and a rifle being used by the men. Id. at *7. The detective also saw one of the men urinating at the side of the front yard near the cyclone fence 15 feet from the gravel road running in front of the house, "presumably confident that he would not be observed." Id. After a 45–minute jump in the May 6 recording, the film showed two other vehicles and two other men had arrived. Id. The men continued socializing, but no longer engaged in target practice. Id. The driver of one of the vehicles went into the house and did not socialize with the others outside. Id. Eventually, the two new men left in a single vehicle and the 3 original men resume their target practice and later enjoyed a bonfire in a burn barrel. Id. at **7–8.

Because of prior contacts with law enforcement, the detective believed the defendant was an alien who was residing in the United States illegally. Id. at *8. The detective confirmed defendants' immigration status and then applied for a search warrant to look for evidence of violations of 18 U.S.C. § 922(g)(5), being an alien in possession of a firearm. Id. The search warrant was issued by a federal magistrate judge. Id. The search was conducted on May 16 and turned up four firearms as well as baggies containing methamphetamine. Id. The court seemed to find it significant that police trained the view of the camera away from the house toward an empty field while they executed the search warrant and then trained the camera back on defendant's house after the search was over. Id. at **8–9. Defendant argued that the pole camera violated his Fourth Amendment right to be free from unreasonable searches.

***6** The court interpreted United States v. Jones, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), to provide two separate avenues for determining whether an unreasonable search in violation of the Fourth Amendment had occurred. Vargas, at *12. First, an [unlicensed] trespass by law enforcement can give rise to an unreasonable search. Id. Second, the court held an unreasonable search can also arise from violation of a reasonable expectation of privacy. Id. Because law enforcement's pole camera did not impinge on any physical property belonging to defendant, the court focused on the second type of analysis. Id.

Applying this analysis, the court concluded that defendant had an actual subjective expectation of privacy and that "society expects that law enforcement's continuous and covert video observation and recording of an individual's front yard must be judicially approved"—i.e. required a search warrant. Id. at *13. In so concluding, the court distinguished this case from those cases relying on the "plain view" doctrine. Id. at **17–18. Here, there was no real-time eyewitness observations by live police officers; rather what police were able to view was the result of "electronic, continuous remote surveillance" over the course of six weeks. Id. The court held it would not grant suppression if the evidence had been obtained by old-fashioned surveillance by undercover officers. Id. at **19–20. However, continuous remote electronic surveillance, which the court termed "one of the most intrusive investigative mechanisms available to law enforcement," was distinguishable. Id. Such investigative methods "provoke an immediate negative visceral reaction" and "raise the specter of the Orwellian state." Id. at *21.

The court distinguished its holding also based on the nature of defendant's home. Id. at *24. Defendant chose to live in a rural, isolated area, in a partially enclosed space, with no nearby neighbors, and off a gravel road over which passersby were few and far between. Id. Due to the nature of the setting, defendant could hear a vehicle approaching for some time before it arrived at his house and could modify his behavior in the interim. Id. Other cases approving pole camera surveillance involved homes that were under observation in urban settings where the suspects' expectation of privacy while in their front yards or on their curtilage was very much reduced. Id. at **25–26.

The court first states the obvious: an unpublished decision by a district court judge in the Ninth Circuit is not binding authority on this court, nor is a decision by the South Dakota Supreme Court on an issue of federal constitutional law. Having said this, the court finds the analysis in Vargas and State v. Jones to be sound and well-supported factually and legally. But just as the district court in Vargas distinguished its case from those decisions by other courts involving different residential settings, so too must this court distinguish the Vargas holding from the facts of Mr. Stefanyuk's case.

The home Mr. Stefanyuk was living in was in a suburban setting, not a rural one as in Vargas. There were many houses in close proximity to Mr. Stefanyuk's, and city streets running by two sides of the house with traffic coming and going from the neighborhood. One house sat facing the front of Mr. Stefanyuk's house directly across the street with an unimpeded view of the Stefanyuk front yard, garage and front door. Another house sat immediately to the south of Mr. Stefanyuk's house. Unlike the defendant in Vargas, who could step outside his home and legitimately expect not to be viewed by anyone, literally every time Mr. Stefanyuk exited his home, he had to expect a passerby or neighbor might view him. The setting was less congested and occupied than perhaps other neighborhoods in Sioux Falls, but it was definitely of a suburban character as opposed to the isolated rural character of Vargas' home.

***7** In addition, the court notes that the Vargas opinion was written four years ago—an eternity when it comes to technology. Perhaps at that time, the idea that one might expect to be constantly under surveillance whenever one is out in public could be considered "Orwellian." However, as Justice Alito noted in his concurrence in Jones, technology is always changing and with it, our expectations of privacy. And it is not always predictable which way public conceptions of privacy will swing. There have been a number of high profile cases well covered in the media where crimes have been solved because of the pervasive nature of video surveillance, public and private.

For example, when a bomb exploded at the finish line of the Boston Marathon, the perpetrators were identified because nearly every inch of downtown Boston is covered by surveillance cameras, public and private. Nor is that phenomenon limited to huge urban centers. In our own town of Sioux Falls, South Dakota, where Mr. Stefanyuk lives, a drug-rip-off-turned-vehicular-homicide approximately 18 months ago was solved by patching together surveillance footage from disparate locations along the road where the parties had driven their vehicles. Furthermore, it is increasingly popular and affordable for private homeowners to have their own video surveillance systems at home. The idea that you can step outside your door and not be filmed by someone or another is no longer an unassailable assumption.

As for the decision in State v. Jones, the surveillance in that case took place over two continuous months, as contrasted with two weeks in Mr. Stefanyuk's case. Furthermore, in Mr. Stefanyuk's case, the investigation was not wholly based on evidence from the pole camera as in State v. Jones. Instead, important and consequential evidence was garnered by Agent Aramayo the old fashioned way: with shoe leather and her own ingenuity. She contacted Mr. Stefanyuk's employer to obtain his work schedule, she wrote down license plates numbers of cars she viewed in person in the driveway, she verified the location of the car she suspected Mr. Stefanyuk of driving to make sure it coincided with what she knew his employment movements would be, and she personally saw Mr. Stefanyuk in the front yard of the subject house with her own unaided eyes. None of this data came from the pole camera. All of the evidence in State v. Jones, and Vargas derived from a camera.

But the court finds the decisions in Vargas and State v. Jones distinguishable for a very important reason neither party has discussed which bears heavily on the reasonable expectation of privacy inquiry: at the time the pole camera was mounted, Mr. Stefanyuk was on federal supervised release in connection with a prior federal prosecution. Therefore, his legitimate expectation of privacy was less than the then-private citizens in State v. Jones and Vargas.

***8** The Eighth Circuit has recently described federal supervised release as "more severe punishment than parole and probation" and stated that a federal supervisee has "the most circumscribed expectation of privacy." United States v. Jackson, 866 F.3d 982, 985 (8th Cir. 2017). The court in Jackson held a defendant on federal supervised release had *no* expectation of privacy in his cell phone that society would recognize as legitimate. Id. The court distinguished Jackson's situation from the defendant in Riley v. California, 573 U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), where the Supreme Court held a search warrant is generally required to search a cell phone. Jackson, 866 F.3d at 986. The defendant in Riley was an arrestee, whereas the defendant in Jackson was on supervised release. Id. The diminished expectation of privacy accorded to Jackson did not apply equally to one who is a mere arrestee and who is still presumed innocent. Id.

Here, during the period from February 8–22, 2017, Mr. Stefanyuk was on federal supervised release. See United States v. Stefanyuk, CR 11–40098 (D.S.D.). He was sentenced on January 9, 2014, to a two-year term of imprisonment with five years of supervised release to follow. Id. at Docket No. 79. His term of supervised release began on April 4, 2016. Id. at Docket No. 85. Therefore, he was 10 months into his five-year term of supervised release at the time the pole camera data was obtained.

Even if Mr. Stefanyuk had a subjective expectation of privacy in his comings and goings from his home over the two-week period during which he was subject to electronic surveillance, that expectation is not one society is willing to recognize as legitimate given Mr. Stefanyuk's status as a federal supervisee. Jackson, 866 F.3d at 986. Accordingly, the court recommends Mr. Stefanyuk's motion to suppress be denied.

CONCLUSION

Based on the foregoing facts, law, and analysis, this magistrate judge respectfully recommends that defendant Maksim Stefanyuk's motion to suppress [Docket No. 45] be denied.

All Citations

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Footnotes

1 United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

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United States District Court, E.D. Wisconsin.

UNITED STATES of America Plaintiff,
v.
Gregory TIRADO, Jr., et al. Defendants.

Case No. 16-CR-168
|
Signed 08/21/2018

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DECISION AND ORDER

LYNN ADELMAN, District Judge

***1** I previously denied the defendants' motions to suppress evidence obtained via the use of pole cameras. I granted permission to seek reconsideration after the Supreme Court decided Carpenter v. United States, 138 S. Ct. 2206 (2018), and several defendants have done so.

Carpenter does not require a different result. While the Court relied on the reasonable expectation of privacy theory endorsed by the concurrences in United States v. Jones, 565 U.S. 400 (2012), the decision itself[1] was "a narrow one." 138 S. Ct. at 2220. The Court held that the government's collection of cell-site location information ("CSLI"), which allows law enforcement to chronicle a person's past movements over an extended period of time, constituted a search for Fourth Amendment purposes. Id. at 2216. The Court stressed the breadth of information law enforcement obtains through such data:

> Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations. These location records hold for many Americans the privacies of life. And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.

Id. at 2217-18 (internal citations and quote marks omitted). The Court further noted that "[w]hile individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." Id. at 2218. Finally, the Court noted:

> [T]he retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements

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> were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States – not just those belonging to persons who might happen to come under investigation – this newfound tracking capacity runs against everyone. Unlike with the GPS device in Jones, police need not even know in advance whether they want to follow a particular individual, or when.
>
> Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may – in the Government's view – call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

***2** Id.

1 The Jones majority relied on a trespass theory. It is undisputed that the police did not trespass on the defendants' property in this case.

In addition to stressing the nature of the data at issue, as is pertinent here, the Court specifically qualified its decision, stating: "We do not ... call into question conventional surveillance techniques and tools, such as security cameras." Id. at 2220. The surveillance at issue in this case "used ordinary video cameras that have been around for decades." United States v. Tuggle, No. 16-cr-20070, 2018 U.S. Dist. LEXIS 127333, at *9, 2018 WL 3631881 (C.D. Ill. July 31, 2018). [2]

2 Defendants argue that the "security cameras" referenced by the Court suggest transactional or moment-in-time monitoring, e.g., while the person makes a withdrawal at an ATM, unlike the more intense surveillance at issue here. It is hard to see a meaningful distinction. In both instances, the camera records only what is in front of it, and only matters exposed to the public.

Defendants note Carpenter's admonition that the Fourth Amendment was designed to place obstacles in the way of a too permeating police surveillance, 138 S. Ct. at 2214, particularly when technology permits the police to monitor activities in ways greater in kind and degree than the proverbial nosy neighbor, id. at 2219. They argue that the surveillance at issue here also permits a detailed chronicle of a person's activities, unlike techniques such as a onetime fly-over or tracking of a single trip with a beeper, and it does so at a place (the home) generally treated under the Fourth Amendment as especially private.

It is true that Carpenter distinguished the short-term public tracking approved in previous cases from the long-term surveillance of a person's every move allowed by new technologies like GPS or CSLI. However, "[p]ole cameras are limited to a fixed location and capture only activities in camera view, as opposed to GPS, which can track an individual's movement anywhere in the world." Tuggle, 2018 U.S. Dist. LEXIS 127333, at *10, 2018 WL 3631881. Defendants fail to explain how such surveillance provides the same aggregate account of a person's life, revealing his "political, professional, religious, and sexual associations." Carpenter, 138 S. Ct. at 2217 (internal quote marks omitted); see United States v. Houston, 813 F.3d 282, 290 (6th Cir. 2016). It is undisputed that the cameras used here did not record events inside the home or otherwise permit the police to see things an officer standing on the street could not see.

THEREFORE, IT IS ORDERED that defendants' requests for reconsideration (R. 576, 577, 579) are denied.

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UNITED STATES of America, Plaintiff,
v.
Travis TUGGLE, et al., Defendants.

Case No. 16-cr-20070-JES-JEH
|
Signed 07/31/2018

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ORDER AND OPINION

James E. Shadid, Chief United States District Judge

***1** Now before the Court is Defendant Travis Tuggle's Motion to Suppress (Doc. 50), and the United States' Response (Doc. 51). For the reasons set forth below, the Defendant's Motion (Doc. 50) is DENIED.

BACKGROUND

Defendant Travis Tuggle was indicted on August 1, 2017 in a two-count superseding indictment. Count 1 charges Defendant with conspiracy to distribute and possess with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A). Doc. 41. Count II charges the Defendant with maintaining a drug-involved premises in violation of 21 U.S.C. § 856. *Id.* On July 6, 2018, the Defendant filed the present Motion to Suppress, arguing that evidence obtained from pole camera footage outside his residence constituted an impermissible warrantless search and should be suppressed. Doc. 50. Currently, the trial is scheduled for September 10, 2018.

"Operation Frozen Tundra" was an expansive investigation of a large-scale drug trafficking network active in several central Illinois counties, which took place from late 2013 to early 2016. Doc. 51, at 4. This investigation was approved as a "OCDETF" case, meaning that multiple federal agencies were cooperating and the overall drug network involved large-scale trafficking and out-of-state suppliers. *Id.* Through the course of the investigation, the Government began to focus their attention on the Defendant and his accused co-conspirators. *Id.* at 1.

During the investigation, the Defendant maintained a residence at 709 North 9th Street, in Mattoon, Illinois. Doc. 50. Many customers and co-conspirators of the supposed drug trafficking ring were believed to live nearby the Defendant's residence. Doc. 51, at 2. This neighborhood was made up of frequently untraveled roads, and made physical surveillance difficult for investigators. *Id.* While the Government investigated the suspected offenders, they maintained three pole cameras on public property in the surrounding area of Defendant's residence. *Id.* Two of the three cameras were placed on a telephone pole in an alley between Dewitt and Piatt Avenues, just east of 9th Street and immediately next to the Defendant's residence. *Id.* These two cameras were placed on the same pole and shared a view of the Defendant's driveway and the front of his residence. *Id.* Defendant's driveway takes up the majority of the front yard. *Id.* at 6. The third camera was placed approximately one block south of the other cameras, in the 600 block of North 9th Street, which could also view the Defendant's residence but was primarily used to surveil co-defendant Joshua Vaultonburg's shed. Doc. 51, at 2.

Agents could remotely operate the cameras to zoom, pan, and tilt. *Id.* The cameras were equipped with rudimentary lighting technology to minimally assist the cameras' operation at night. *Id.* The cameras could not record audio, nor did they have infrared or any capabilities to view or capture anything inside the Defendant's residence that he did not expose to the public. *Id.* During the investigation, a few cameras intermittently stopped functioning and were replaced by identical models in the same locations. *Id.* at 3. The surveillance footage was viewable in real time from the East Central Illinois Task Force's office in Mattoon and the data was stored on a server at the FBI's Springfield office. *Id.*

***2** The pole cameras could only view the exterior of the Defendant's residence and the surrounding area of the house. *Id.* The Defendant's residence is located in a populated

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residential area and had no fence, wall, or other object that would obstruct the view of a passerby. *Id.* The pole cameras recorded roughly 100 instances believed to be the Defendant meeting with various couriers and suppliers. *Id.* Those individuals would park in the Defendant's driveway then often carry items such as tires, boxes, and bags into the Defendant's residence. *Id.* Those individuals would then leave with only the rims of tires, smaller sacks, and sometimes nothing at all. *Id.* The cameras further captured the Defendant carrying items across the street to co-defendant Josh Vaultonburg's shed. *Id.* at 4. Various witnesses have uniformly corroborated that the cameras captured couriers bringing the Defendant's shipments of methamphetamine and once they left, the Defendant's distributors would arrive to pay and pick up their batch of methamphetamine. *Id.* The pole cameras operated, in some fashion or another, from August 21, 2014, to March 2, 2016. [1] *Id.* The pole cameras captured footage of the Defendant's residence for approximately 18 months. *Id.* The lengthy nature of the investigation was largely attributed to the size and scope of the network, which extended well beyond Defendant and his particular conspiracy. *Id.* The Government never sought or received a warrant for the pole cameras. Doc. 50.

1 The first camera, which was focused on the front of the Defendant's residence, was installed on August 21, 2014. That camera served as the only pole camera until September 25, 2015, when a second camera was installed providing the view of co-defendant Vaultonburg's residence (and also the Defendant's). The third camera (the second camera stacked with the first pole camera focused on the Defendant's residence) was installed on December 28, 2015. All cameras were removed on March 2, 2016.

LEGAL STANDARD

The Fourth Amendment provides in part, that the people have a right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. v. Jones*, 132 S. Ct. 945, 949 (2012). "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). "A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). Furthermore, the Fourth Amendment protects people, not places. *Katz v. United States*, 389 U.S. 247, 351 (1967). What a person exposes to the public is not private, even in his home or office, but what he seeks to preserve as private, even in a public area, may be constitutionally protected. *Id.*

ANALYSIS

Defendant argues in his Motion to Suppress that the Government violated his reasonable expectation of privacy secured by the Fourth Amendment when it conducted warrantless surveillance of his residence with pole cameras for 18 months. Doc. 50. The Government responds that Defendant did not have a reasonable expectation of privacy in the activities recorded by the pole cameras, and the length of the surveillance does not alter this analysis. Doc. 51.

1. Reasonable Expectation of Privacy

"The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (internal quotation omitted). Although much of the early Fourth Amendment jurisprudence regarding searches tied the doctrine to "common-law trespass," the Supreme Court has more recently recognized that Fourth Amendment "protects people, not places"; thus, violations may occur even where the Government does not physically intrude on a constitutionally protected area. *Id.* (citing *United States v. Jones*, 565 U.S. 400, 405, 406, n. 3 (2012), *Katz v. United States*, 389 U.S. 347, 351 (1967)); *see also Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass.").

Following *Katz*, "[w]hen an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' [the Supreme Court has] held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Id.* (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)). In *California v. Ciraolo*, the Supreme Court stated that "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." 476 U.S. 207, 213 (1986). However, "[a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, [the Supreme] Court has

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sought to 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' " *Carpenter*, 138 S. Ct. at 2214 (quoting *Kyllo*, 533 U.S. at 34). Thus, in *Kyllo*, the Supreme Court held that the use of a thermal imager to detect heat radiating from the side of a home was a search under the Fourth Amendment and thus required a warrant. 533 U.S. at 34. In so holding, the Court reasoned that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' *Silverman*, 365 U.S., at 512, 81 S.Ct. 679, constitutes a search−at least where (as here) the technology in question is not in general public use." *Id.*

***3** Defendant takes issue with the Government surveilling the outside of his house and driveway with cameras affixed to a utility pole adjacent to his property. "When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (citing *Florida v. Jardines*, 569 U.S. 1, 11 (2013)). However, it is undisputed here that law enforcement never physically intruded on Tuggle's property when they installed and monitored the pole cameras. Because law enforcement did not trespass on Tuggle's property in order to surveil his activities, the inquiry becomes whether he had a subjective expectation of privacy in his driveway and front of his house. "[A] Fourth Amendment search does *not* occur−even when the explicitly protected location of a *house* is concerned−unless "the individual manifested a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable." *Kyllo*, 533 U.S. at 33 (quoting *Ciraolo*, 476 U.S. at 211).

Here, Defendant's residence was located in a populated residential area and had no fence, wall, or other object that would obstruct the view of a passerby. The lack of any attempt to obscure his driveway or residence from public view weights against a finding that he "manifested a subjective expectation of privacy in the object of the challenged search." *Kyllo*, 533 U.S. at 33. Even if Defendant had a subjective expectation of privacy in his driveway and the front of his house, it is not one that society would find reasonable. *See, e.g., United States v. Evans*, 27 F.3d 1219, 1228 (7th Cir. 1994) ("The agents' approach to the garage did not implicate a Fourth Amendment interest because Evans did not present any evidence at the suppression hearing that he had a reasonable expectation of privacy in the driveway."). Significantly, the pole cameras could only view the exterior of the Defendant's residence and the surrounding area of the house. The cameras only captured what would have been visible to any passerby in the neighborhood. Thus, this case is unlike the thermal imaging that was found to be a search in *Kyllo*. 533 U.S. at 34. And while the Supreme Court has recently extended Fourth Amendment protections to address surveillance methods implicating new technologies, the surveillance here used ordinary video cameras that have been around for decades. *Cf. Carpenter v. United States*, 138 S. Ct. 2206 (2018), *Riley v. California*, 134 S. Ct. 2473 (2014), *United States v. Jones*, 565 U.S. 400 (2012). In fact, when extending Fourth Amendment protections to cell site location information, the Supreme Court specifically stated that its decision did not "call into question conventional surveillance techniques and tools, *such as security cameras*." *Id.* at 2220 (emphasis added).

The Court further finds the defendant had no expectation of privacy in the third camera that was placed approximately one block south of the other cameras, in the 600 block of North 9th Street, which could also view the Defendant's residence but was primarily used to surveil co-defendant Joshua Vaultonburg's shed.

2. Long−term Pole Camera Surveillance Under the Fourth Amendment

The remaining question before the Court is whether this 18-month surveillance violated the defendant's reasonable expectation of privacy. Defendant analogizes the facts here to the placing of GPS tracking on a car. Long periods of GPS tracking have been found to impinge on an expectation of privacy. *United States v. Jones*, 565 U.S. 400, 414 (2012). The Court does not find that analogy applicable here. Pole cameras are limited to a fixed location and capture only activities in camera view, as opposed to GPS, which can track an individual's movement anywhere in the world. The Seventh Circuit has not made a dispositive ruling on the long-term warrantless use of pole cameras. However, several other circuits have been presented with this issue and all of them have allowed the evidence to be admitted. *See United States v Houston*, 813 F.3d 282, 289 (6th Cir. 2016) (warrantless use of pole camera footage for over 10 weeks); *United States v Bucci*, 582 F.3d 108, 116−17 (1st Cir. 2009) (approving eight months of warrantless pole camera surveillance); *United States v Mazzara*, 2017 U.S. Dist. Lexis 178575, 2017 WL 4862793 (S.D.N.Y. Oct. 27, 2017) (finding 21 months of pole camera surveillance of a residence from across the street

did not violate Fourth Amendment right). At some point the length of monitoring may constitute a search. Here, the facts and case law from other circuits do not support a finding that the extended surveillance at issue here constitute that search. Therefore, the Motion to Suppress is respectfully denied. The matter remains set for Pre-Trial for August 13, 2018 at 2:30 pm and Jury Trial September 10, 2018 at 9:00 am.

CONCLUSION

***4** For the reasons set forth above, Defendant's Motion to Suppress (Doc. 50) is DENIED.

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United States v. Vargas

United States District Court for the Eastern District of Washington

December 15, 2014, Decided; December 15, 2014, Filed

No. CR-13-6025-EFS

Reporter
2014 U.S. Dist. LEXIS 184672 *

UNITED STATES OF AMERICA, Plaintiff, v. LEONEL MICHEL VARGAS, Defendant.

Subsequent History: Reconsideration denied by, Motion denied by ***United States v. Vargas***, *2015 U.S. Dist. LEXIS 451 (E.D. Wash., Jan. 5, 2015)*

Counsel: **[*1]** For Leonel Michel Vargas, Appeals court case number: 15-30006 Ninth Circuit Court of Appeals Interpreter Required, Defendant: Spanish: John Scott Matheson, LEAD ATTORNEY, Kennewick, WA USA.

For Electronic Frontier Foundation Amicus, on behalf of Defendant, Defendant: Robert Michael Seines, LEAD ATTORNEY, Robert Seines Law Office, Liberty Lake, WA USA; Hanni Meena Fakhoury, PRO HAC VICE, Electronic Frontier Foundation, San Francisco, CA USA.

For USA, Plaintiff: Benjamin David Seal, LEAD ATTORNEY, United States Attorneys Office, Yakima, WA USA.

Judges: EDWARD F. SHEA, Senior United States District Judge.

Opinion by: EDWARD F. SHEA

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

The first duty of government is the safety of its people—by Constitutional means and methods. Technology, including the means for covert surveillance of individuals through the use of a hidden video camera that wirelessly transmits images to an offsite computer of a law enforcement officer, can be an important tool in investigating crime. Here, in April and May 2013, law enforcement officers obtained permission from a utility company to install, and did install, a disguised video camera on a utility pole more than one hundred yards from Defendant **[*2]** Leonel Michel Vargas' rural eastern Washington home. It continuously recorded activity in the front yard of Mr. Vargas' property for more than six weeks and transmitted those images to a law enforcement officer's computer. This permitted the officer, when viewing live footage, to pan and zoom the camera and, when the officer was off duty, to record the footage for later viewing. Mr. Vargas argues this constant surreptitious video viewing and recording of the activities at the front of his home and yard violated his *Fourth Amendment* right to be free from unreasonable search. For that reason, he asks the Court to suppress the evidence obtained as a result of this prolonged surreptitious video viewing and recording. The U.S. Attorney's Office (USAO) opposes suppression, contending that the video feed simply permitted law enforcement to remotely observe what any law enforcement officer could have observed if he passed by Mr. Vargas' front yard on the public gravel access road in front of Mr. Vargas' home. After reviewing relevant *Fourth Amendment* jurisprudence and applying such to the facts here, the Court rules that the Constitution permits law enforcement officers to remotely and continuously view and record an individual's **[*3]** front yard (and the activities and people thereon) through the use of a hidden video camera

concealed off of the individual's property *but only* upon obtaining a search warrant from a judge based on a showing of probable cause to believe criminal activity was occurring. The American people have a reasonable expectation of privacy in the activities occurring in and around the front yard of their homes particularly where the home is located in a very rural, isolated setting. This reasonable expectation of privacy prohibits the warrantless, continuous, and covert recording of Mr. Vargas' front yard for six weeks. Mr. Vargas' motion to suppress the evidence obtained as a result of the video feed is granted. The Court provides a more detailed articulation of the factual circumstances and its ruling below.

A. Facts

Mr. Vargas' home is located on Arousa Road: a gravel road in the rural farmland area of Franklin County in eastern Washington. Arousa Road borders Mr. Vargas' front yard on the east; continuing eastward beyond Arousa Road is undeveloped land with sagebrush and other native plants. Mr. Vargas' driveway is located on the southern portion of his property, with a gate separating Arousa **[*4]** Road and the driveway. The driveway leads to a mixed gravel and dirt parking area and an open, detached parking structure, which was used to store items and park a car and a four-wheeled all-terrain vehicle (ATV). In addition to the gated driveway, a simple wire cyclone fence and a twenty-foot strip of natural vegetation separates Mr. Vargas' front yard from the gravel Arousa Road. Mr. Vargas' home sits approximately sixty feet west of Arousa Road: immediately to the east of the house is an approximate twenty-foot concrete patio, then approximately ten feet of grass and weeds, followed by twenty-five feet of a mixed dirt and gravel parking area, then twenty feet of undeveloped land with natural vegetation in which the cyclone fence is positioned, and then Arousa Road. The concrete patio was used to store adult and children bicycles, a barbeque, a cooler, a garbage-collection container, and other items. South of the driveway and parking structure is an orchard. The orchard also backs the home on its westerly side. North of Mr. Vargas' home is a partial cyclone fence and undeveloped land with sagebrush and other native plants; near the fence was a metal burn barrel. Given the home's **[*5]** setting and the elevation differences in the adjacent land, there are no structures other than those on Mr. Vargas' property that can be viewed from his front door. Other than the gravel Arousa Road which runs in front of Mr. Vargas' property, there is also a mixed dirt and gravel road, approximately 150 yards to the north of his property, which is perpendicular to Arousa Road. This is a rural, isolated location with very few vehicles using these roads.[1]

City of Kennewick Detective Aaron Clem, who is assigned to the Tri-Cities Violent Gang Task Force,[2] received information in September 2012 that Mr. Vargas was involved in drug distribution in the Tri-Cities area. In April 2013, desiring to learn who Mr. Vargas was associating with at his home, Detective Clem requested permission from Task Force supervising agents to install a sophisticated video camera in a surreptitious manner so that activities in Mr. Vargas' front yard could be surveilled through electronic, remote means. Permission was granted, **[*6]** and FBI technical agents worked with a local utility company to install a hidden video camera on a telephone pole. The selected telephone pole is on the other side of Arousa Road from Mr. Vargas' home and is approximately 150 yards south of the home. The land on which the telephone pole sits is at the crest of a hill to the south of Mr. Vargas' home; therefore, the telephone pole sits at a higher elevation than Mr. Vargas' home. The video camera was installed near the top of the telephone pole. The video camera began operating April 4, 2013.

The video camera's silent feed was wirelessly transmitted to Detective Clem's computer in his office approximately twenty miles away. From his computer, Detective Clem could rotate and zoom the video camera's view. Detective Clem usually aimed the video camera at Mr. Vargas' front yard; yet, Detective Clem could also remotely pan and zoom the camera so that **[*7]** he could focus on anything in the front yard, including the front door, items in the open parking structure, vehicles (and open trunks and doors), individuals, and surrounding area. The video camera operated twenty-four hours a day and its feed was saved to an external hard drive connected to Detective

[1] The "lay of the land" can be discerned from the pictures offered at the suppression hearing and attached to the briefs, ECF Nos. 49 & 60, as well as the recorded video, ECF Nos. 71, 81, & 87.

[2] The Task Force is comprised of law enforcement officers from the U.S. Marshals Service, the Federal Bureau of Investigation (FBI), the Drug Enforcement Agency, Benton and Franklin Counties Sheriff's Departments, and each of the Tri-Cities (Richland, Kennewick, and Pasco) City Police Departments.

Clem's computer.[3] Although Agent Clem testified that the recording was continuous for this sixweek period, there are segments on the hard-drive recording and the DVD that "jump" in time. The Court is unsure whether these time jumps, which typically range from thirty minutes to two hours, are caused by a recording malfunction or whether law enforcement deleted these segments from the recording.

The video camera did not have night vision, or infrared or heat-sensing capabilities. Once the feed was recorded, the recorded image cannot be enlarged without distortion, but "still photographs" **[*8]** can be taken from the video recording, some of which were used to support the subsequent search warrant application, Supp. Hrg. Gov't Ex. No. 1, which is discussed below. There is no evidence that the video camera was used to record what was occurring inside Mr. Vargas' home; however, the technical abilities of the camera would have made it possible for Detective Clem to zoom inside an open front door or an unobstructed window.

When Detective Clem's work schedule permitted, he remotely watched the "live" video feed on his computer. However, often he needed to watch the recorded video feed given that he did not remain at his office computer twenty-four hours a day, seven days a week during the six-week time period the wireless video feed was provided to his work computer. While reviewing the recorded video feed from May 2, 2013, Detective Clem observed Mr. Vargas walk from his backyard to the driveway area in the front of his house and raise his hands while holding an object consistent with a firearm. Detective Clem believed, based on Mr. Vargas' stance and hand positioning, that Mr. Vargas was engaging in target practice with a pistol.

On May 6, 2013, Detective Clem remotely observed, **[*9]** through the live video-camera feed, Mr. Vargas arrive home and greet two males who were waiting in his front yard. The three men socialized and drank in the front yard under the shade of a large tree. After a while, Mr. Vargas placed what appeared to be a glass beer bottle on top of a wooden fence post — part of the fence that parallels Arousa Road. The men, including Mr. Vargas, took turns engaging in target practice by using a firearm to shoot at the bottle. Detective Clem used his computer controls to zoom and pan the video camera to focus on the individuals' faces, hands, and conduct during the target practice. Because of the camera's zooming capabilities, Detective Clem observed what appeared to be a silver semi-automatic pistol of unknown caliber. Detective Clem also observed what appeared to be recoil from the pistol and smoke leaving the pistol's barrel. Later Mr. Vargas retrieved a rifle from the direction of his house, and the men continued to take turns engaging in target practice, now with the rifle. The location is so remote that the video recorded one of the men urinating at the side of the front yard near the cyclone fence fifteen feet from Arousa Road, presumably confident **[*10]** that he would not be observed.

The recording for May 6 later jumps from 3:56 p.m. to 4:45 p.m.; as a result, there is no recorded video for approximately forty-five minutes. When the recording resumes at 4:45 p.m., two other vehicles and two other men are present. The men continued socializing but no target practice occurred in the presence of these two recently arrived men. After some time, the two recently arrived men leave in a single vehicle. Because the recording does not contain the segment of time when these two "new" vehicles arrive, it is unknown to the Court as to whom arrived in the other "new" vehicle. However, it appears that the driver of that vehicle went into the house and did not socialize with Mr. Vargas and the others outside. Following the departure of these two new men, target practice resumes by the three men who were initially present. Later that evening, those three men, including Mr. Vargas, enjoy a bonfire in the nearby burn barrel.

Based on his review of Mr. Vargas' prior contacts with law enforcement, Detective Clem suspected that Mr. Vargas was residing unlawfully in the United States. Detective Clem spoke to U.S. Immigration and Customs Enforcement agents, **[*11]** who also believed that Mr. Vargas was in the United States unlawfully. On May 14, 2013, Detective Clem applied for a search warrant based on Mr. Vargas' suspected violation of *18 U.S.C. § 922(g)(5)*: being an alien in possession of a firearm. A federal magistrate judge issued a search warrant later that day for evidence of crime and contraband in Mr. Vargas' home and outbuildings. On May 16, 2013, the Task Force executed the search warrant at approximately 6:00 a.m. During the search, four firearms were found, as well as baggies containing 5 grams of a white crystal substance that field tested

[3] The external hard drive is ECF No. 81. Also part of the record is a DVD spanning a two-hour interval on May 6, 2013, from the hard-drive recording, which shows Mr. Vargas and two other men engaging in target practice in the area between Mr. Vargas' home and the fence running parallel to Arousa Road. ECF No. 71.

presumptive positive for methamphetamine.

On the day that Detective Clem applied for the search warrant, he also requested that the FBI technical agents turn off the video camera feed. Detective Clem testified that he was unsure when the video camera was physically removed. Yet, the recording shows on May 16, 2013, at 4:45 a.m. (approximately one hour before the search warrant was executed) that the video camera's lens was shifted (presumably remotely) so that only the sagebrush field to the east of home was in view. At 10:50 a.m., the video camera's lens was shifted back (presumably remotely) so that Mr. Vargas' home **[*12]** and front yard was in its view again. Law enforcement apparently finished executing the search warrant by that time as law enforcement officers are not seen on Mr. Vargas' property when the video camera's lens shifts back to Mr. Vargas' property. The recording contains footage until approximately 8:00 a.m. on May 17, 2014.

On May 16, 2013, a criminal complaint was filed in this District charging Mr. Vargas with violating *18 U.S.C. § 922(g)(5)* (alien in possession of a firearm) and *21 U.S.C. § 841(a)(1)* (intent to distribute 5 grams or more of actual meth). ECF No. 1. On May 22, 2013, an Indictment was filed, charging Mr. Vargas with these same crimes. ECF No. 12.

Believing that the evidence obtained as a result of the video camera's surreptitious viewing and recording of the on-goings in his front yard for six weeks violated his *Fourth Amendment* right to be free from unreasonable search, Mr. Vargas filed a motion to suppress the evidence obtained as a result of the video camera. ECF No. 47. The Court held an evidentiary hearing on the opposed suppression motion on February 11, 2014, ECF No. 72, and permitted the Electronic Frontier Foundation (EFF) to submit amicus curiae arguments, ECF Nos. 55 & 63.[4] Following the hearing, the Court invited **[*13]** supplemental briefing. ECF Nos. 76, 86, 93, & 97. The Court also requested the USAO provide Defendant and the Court with technical details regarding the video camera and associated technology (collectively, "video camera"). The USAO expressed concern regarding disclosing details about the video camera, contending that such information is protected by the law-enforcement privilege. As explained below, the Court determines it need not learn further details of the technological capabilities of the video camera, or ascertain whether the law-enforcement privilege protects such information, under these circumstances.

B. Analysis

Law enforcement may collect information to aid its investigations, but law enforcement's conduct is limited by the *Fourth Amendment*. *Florida v. Jardines, 133 S. Ct. 1409, 1414, 185 L. Ed. 2d 495 (2013)*. The *Fourth Amendment* protects "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Const. amend. IV*. It is a basic principle of *Fourth Amendment* law that searches and seizures without **[*14]** a warrant are presumptively unreasonable. *See, e.g., Riley v. California, 134 S. Ct. 2473, 2494-95, 189 L. Ed. 2d 430 (2014)*; *Groh v. Ramirez, 540 U.S. 551, 559, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004)*. How the *Fourth Amendment* applies to protect the people's right to be free from unreasonable search and seizure is a matter of continuous public and legal scrutiny, especially with the evolution of new technologies and their use by law enforcement.[5] *Riley, 134 S. Ct. at 2484* (recognizing

[4] Mr. Vargas was present at the pretrial conference, represented by John Matheson. Alexander Ekstrom appeared on behalf of the USAO. Hanni Fakhoury and Robert Seines appeared on the EFF's behalf. The Court heard testimony from Detective Aaron Clem.

[5] Recent polls indicate that many Americans are concerned with the oversight that presently applies to government surveillance programs. *See* Emily Swanson, *Poll: NSA Oversight is Inadequate, Most Americans Say*, Huffington Post, Aug. 27, 2013, *available at* http://www.huffingtonpost.com/2013/08/17/nsa-oversight-poll_n_3769727.html ; Frank Newport, *Americans Disapprove of Government Surveillance Programs*, GALLUP Politics, June 12, 2013, *available at* http://www.gallup.com/poll/163043/americans-disapprove-government-surveillance-programs.aspx . *See also* Adam Schwartz, *Chicago's Video Surveillance Cameras: A Pervasive and Poorly Regulated Threat to Our Privacy* ***[*15]*** , 11:2 Nw. J. Tech. & Intell. Prop. 2, 47 (Jan. 2013) (discussing privacy concerns with government use of cameras even in public spaces, and recommending that the government notify the public as to where a camera is located); The Editorial Board, *The President on Mass Surveillance*, N.Y. Times, Jan. 17, 2014, *available at* http://www.nytimes.com/2014/01/18/opinion/the-president-on-mass-surveillance.html?module=Search&mabReward=relbias%3Ar%2C%5B%22RI%3A8%22%2C%22RI%3A13%22%5D ("The president announced important new restrictions on the collection of information about ordinary Americans, including the requirement of court approval before telephone records

that flip phone and smart phones are "based on technology nearly inconceivable just a few decades ago"). "The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities." *Arizona v. Evans, 514 U.S. 1, 17-18, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995)* (O'Connor, J., concurring).

The Supreme Court's recent decisions in *United States v. Jones, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)*, and *Florida v. Jardines, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013)*, discuss and clarify the *Fourth Amendment* analysis the Court is to employ when analyzing the constitutionality of a search conducted by law enforcement. To determine whether an unreasonable search occurred, a court considers two Fourth-Amendment approaches: 1) whether a trespass by law enforcement occurred (property-based approach), and/or 2) whether an individual's reasonable expectation **[*16]** of privacy was violated by law enforcement (reasonable-expectation-of-privacy approach). *Jones, 132 S. Ct. at 951* & *953*.

The property-based approach does not apply here. Law enforcement did not physically enter Mr. Vargas' land or home until after it obtained a search warrant based on the information learned from the video camera. And law enforcement did not gain access to Mr. Vargas' wireless service or other digital property to covertly record and transmit the activities in the front yard. The video camera did "intrude" upon Mr. Vargas' front yard and the vehicles contained therein by recording the incidents occurring thereon or items contained therein; however, the camera itself was not on Mr. Vargas' land but rather on a telephone pole on another's land, to which law enforcement had obtained permission to install the camera. For these reasons, a physical trespass did not occur. *See Jones, 132 S. Ct. at 953* ("Situations involving merely the transmission of electronic signals without trespass . . . *remain[s]* subject to" a reasonable-expectation-of-privacy approach.).

The reasonable-expectation-of-privacy approach requires the Court to assess whether 1) Mr. Vargas had an actual (subjective) expectation that the activities in his front yard would **[*17]** be private, and 2) "'society is prepared to recognize [his subjective expectation of privacy] as reasonable.'" *United States v. Lopez-Cruz, 730 F.3d 803, 807 (9th Cir. 2013)* (internal citations removed). Accordingly, the Court's analysis focuses on whether Mr. Vargas had a reasonable expectation of privacy to not have his front yard continuously observed and recorded for six weeks by a camera with zooming and panning capabilities hidden on a telephone pole over a hundred yards away, and whether his subjective expectation of privacy is objectively reasonable. *See id.* The Court finds the answer to both of these questions is clear: society expects that law enforcement's continuous and covert video observation and recording of an individual's front yard must be judicially approved, and Mr. Vargas' conduct during the six weeks that his front yard was covertly observed and recorded indicates that he expected not to have his front yard covertly observed and recorded on a continuous basis by law enforcement.

The parties' and EFF's arguments, concerning the subjective and objective reasonable expectations of privacy, include analysis of whether Mr. Vargas' front yard is part of his home's curtilage or an "open field." Given the invasive nature of the employed **[*18]** continuous video surveillance, the Court rules that the *Fourth Amendment* analysis here is not controlled by whether Mr. Vargas' front yard is or is not part of his home's curtilage. *See Riley, 134 S. Ct. at 2490-91* (assessing the pervasiveness of the intrusion on one's privacy when searching cell phones). Yet to provide a thorough analysis of all issues addressed by the parties, the Court proceeds to analyze curtilage and "open field" principles to the facts of this case.

Typically, an individual has a reasonable expectation of privacy to his curtilage: the area immediately surrounding his home that "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life." *United States v. Dunn, 480 U.S. 294, 300, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987)*; *see also Jardines, 133 S. Ct. at 1414* ("At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting *Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961)*)). Four factors assist with assessing whether an area is within the curtilage: 1) the area's proximity to the home, 2) whether the area is

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can be searched. He called for greater oversight of the intelligence community and acknowledged that intrusive forms of technology posed a growing threat to civil liberties."); *Surveillance of Citizens by Government*, N.Y.Times, *available at* http://topics.nytimes.com/top/reference/timestopics/subjects/s/surveillance_of_citizens_by_government/index.html (organizing commentary and archival articles regarding surveillance of citizens by the government).

enclosed, 3) the uses for that area, and 4) the steps taken by the resident to protect the area from observation by a passerby. *Dunn, 480 U.S. at 301*. These factors do not complete the curtilage assessment but rather "are useful analytical **[*19]** 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" protected by the *Fourth Amendment*. *Id.*

While a person typically has a reasonable expectation of privacy to his curtilage, an individual has no reasonable expectation of privacy in an "open field," the area outside of a home's curtilage. *Oliver v. United States, 466 U.S. 170, 179, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984)* ("[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home [the curtilage]."). "An open field need be neither 'open' nor a 'field' as those terms are used in common speech. For example . . ., a thickly wooded area nonetheless may be an open field as that term is used in construing the *Fourth Amendment*." *Id. at 180, n.11*.

After assessing each of the *Dunn* factors, the Court concludes Mr. Vargas' front yard is part of his home's curtilage. First, the front yard is immediately adjacent to the house. Second, the front yard is fenced on the east and includes a gated driveway. Although the front wire cyclone fence, which is supported by wooden and metal posts, does not substantially obstruct a passerby's view, a passerby's **[*20]** view of the front yard is hindered to some degree by the sagebrush, trees, and other native plants, which are in the front yard and which line the fence. Furthermore, there is a slight embankment between Arousa Road and the front yard. The open parking structure provides a southern obstacle, and the house provides a western barrier. As to the third *Dunn* factor, Mr. Vargas and those he lived with used their front yard for "backyard purposes": to barbeque, socialize with guests, and target practice. In addition, the household used the front yard to park cars and the ATV, store adult and children's bikes, and hold the garbage-collection container and a burn barrel. The USAO argues that target practice is not an intimate activity associated with the sanctity of Mr. Vargas' home and the privacies of life. However, the Court must view this activity in the context of the home's setting—a rural locale off a gravel road—and in light that the target practice was an activity engaged in by three men as they relaxed and socialized in the shade of the tree in Mr. Vargas' front yard. The relaxed nature of this gathering, and the expectation that it was a private activity, is underscored by the fact **[*21]** that one of the men urinated near the cyclone fence, approximately fifteen feet from Arousa Road. The Court finds under these circumstances that the act of engaging in target practice in the front yard is consistent with the Court recognizing the front yard as part of the home's curtilage. As to the last *Dunn* factor (the steps taken by the resident to protect the area from observation by a passerby), Mr. Vargas selected to live in a home in a rural setting off a gravel road with trees, fencing, and a gated driveway.

Accordingly, after considering these four factors, amongst the totality of the circumstances, the Court finds Mr. Vargas' front yard is part of his home's curtilage. *See Jardines, 133 S. Ct. at 1414-15* (recognizing that the home's front porch was part of the curtilage even though it was not enclosed or gated, and could be seen from the road). Mr. Vargas' front yard was separated from the gravel Arousa Road by a fence and gated driveway; Mr. Vargas also enjoyed a sense of enclosure in his front yard due to the parking structure, northern fence, and the natural vegetation and elevation change near the eastern fence; and Mr. Vargas did not affirmatively draw the public onto his property. *Cf. United States v. Duenas, 691 F.3d 1070, 1081 (9th Cir. 2012)* (finding the **[*22]** non-enclosed front yard was not part of the curtilage as there was no evidence regarding the uses for the non-enclosed front yard); *United States v. Bausby, 720 F.3d 652, 656 (8th Cir. 2013)* (finding a chain-link-fenced front yard was not part of the curtilage because the defendant took affirmative steps to draw the public into his front yard by displaying items for sale); *United States v. Anderson-Bagshaw, 509 Fed. Appx. 396, 404-05 (6th Cir. 2012)* (unpublished opinion) (distinguishing between three areas outside the home, finding the backyard, which was in immediate proximity to the house and was fairly enclosed by trees, a fence, and a barn, and contained a picnic table and clothesline, was part of the curtilage, and finding the pasture and barnyard were outside of the curtilage). Accordingly, the Court finds the front yard is part of the home's curtilage. However, as mentioned above, the Court's finding of curtilage is not essential to the Court's finding that law enforcement's constant video-camera surveillance of Mr. Vargas' front yard for six weeks is an unreasonable search given that Mr. Vargas reasonably expected that his private activities in his front yard would not be subject to such constant, covert surveillance.[6]

[6] Given the reasonable expectation of privacy that Mr. Vargas

The Court so rules while recognizing that law enforcement is not barred from making "plain view" observations of a home's curtilage. "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." California v. Ciraolo, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).

The permitted "plain view" observations in Ciraolo, however, are much different from law enforcement's electronic, continuous remote surveillance here. In *Ciraolo*, the Supreme Court analyzed "whether naked-eye observation of the curtilage[, *i.e.*, a fully-fenced backyard,] by police from an aircraft lawfully operating at **[*24]** an altitude of 1,000 feet violates an expectation of privacy that is reasonable." Id. at 213-14. The Supreme Court held no, highlighting that any member of the public flying in the airspace above the defendant's home could have seen the marijuana in the backyard, and therefore defendant's expectation that his garden would not be observed was unreasonable and not an expectation that society is prepared to honor. *Id.*

The same day as *Ciraolo*, the Supreme Court decided Dow Chemical Co. v. United States, 476 U.S. 227, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986). In *Dow Chemical*, the Supreme Court determined "the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the 'curtilage' of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras." Id. at 240.

Yet, the Supreme Court took the opportunity to note in *Dow Chemical*, "this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened." Id. at 237, n.3. This comment by the Supreme Court in *Dow Chemical* is interesting **[*25]** given its same-day ruling in *Ciraolo*: law enforcement's naked-eye observation of marijuana in one's back yard did not constitute a Fourth Amendment violation. The Supreme Court's comment in Dow Chemical indicates that *Ciraolo* may have been decided differently if law enforcement's observations included more than a one-time naked-eye observation of defendant's backyard.

In 2011, the Ninth Circuit commented on plain-view curtilage observations by law enforcement in United States v. Perea-Rey, 680 F.3d 1179 (9th Cir. 2011). In *Perea-Rey*, the Ninth Circuit determined a carport within the fenced front yard and adjacent to the house was part of the curtilage and therefore the officers violated the defendant's Fourth Amendment right by entering the curtilage without a warrant. While *Perea-Rey* involved a physical trespass by the officers, the Ninth Circuit commented, "a warrant is not required to observe readily visible items within the curtilage, and 'officers [need not] *shield their eyes* when passing by a home on public thoroughfares." Id. at 1186 (emphasis added). The Ninth Circuit highlighted that therefore law enforcement can use what they actually saw from a public vantage point, such as a sidewalk, in a warrant application. *Id.*

Based on this Fourth Amendment jurisprudence, there is no question that, **[*26]** if Agent Clem had personally watched Mr. Vargas possess a firearm in his front yard, when either passing by on Arousa Road, flying above Mr. Vargas' property on a one-time occasion, or sitting on the telephone pole with a camera and telephoto lens, Agent Clem's observation would not constitute a search, and therefore, he could use such observation as a basis for a search warrant. Although having an agent sit on top of a telephone pole may seem far afield, it is consistent with Justice Scalia's "constable" example in Jones, 132 S. Ct. at 950, n.3. In *Jones*, Justice Scalia posits that a constable could conceal himself in a suspect's coach in order to track the movements of the coach, thereby serving as an 18th century global-positioning-system (gps) device.

Here, it may have been possible for law enforcement agents to take turns personally observing Mr. Vargas' activities in his front yard for a thirty-day period but the success of such hypothetical constables going unnoticed by Mr. Vargas for thirty days is highly unlikely. *See* Nerber, 222 F.3d at 604 (recognizing that people modify their behavior when they are in the presence of others). Nevertheless, the Court is limited to the facts

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possessed to his front-yard activities, **[*23]** the question of whether he possesses a privacy interest in his "personal curtilage" need not be addressed. *See* Andrew Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 Wm. & Mary L. Rev. 1283, 1345-48 (April 2014) (discussing the need for Fourth Amendment jurisprudence to recognize a privacy right to one's personal curtilage, especially given the pervasive use of public surveillance by video cameras).

before it, which do not include constables sitting **[*27]** on the telephone pole. Rather Agent Clem only had the information pertaining to Mr. Vargas' May 2 and 6, 2013 target practices because of the live and recorded view afforded by the video camera, which was covertly installed approximately thirty days prior to these events. This "view" is so different in its intrusiveness that it does not qualify as a plain-view observation.

"Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are, dictates that its use be approved only in limited circumstances." *Nerber, 222 F.3d at 600*. Although law enforcement is permitted to use technology to enhance investigative abilities, *see Ciraolo, 476 U.S. at 215*, law enforcement's video surveillance of Mr. Vargas' front yard for six weeks with a camera that could zoom and record violated his reasonable expectation of privacy: an expectation that society is prepared to recognize as reasonable.[7]

Continuous video surveillance of an individual's front yard "provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the specter of the Orwellian state." *United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987)* (permitting thirty days of video surveillance from a pole camera which recorded defendant's backyard only because law enforcement had obtained a warrant to do so); *see also Nerber, 222 F.3d at 603-04* (suppressing in part evidence obtained from a video camera installed in a hotel room because, although the defendants did not rent the room, they had a legitimate expectation of privacy when they were in the room by themselves); *United States v. Taketa, 923 F.2d 665, 673-74 (9th Cir. 1991)* (suppressing video footage of federal employees in their offices because it violated the *Fourth Amendment* as they had a legitimate expectation of privacy not to be continuously recorded by a hidden ceiling camera in their office); *Shafer v. City of Boulder, 896 F. Supp. 2d 915, 930-32 (D. Nev. 2012)* (finding, in the context of a *42 U.S.C. § 1983* lawsuit, that the use of a video camera on a neighbor's property to film the plaintiff's backyard for fifty-six days constituted a search as the plaintiff had a reasonable expectation that his home would not be subject to unwarranted government video surveillance). This dragnet law enforcement practice is not akin **[*29]** to either a naked-eye observation or a photographic picture by a live officer.[8] *See United States v. Knotts, 460 U.S. 276, 284, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1982)* (noting "if such dragnet type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable"). Electronic surveillance by the government is increasing, and the need to balance this government tool with the *Fourth Amendment* is required. *See Riley, 134 S. Ct. at 2484-85* (assessing the degree to which the search intrudes on an individual's privacy and the degree to which the search is needed to promote legitimate governmental interests).

Here, the *Fourth Amendment* permits the type of electronic surveillance employed only if a warrant[9] supported by probable cause is obtained because society recognizes Mr. Vargas' subjective expectation of privacy in his front yard as a reasonable expectation of

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[7] *Cf.* Marc Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Places*, *63 Am. U. L. Rev. 21, 84-86 (Oct. 2013)* (recommending that *Fourth Amendment* analysis pertaining to public surveillance focus on whether a recording was **[*28]** generated and reviewed by law enforcement).

[8] The use of drones by law enforcement is another investigative practice that deviates greatly from "traditional" law enforcement investigative practices. Many states have adopted legislation to control the use of drones because a drone's ability to constantly and covertly view and record an individual or setting infringes on the American public's reasonable expectation of privacy that they will not be constantly and covertly observed by the government without a warrant. While seeking to protect this reasonable expectation of privacy, the drone legislation permits law enforcement to seek a judicial warrant to utilize **[*30]** a drone for investigative purposes; or under limited exceptions, which are similar to the warrant exceptions developed under *Fourth Amendment* case law, the legislation permits law enforcement to use a drone for investigative purposes without a warrant in order to counter a specific terrorist attack or prevent specific imminent danger to life or property. *See* Judge C. Philip Nichols, *Drones: The Coming of Age of a Not-So-New Technology*, 53 ABA: The Judge's Journal 4 (2014) (summarizing thirteen state's enacted drone legislation); Y. Douglas Yang, *Big Brother's Grown Wings: The Domestic Proliferation of Drone Surveillance and the Law's Response*, *23 B.U. Pub. Int. L.J. 343, 365 (Summer 2014)* (discussing the different state's legislative response to the use of drones). *See also* George

privacy.[10] And given the setting, Mr. Vargas reasonably believed that his front-yard activities **[*31]** would be private. Mr. Vargas chose to live in a rural area: an area mixed with farmland and undeveloped, sagebrush land. His rural home sits off a gravel road, and his front yard has a sense of enclosed space given a gated driveway and cyclone fence separating it from the gravel road. The USAO argues that any passerby could have seen Mr. Vargas' conduct. However, the setting of Mr. Vargas' home does not make the likelihood of a passerby likely: the road is gravel, his neighbors are "country neighbors," *i.e.*, they live a distance away, and there are no public sidewalks. In addition, Mr. Vargas could hear a vehicle coming down the gravel road and modify his behavior, *i.e.*, target practice would cease. *See* Nerber, 222 F.3d at 604 ("People feel comfortable saying and doing things alone that they would not say or do in the presence of others."). In fact, the recording shows that Mr. Vargas ceased target practice in the presence of the two new individuals. Even if Mr. Vargas could not expect total privacy in his rural front yard, "this diminished privacy interest does not eliminate society's expectation to be protected from the severe intrusion of having the government monitor private activities through hidden **[*32]** video cameras." *Id.*

The circumstances before the Court are different in kind from the circumstances in the cases cited by the USAO: United States v. Jackson, 213 F.3d 1269 (10th Cir. 2000), *vacated on other grounds, Jackson v. United States, 531 U.S. 1033, 121 S. Ct. 621, 148 L. Ed. 2d 531 (2000)*; and United States v. Vankesteren, 553 F.3d 286 (4th Cir. 2009). In *Jackson*, the Tenth Circuit upheld law enforcement's use of video surveillance from a pole camera to record the front of the defendant's home in Elk City, Oklahoma. The defendant's home in *Jackson* was on a public street, and there was no meaningful analysis as to the impact of the *prolonged* nature of the video surveillance. 213 F.3d at 1280-81. In *Vankesteren*, the Fourth Circuit permitted the warrantless use of video surveillance from a pole camera to "view" defendant's bird-trapping conduct on fields which were located more than a mile from his home. 553 F.3d at 287-88 (4th Cir. 2009). And fairly recently, an Arizona District Court found that law enforcement did not conduct a search by obtaining permission of a neighboring business to install a video camera to continuously record the happenings in the adjacent apartment complex's fenced **[*34]** parking lot because a passerby could observe the happenings if he was in either the parking lot or outside the complex through the iron fence's openings. United States v. Brooks, 911 F. Supp. 2d 836, 843 (D. Ariz. 2012).

The facts involved in these three cases are different from those before the Court. Here, the video camera recorded the activities in Mr. Vargas' partially fenced, rural front yard for six weeks: this is not a public or urban setting.[11] *See* Oliver, 466 U.S. at 178 ("[A]n

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Blum, Romualdo Eclavea, Alan Jacobs, and Eric Surette, ***68 Am. Jur. 2d Searches and Seizures § 114*** (Nov. 2014) (discussing the case-law exceptions to the Fourth Amendment's warrant requirement).

[9] Not only has technology eased law enforcement's investigative abilities but technology has also expedited law enforcement's ability to obtain a warrant. *See* Missouri v. McNeely, 133 S. Ct. 1552, 1561-62, 185 L. Ed. 2d 696 (2013) (observing that technology now "allow[s] for the more expeditious processing of warrant applications," and citing state statutes permitting warrants to be obtained "remotely through various means, including telephonic or radio communication, electronic communication . . ., and video conferencing")); *see also* Admin. Office of the U.S. Courts, Table S-17: Matters Disposed of by U.S. Magistrate Judges During the 12-Month Periods Ending September 30, 2004, and September 30, 2009 Through 2013, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S17Sep13.pdf (showing an 83% increase in search warrant applications between 2004 and 2013); Admin. Office of the U.S. Courts, Wiretap Report 2012 (2012), *available at* http://www.uscourts.gov/Statistics/WiretapReports/wiretap-report-2012.aspx (comparing 3,397 wiretap applications in 2012, with 1,359 wiretap applications in 2002; with approximately 99% of the wiretap applications being granted in those years).

[10] A warrantless video search and recording by law enforcement for a limited period of time based merely on reasonable suspicion may be consistent with Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Yet, here, law enforcement's continued use of the **[*33]** covert video recording clearly exceeded *Terry*: a warrant was required. This also is not a case involving officer safety or the use of a recording device activated by a law enforcement officer during a *specific* encounter at which the officer was present.

[11] Video cameras are commonly used by law enforcement in public places. *See also* Opinion, *Terrorism Forces Us to Rethink Use of Surveillance*, The Olympian, May 9, 2013, *available at* http://www.theolympian.com/2013/05/09/2538441/terrorism-forces-us-to-rethink. html (discussing polling results showing approximately 80 percent of respondents favor surveillance by camera of public places); Jerry Ratcliffe, Center for Problem-Oriented Policing, *Video Surveillance of Public Places* (2006), *available at* http://www.popcenter.org/responses/video_surveillance ;

individual may . . . legitimately demand privacy for activities conducted . . . in the area immediately surrounding the home."). Mr. Vargas had a "'constitutionally protected reasonable expectation of privacy'" to not have his front yard continuously recorded by a surreptitiously placed video camera on a distant telephone pole that could zoom to view the activities occurring in his front yard for six weeks. *Ciraolo, 476 U.S. at 211* (quoting *Katz v. United States, 389 U.S. 347, 360, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)* (Harlan, J., concurring)). Absent Mr. Vargas' May 2 and 6, 2013 target practice, how long the video camera would have remained operational is unknowable. The reasonableness of the expectation that one would not be observed and recorded in Mr. Vargas' front yard by a covert video camera is underscored by law enforcement's decision to shift the view of the camera during the execution **[*35]** of the search warrant.

Because the invasive and continuous manner in which the video camera was used for six weeks to surreptitiously record Mr. Vargas' front yard clearly violates Mr. Vargas' *Fourth Amendment* right to be free from unreasonable search, whether the video camera is or is not "in general public use" is immaterial to the Court's *Fourth Amendment* analysis. *Cf. Kyllo v. United States, 533 U.S. 27, 34, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)* (obtaining information regarding conduct inside a home through the use of technology that is not in **[*36]** general public use is a search); *Dow Chem. Co. v. United States, 476 U.S. 227, 238, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986)* (recognizing that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant"). Further, given the continued advancement of technology and reduction of cost in "old technology," the "in general public use" doctrine may lose viability: but this is a question for a different day. Colin Shaff, *Is the Court Allergic to Katz? Problems Posed by New Methods of Electronic Surveillance to the "Reasonable-Expectation-of-Privacy" Test*, *23 S. Cal. Interdisc. L.J. 409, 448 (Winter 2014)* (questioning the *Katz* test and suggesting that "although new surveillance technologies may be superficially similar to preceding technologies, modern technology can produce a detailed and broad picture of an individual, entailing a very different violation of privacy than did the earlier technology").

In summary, the severe governmental intrusion into Mr. Vargas' privacy was an unreasonable search.[12] *See Nerber, 222 F.3d at 600* (encouraging courts to consider the severity of the governmental intrusion when assessing whether an individual has a reasonable expectation of privacy). Because a warrant was not **[*37]** obtained to install and operate the video camera, and the USAO has not proffered any exception to the warrant requirement, the evidence obtained from the video surveillance is suppressed as the *Fourth Amendment* "requires adherence to judicial processes and . . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the *Fourth Amendment* — subject only to a few specifically established and well-delineated exceptions." *Katz, 389 U.S. at 357* (internal citations and quotations omitted); *see also Riley, 134 S. Ct. at 2482* ("Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" (internal citation removed)); *Payton v. New York, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1979)* ("Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the" *Fourth Amendment*.). In addition, because the search warrant subsequently obtained on May 14, 2013, to search Mr. Vargas' home and property was based on the information obtained from the video surveillance, the evidence discovered pursuant to the execution of the search warrant is suppressed.[13] *See Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)* ("fruit of the poisonous tree"). **[*38]**

Andrea Noble, *Public Surveillance from Private Property Questioned*, The Washington Times, Feb. 5, 2012 (discussing the use of video cameras by a private neighborhood association in order to deter crime by taping public spaces such as streets and sidewalks). Mr. Vargas' front yard is not a public place.

[12] Because the evidence obtained from the use of the video camera is suppressed, the Court does not analyze whether the USAO has a duty under *Federal Rule of Criminal Procedure 16(a)(1)(E)(i)* and *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, to disclose the technical details of the video camera.

[13] A search warrant obtained for silent video surveillance must comply with the standards set forth in *United States v. Koyomejian. 970 F.2d 536, 542 (9th Cir. 1992)* (adopting four requirements, in addition to the probable-cause requirement, that a warrant seeking permission to conduct silent video surveillance must meet). *See also Fed. R. Crim. P. 41(b)*.

C. Conclusion

For the above-given reasons, **IT IS HEREBY ORDERED**: Defendant's Motion to Suppress Evidence from Continuous Video Surveillance Pole Cam, **ECF No. 47**, is **GRANTED**.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to counsel and the U.S. Probation Office.

DATED this 15th day of December 2014.

/s/ Edward F. Shea

EDWARD F. SHEA

Senior United States District Judge

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654 Fed.Appx. 735
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Gary J. WYMER; Terrance L. Wymer; Gary G. Wymer, Jr.; Robert W. Debolt, Jr.; John A. Debolt; Michael G. Wymer, Defendants–Appellants.

Case Nos. 15–3496/3510/3511/3512/3513/3519
|
FILED June 29, 2016

Synopsis

Background: Defendants were convicted in the United States District Court for the Northern District of Ohio of participating in conspiracy to steal trucks and transport them in interstate commerce as part of illegal chop-shop operation, and they appealed both from their convictions and from sentences imposed.

Holdings: The Court of Appeals, McKeague, Circuit Judge, held that:

[1] recording of open truck yard of commercial facility that was plainly visible to any passersby, even over five-month period by pole camera installed on top of nearby telephone pole, did not violate Fourth Amendment rights of owner of facility;

[2] finding that defendant had knowingly entered into conspiracy was sufficiently supported by evidence;

[3] sentencing court did not double count by treating, as victims of conspiracy, both the insurance companies that made payments in connection with trucks that were stolen and the insureds whose trucks were stolen;

[4] sentencing court did not clearly err in calculating pre-indictment loss caused by conspiracy;

[5] sentencing court did not clearly err when it denied an acceptance-of-responsibility adjustment to defendant who refused to meet a second time with probation officer, and who waited until morning of his trial to plead guilty; and

[6] above- and within-Guidelines sentences imposed on conspirators were not substantively unreasonable.

Affirmed.

West Headnotes (15)

[1] **Searches and Seizures** Use of electronic devices; tracking devices or "beepers."

Searches and Seizures Plain View from Lawful Vantage Point

Video recording of open truck yard of commercial facility that was plainly visible to any passersby, even over five-month period by pole camera installed on top of nearby telephone pole, did not violate Fourth Amendment rights of owner of facility, regardless of practicality of conducting in-person surveillance by law enforcement officers over this same five-month period, as area recorded was visible to public. U.S. Const. Amend. 4.

3 Cases that cite this headnote

[2] **Conspiracy** Larceny, embezzlement, burglary, and robbery; stolen property

Finding that defendant had knowingly entered into conspiracy to steal trucks, to transport trucks and their cargos in interstate commerce, and to break trucks down into scrap as part of chop-shop operation operated by his brother, was sufficiently supported by evidence that defendant, who operated salvage facility, had accepted seven stolen trailers for processing with knowledge that they were stolen, had used crushers and other heavy machinery at salvage facility to break stolen trucks and trailers down into smaller pieces for scrapping, and had enlisted his son to transport material to local scrapyards to convert it into cash. 18 U.S.C.A. §§ 371, 659, 2312, 2314.

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[3] **Sentencing and Punishment** Receiving stolen goods

In deciding whether there were 50 or more victims of conspiracy to steal trucks and transport them in interstate commerce as part of illegal chop-shop operation, so as to warrant four-level increase in defendants' base offense levels, sentencing court did not double count by treating, as victims of conspiracy, both the insurance companies that made payments in connection with trucks that were stolen and the insureds whose trucks were stolen; insureds were not immediately reimbursed for loss of trucks, and both insurers and insureds sustained actual losses. U.S.S.G. § 2B1.1(b)(2)(B).

[4] **Criminal Law** Sentencing and Punishment

Any error by sentencing court when it treated, as victims of conspiracy to steal trucks and transport them in interstate commerce, the relatives and employees of truck owners was harmless beyond reasonable doubt, where number of victims exceeded 50, and thus warranted four-level increase in defendants' base offense levels, even without these relatives and employees, if court treated as victims only the owners whose trucks were stolen and insurance companies that made payments in connection with these thefts. U.S.S.G. § 2B1.1(b)(2)(B).

[5] **Sentencing and Punishment** Value of loss or benefit

Sentencing court did not clearly err in calculating pre-indictment loss caused by defendants' conspiracy to steal trucks and transport them in interstate commerce as part of illegal chop-shop operation when, unable to identify specific trucks taken by members of conspiracy after trucks had been broken down, stripped of all identifying information and sold for scrap, it applied multiplier to revenue derived by lead conspirators during this pre-indictment period from sales they had made to scrapyards; there was no evidence of any legitimate sales to scrapyards by members of conspiracy during pre-indictment period,, and court applied conservative multiplier based on estimated value of trucks in operating condition and as sold for scrap. U.S.S.G. § 2B1.1.

[6] **Criminal Law** Sentencing and Punishment

In criminal prosecution arising out of conspiracy to steal trucks and transport them in interstate commerce as part of illegal chop-shop operation, sentencing court did not plainly err by failing to proceed theft-by-theft or defendant-by-defendant, and in instead finding that all of conspirators were generally responsible for thefts that occurred during pre-indictment period and during entire indictment period. U.S.S.G. § 1B1.3.

1 Cases that cite this headnote

[7] **Sentencing and Punishment** Conduct in furtherance of jointly undertaken activity

In criminal prosecution arising out of conspiracy to steal trucks and transport them in interstate commerce as part of illegal chop-shop operation, sentencing court did not clearly err in finding that lead conspirator who was heavily involved in illicit conduct, by storing stolen vehicles and their cargos at his facility, by using machinery at separate salvage facility to dismantle stolen vehicles for scrap, and by recruiting his son to transport stolen materials to scrapyards, was responsible for criminal conduct at both facilities over entire course of conspiracy. U.S.S.G. § 1B1.3.

[8] **Sentencing and Punishment** Defendant's role in offense

In criminal prosecution arising out of conspiracy to steal trucks and transport them in interstate commerce as part of illegal chop-shop operation, sentencing court did not clearly err in finding that conspirator's involvement in conspiracy had continued beyond the date when he testified that he left conspiracy, and that he was responsible for all of the losses caused by chop-shop operation

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during the entire period charged in indictment, where cell phone records indicated that he was still making runs on behalf of conspiracy and assisting another conspirator after this date. U.S.S.G. § 1B1.3.

[9] **Sentencing and Punishment** Defendant's role in offense

In criminal prosecution arising out of conspiracy to steal trucks and transport them in interstate commerce as part of illegal chop-shop operation, sentencing court did not clearly err in relying on testimony of other conspirators as to defendant's role in conspiracy, and upon evidence of stolen goods recovered from defendant's possession, in finding that defendant's involvement in conspiracy extended beyond time period when he was videotaped scrapping stolen goods, and in treating all of thefts by conspirators as relevant conduct. U.S.S.G. § 1B1.3.

[10] **Sentencing and Punishment** Conduct in furtherance of jointly undertaken activity

In criminal prosecution arising out of conspiracy to steal trucks and transport them in interstate commerce as part of illegal chop-shop operation, sentencing court did not clearly err in holding responsible for the entire loss caused by conspiracy a "torcher" who played a significant role for substantial period during lifetime of conspiracy in using his blow torch to obliterate vehicle identification numbers (VINs) from stolen goods and saw to dismantle trucks and cut up stolen cargo, and who was described by lead conspirator as being one of his two best workers, and one of two best paid workers in group. U.S.S.G. § 1B1.3.

[11] **Sentencing and Punishment** Amount, value

Given that sentencing court did not clearly err in calculating amount of loss for which each member of conspiracy was responsible, it did not abuse its discretion in ordering restitution in those amounts. 18 U.S.C.A. § 3663A(a)(1).

[12] **Criminal Law** Sentencing and Punishment

Any error by sentencing court in imposing two-level aggravating role enhancement on defendant as alleged lead conspirator was harmless beyond reasonable doubt where, even without this two-level enhancement, defendant's Guidelines range would remain entirely above the 60-month statutory maximum for his conspiracy conviction. 18 U.S.C.A. §§ 371, 659, 2312, 2314; U.S.S.G. § 3B1.1.

[13] **Sentencing and Punishment** Acceptance of responsibility

Sentencing court did not clearly err when it denied an acceptance-of-responsibility adjustment to defendant who refused to meet a second time with probation officer, and who waited until morning of his trial to plead guilty, where defendant, even when pleading guilty and admitting that there was factual basis for his plea, did not agree with government's recitation of factual basis or provide any specifics as to why he disagreed with that recitation. U.S.S.G. § 3E1.1.

[14] **Sentencing and Punishment** Deterrence

Sentencing and Punishment Nature, degree or seriousness of offense

Sentencing and Punishment Factors Related to Offender

Sentencing and Punishment Total sentence deemed not excessive

Concurrent, above-Guidelines sentences of 120 months imposed on conspirator for substantive theft and interstate transportation offenses that he committed in furtherance of conspiracy to steal trucks as part of illegal chop-shop operation were not substantively unreasonable, though exceeding high point in recommended Guidelines range by 23 months, where district court considered number of victims and financial loss involved, as well as defendant's role in conspiracy, and found that statutory maximum,

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above-Guidelines sentence was warranted based on nature and seriousness of offenses, history and characteristics of defendant, and need to afford adequate deterrence. 18 U.S.C.A. §§ 371, 659, 2312, 2314, 3553(a); U.S.S.G. § 1B1.1 et seq.

[15] **Conspiracy** Sentence and Punishment

Sentencing and Punishment Sentence or disposition of co-participant or codefendant

Sixty-month, within-Guidelines sentence imposed on defendant who pled guilty to conspiring to commit offense against the United States, based on his participation in conspiracy to steal trucks and transport them in interstate commerce as part of illegal chop-shop operation, was not substantively unreasonable, though in excess of 40-month sentence imposed on another conspirator, given need for public deterrence and defendant's significant role in conspiracy in dismantling stolen trucks and trailers, helping to remove any identifying marks so that stolen items could not be traced, and scrapping much of material. 18 U.S.C.A. § 371; U.S.S.G. § 1B1.1 et seq.

***739 ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO**

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BEFORE: McKEAGUE and GRIFFIN, Circuit Judges; BERTELSMAN, District Judge. *

OPINION

McKEAGUE, Circuit Judge.

Michael Wymer, Gary Wymer Sr., Robert Debolt, Gary Wymer Jr., Terrance Wymer, and John Debolt all took part in a large-scale chop-shop operation based in Toledo, Ohio that resulted in criminal charges for fourteen individuals. These six defendants raise numerous challenges to their convictions and their sentences. For the reasons below, we affirm all challenged convictions and sentences.

I. Background

A. The Conspiracy

After Michael Wymer completed a state sentence for possessing a stolen loader in June 2011, he immediately resumed his chop-shop operation. He enlisted various family members to assist him, including the five other defendants in this case: Gary Wymer Sr., Robert Debolt, Gary Wymer Jr., Terrance Wymer, and John Debolt. They began stealing trucks and trailers loaded with scrap metal from highway rest stops and other locations in Ohio, Michigan, and Indiana. The men brought the stolen items to their facilities in Toledo, Ohio to chop the trucks and trailers into pieces to scrap for a profit.

The defendants identified targets for their thefts in two ways. Most commonly, Robert Debolt would identify a particular truck, trailer, or location to be targeted. Since Robert Debolt was a trucker, he frequently observed semi-trucks and trailers that could profitably be stolen and chopped into pieces that could then be scrapped. Alternatively, Michael Wymer and an accomplice (often Robert Debolt) would travel along one of a handful of routes within a several hundred mile radius of

Toledo, usually late at night. They would stop and loiter at rest stops, motels, and other locations where drivers parked their tractors and trailers overnight.

***740** Upon finding an unattended truck or trailer, they would haul it back to one of two facilities: a facility owned by Michael Wymer on Sterling Street or one owned by Gary Wymer Sr. on Consaul Street. Both locations were secured with locked gates, so Michael Wymer routinely called other family members to meet him to open the gate when he brought the stolen items back. The next morning, the family work-crew would dismantle the trucks and trailers. Vehicle identification numbers (VINs) and other identifying information were removed from the trucks, trailers, and other stolen items. Within a few days of the theft, the entire truck and trailer were cut into small pieces, cleaned of any identification, and taken to local scrapyards to be exchanged for cash. Larger items were taken to the Consaul Street facility where Gary Wymer Sr. would dismantle them for re-use or crush them for scrapping. The contents of the trailers were repackaged and taken to a scrapyard in Pennsylvania, sold on Craigslist, or kept for personal use.

B. The Investigation

In August 2012, law enforcement received an anonymous tip about a stolen truck operation in northwest Ohio. The tip specifically named Michael Wymer as the person running the operation. The investigators found a truck yard at 623 Sterling Street in Toledo, Ohio that they suspected might be the one referenced by the tipster. They attempted to conduct physical surveillance, but they were generally unsuccessful because the yard and buildings were open to the adjacent streets and Michael Wymer was aggressive about confronting any loitering vehicles.

Pole Camera. On September 20, 2012, investigators installed a pole camera to watch the traffic moving in and out of the yard. The pole camera was installed on a telephone pole outside of the Sterling Street property on Center Street, looking east towards the building. The camera would capture vehicles as they entered the open area from either the Sterling Street driveway or the Center Street driveway. It also captured any vehicle parked in the open work-yard area.

At trial, the government introduced photographs and brief video clips from the pole camera footage. These exhibits showed stolen trucks or trailers returning to or parked at the Sterling facility within hours of having been stolen. The stolen items were readily identifiable by distinctive paint schemes, company logos, product serial numbers, or other unique features. The pole camera footage also showed Michael Wymer and his crew processing the stolen cargo and dismantling the stolen trucks and trailers.

Physical Surveillance. On several occasions, law enforcement officers also went to the Sterling facility and observed stolen trucks and trailers in person. For example, after a theft in early October 2012, one of the agents observed a stolen truck in the yard area with "Bunn Transportation" painted on the door. Soon after, Terrance Wymer came into the yard and scraped off the lettering. On other occasions, the officers intercepted or made visual contact with the stolen vehicles as they were being brought back to Toledo. And on November 14 and 17, 2012, a surveillance camera at a Super 8 motel in Austintown Township, Ohio recorded Michael Wymer casing a vehicle, breaking into the cab, and driving away.

GPS and Cell Phone Records. Investigators also obtained a warrant to place a GPS device on Michael Wymer's personal car and the semi-truck that he used to commit many of the thefts. Through the GPS trackers, the investigators discovered that Michael Wymer and the other defendants were also operating out of Gary ***741** Wymer Sr.'s facility at 2322 Consaul Street in Toledo, Ohio.

The GPS data showed that Michael Wymer's car or truck was at the site of almost all of the charged thefts at the time of each theft. Footage from the pole camera would show that sometime soon after each theft, but almost always during the middle of the night, a semi-truck or trailer would enter the Sterling Street location. Often the truck or trailer would be pulled into the garage and the lights turned off. The next morning, a team of workers would arrive and engage in a flurry of activity for several days as the stolen cargo was repackaged for transportation and sale and as the stolen truck or trailer was cut into small, untraceable pieces for scrap.

Additionally, investigators examined cell phone numbers collected via grand jury subpoenas and search warrants. The evidence showed that Michael Wymer's cell phone made or received phone calls using cell towers in close proximity to many of the thefts during the time of the thefts. The records, along with witness testimony, also established that Michael Wymer regularly called his co-conspirators while returning with a stolen truck in order to have them open the gate for him to pull into the Sterling facility.

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Search of Facilities. Investigators concluded their surveillance in January 2013. They determined that between August 2012 and January 2013, the conspirators had engaged in twenty-four separate incidents of theft of trailers, semi-tractors, and cargo. Investigators executed a search warrant on the Sterling facility in February 2013. The search uncovered a video surveillance system at the Sterling facility. Michael Wymer had installed the system because he thought that his own employees were stealing from him, and so he set it up to capture both the inside and outside of the garage facility. This system recorded approximately six weeks of activity, spanning from early November through the middle of December of 2012. Law enforcement recovered the hard drive for the surveillance system with the recorded video when they searched the Sterling facility in early February 2013. The hard drive had numerous video recordings of Michael Wymer and his accomplices bringing stolen trucks and trailers onto the Sterling site. It also contained recordings of Michael Wymer and his crew dismantling numerous stolen items and processing the stolen loads of cargo for scrap.

After executing the search warrant, investigators were also able to trace items from several of the thefts to the Sterling property. For example, Patrick June left a jacket bearing his name and company logo in his truck when he parked it in Adrian, Michigan the night of December 16, 2012. His truck was stolen soon after. The GPS data showed that Michael Wymer's car was at the scene of the theft that night, and June's jacket and other belongings were found at the Sterling facility during the search. Officers also found remnants of several stolen trucks and loads of cargo. For example, red side pieces from a trailer stolen from Anna, Ohio were found at the Sterling garage. Similarly, a seat from a truck stolen from Holiday City, Ohio was found there. Pieces of steel stolen in January 2013 were also recovered.

C. Procedural History

The first indictment was filed on March 7, 2013. A superseding indictment was filed on June 12, 2013. A final, second superseding indictment was filed on February 11, 2014.

Michael Wymer. Michael Wymer was the ringleader of the chop-shop conspiracy. He went to trial and was found guilty of one count of conspiracy to defraud the ***742** government by committing theft of interstate shipments; four counts of interstate transportation of stolen vehicles; eight counts of interstate transportation of stolen goods; and two counts of theft of interstate shipments by carrier. He was sentenced to 60 months' imprisonment for the conspiracy count and 120 months' imprisonment on each of the remaining seven counts, with the sentences to run concurrently, followed by a three-year term of supervised release.

Gary Wymer Sr. Gary Wymer Sr. is Michael Wymer's brother. He owned a salvage yard business on Consaul Street in Toledo. He assisted Michael Wymer by accepting seven stolen trailers for processing into scrap metal during a five-week period in late 2012. He was convicted by a jury of conspiracy. He was sentenced to 60 months' imprisonment, followed by a two-year term of supervised release.

Gary Wymer Jr. Gary Wymer Jr. is Gary Wymer Sr.'s son and Michael Wymer's nephew. He operated his own scrapping business out of his father's scrapyard on Consaul Street. He knew of the conspiracy, and on one occasion he and his cousin Terrance Wymer knowingly took a load of stolen scrap from Michael Wymer's scrapyard to sell. He pleaded guilty to conspiracy. He was sentenced to 48 months' imprisonment followed by a two-year term of supervised release.

Robert Debolt. Robert Debolt acted as a driver and a lookout for Michael Wymer when Michael Wymer stole property. He also participated in the thefts, driving loads of stolen cargo to a scrapyard in Pennsylvania. Robert Debolt was charged with conspiracy, two counts of interstate transportation of stolen vehicles, three counts of interstate transportation of stolen property, and two counts of stealing goods and property from an interstate freight shipment. His trial was scheduled to begin on September 22, 2014, but that morning he pleaded guilty to all of the charges against him. He was sentenced to 120 months' imprisonment followed by a three-year term of supervised release.

Terrance Wymer. Terrance Wymer is Michael Wymer's nephew. His primary role was to take cut-up stolen pieces of metal to scrapyards for Michael Wymer. He was caught taking several stolen items with intact VINs to a local scrapyard for Michael Wymer. He appeared on one occasion in a surveillance video participating in the dismantling of a stolen vehicle with a cutting torch. After one theft, he was seen scraping decals off of a stolen truck. Terrance Wymer was entrusted to help Michael Wymer safely return to the facility with stolen items by opening the gate. He was also observed helping to unload and hide a load of stolen

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ATVs and motorcycles. He was charged with conspiracy. He pleaded guilty. He was sentenced to 60 months' imprisonment followed by a two-year term of supervised release.

John Debolt. John Debolt was a part-time employee of Michael Wymer at the Sterling facility. He worked as a torcher, performing both legal and illegal acts during his employment. As part of the criminal enterprise, he used a torch to obliterate VINs from stolen goods and used a saw to dismantle trucks and cut up stolen cargo. He was charged with conspiracy. He went to trial and was found guilty. He was sentenced to 60 months' imprisonment followed by a two-year term of supervised release.

We begin by addressing the arguments of Michael Wymer and Gary Wymer Sr. attacking their convictions. Next, we will address the claims of Terrance Wymer, Gary Wymer Sr., Gary Wymer Jr., Robert Debolt, and John Debolt that their sentences are procedurally unreasonable. Finally, we will evaluate the substantive ***743** reasonableness of Robert Debolt's and Terrance Wymer's sentences.

II. The Convictions

Michael Wymer brings a Fourth Amendment claim regarding evidence from a pole camera. Gary Wymer Sr. brings a sufficiency of the evidence claim.

A. Fourth Amendment Claim

[1] Michael Wymer appeals the district court's denial of his motion to suppress pole camera footage and the fruits of that search. He claims that the pole camera video surveillance constitutes an illegal search on his property in violation of his Fourth Amendment rights. When reviewing the denial of a motion to suppress, we review a district court's factual findings for clear error and its legal conclusions *de novo*. *United States v. Hurst*, 228 F.3d 751, 756 (6th Cir. 2000). All evidence must be viewed "in the light most likely to support the district court's decision." *Id.*; *see also United States v. Montgomery*, 377 F.3d 582, 585 (6th Cir. 2004) ("When considering the denial of a suppression motion, we must view the evidence in the light most favorable to the government.").

In the spring of 2012, Michael Wymer bought two adjoining industrial parcels on Sterling Street in Toledo, Ohio. The Sterling Street facility would become the center for his chop-shop operation for the next year. The site fronted on two streets, with the primary entrance off Sterling Street and a long open yard and driveway extending westward to Center Street. In the southwest corner of the lot was a second business's facility, Klosterman's Bakery, which shared the Center Street driveway and gate. The Klosterman's loading dock abutted the work-yard area, and Klosterman's trucks traveled through and parked on the open space. A chain-link fence surrounded the property, but passersby on both Center Street and Sterling Street had unimpeded visual access to the central open area and driveways, right up to the garage buildings.

Investigators installed a pole camera on a telephone pole outside of the Sterling Street facility. The pole camera became operational on September 20, 2012. Over the next several months, the agents recorded Michael Wymer bringing more than two dozen stolen trucks and trailers into the open yard area. In addition, footage from the pole camera showed the men dismantling several stolen trailers, using forklifts to move stolen trucks and loads of cargo, and emptying a trailer full of stolen aluminum shavings to repackage for scrapping.

Michael Wymer filed a pre-trial motion seeking suppression of the pole camera footage, claiming that it violated his Fourth Amendment rights. At the time, our court had not definitively ruled on whether such use of pole cameras fell under the purview of the Fourth Amendment. *See United States v. Anderson–Bagshaw*, 509 Fed.Appx. 396, 403–06 (6th Cir. 2012) (holding that video recording of the defendant's residential property from a pole camera did not implicate the Fourth Amendment because the areas of the property that were recorded were either not part of the curtilage or were visible from a publicly accessible location, but expressing "some misgivings about a rule that would allow the government to conduct long-term video surveillance of a person's backyard without a warrant"). The district court, however, presciently denied Michael Wymer's motion to suppress, concluding that he lacked a legitimate expectation of privacy in the space filmed by the pole camera because the facility was a commercial site that was open to the public.

Placement. We recently held that a property owner has "no reasonable expectation ***744** of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads." *United States v. Houston*, 813 F.3d 282, 287–88 (6th Cir. 2016). Here, the pole camera was placed upon a public telephone pole. The district court

found that the space captured by the pole camera was fully visible to the public on two sides. Michael Wymer does not contest that the space was visible to a person looking into the yard of the property. Thus, under our precedent, he does not have a reasonable expectation of privacy in this area that was both visible by "any person traveling on the roads surrounding the [property]" and was recorded by a camera located on a public telephone pole. *Id.*; *see also California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (upholding warrantless aerial observations of the curtilage of a home because the Fourth Amendment does not "preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible"); *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (holding that there is no reasonable expectation of privacy in what a person "knowingly exposes to the public"). Indeed, this case presents even less of a privacy interest. The pole camera in *Houston* was trained on a trailer where law enforcement knew that the defendant "spent most of his time" and "occasionally slept." *Id.* at 286. Here, however, the pole camera was recording activity on *commercial* property. "An expectation of privacy in commercial premises ... is different from, and indeed less than, a similar expectation in an individual's home." *New York v. Burger*, 482 U.S. 691, 699, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (citing *Donovan v. Dewey*, 452 U.S. 594, 598–99, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981)).

Length of Time. Michael Wymer argues that the length of time that the pole camera recorded means that "it is unlikely one person could maintain the schedule of the pole camera. Rather, there would have to be several people rotating the view." M. Wymer Br. 7, M. Wymer Reply Br. 3–4. Thus, he argues, the search was unconstitutional. The pole camera in question recorded for approximately five months. But, "the length of the surveillance d[oes] not render the use of the pole camera unconstitutional, because the Fourth Amendment does not punish law enforcement for using technology to more efficiently conduct their investigations. While the [officers] could have stationed agents round-the-clock to observe [the defendant's property] in person, the fact that they instead used a camera to conduct the surveillance does not make the surveillance unconstitutional." *Houston*, 813 F.3d at 288. "[E]ven if it were not practical for [law enforcement] to conduct in-person surveillance for" the entire period of the pole camera recording, "it is only the *possibility* that a member of the public may observe activity from a public vantage point—not the actual practicality of law enforcement's doing so without technology—that is relevant for Fourth Amendment purposes." *Id.* at 289 (emphasis added). Thus, the length of the use of the camera is not problematic "because any member of the public driving on the roads bordering" Michael Wymer's property during the period in question "could have observed the same views captured by the camera." *Id.*

Therefore, we affirm the district court's denial of Michael Wymer's motion to suppress.

B. Sufficiency of the Evidence Claim

[2] Gary Wymer Sr. claims that there was insufficient evidence to convict him of conspiracy to commit an offense against ***745** the United States in violation of 18 U.S.C. § 371. "This court reviews de novo a claim of insufficient evidence, assessing the evidence 'in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Mack*, 808 F.3d 1074, 1080 (6th Cir. 2015) (quoting *United States v. Campbell*, 549 F.3d 364, 374 (6th Cir. 2008)). Thus, we will make all reasonable inferences and resolve all issues of credibility in favor of the jury's verdict. *Id.*; *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A defendant challenging the sufficiency of the evidence has a "very heavy burden." *United States v. Jackson*, 473 F.3d 660, 669 (6th Cir. 2007). "We will reverse a judgment based on a finding of insufficient evidence only if the judgment is not supported by substantial and competent evidence upon the record as a whole." *Campbell*, 549 F.3d at 374.

Gary Wymer Sr. was convicted of conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371. To sustain a conviction for conspiracy, "the government must prove beyond a reasonable doubt that there was an agreement between two or more persons to act together in committing an offense, and an overt act in furtherance of the conspiracy." *Mack*, 808 F.3d at 1080 (quoting *United States v. Beverly*, 369 F.3d 516, 532 (6th Cir. 2004)) (internal quotation marks omitted). The government alleged that the conspiracy had three object offenses: to transport stolen vehicles in interstate commerce in violation of 18 U.S.C. § 2312, to transport stolen property in interstate commerce in violation of 18 U.S.C. § 2314, and to steal goods from an interstate freight shipment and then to possess those items in violation of 18 U.S.C. § 659. When reviewing a multiple-

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object conspiracy conviction for sufficient evidence, it is constitutionally adequate if there is sufficient evidence to support the conspiracy charge on any one of the object offenses. *Griffin v. United States*, 502 U.S. 46, 49–50, 57, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991).

Gary Wymer Sr. argues that the government did not prove that he entered into an agreement to participate in a wrongful activity. He claims that there was only sufficient evidence to show that he aided and abetted by giving substantial assistance to Michael Wymer. Aiding and abetting and conspiracy are related but not synonymous crimes. *United States v. Tate*, 136 Fed.Appx. 821, 828 n.6 (6th Cir. 2005). While "conspiracy involves an *agreement* to participate in a wrongful activity, ... aiding and abetting can be accomplished if the defendant knowingly gave substantial assistance to someone who performed wrongful conduct, *even if the defendant did not necessarily agree to join in the conduct.*" *United States v. Thompson*, 501 Fed.Appx. 347, 361 (6th Cir. 2012) (citing *Aetna Cas. & Sur. Co. v. Leahey Constr.*, 219 F.3d 519, 534 (6th Cir. 2000)) (emphasis added).

Here, however, there was sufficient evidence by which a rational trier of fact could have found that Gary Wymer Sr. entered into an agreement with Michael Wymer to commit an offense. "The element of agreement ... is nearly always established by circumstantial evidence, as conspirators seldom make records of their illegal agreements." *United States v. Short*, 671 F.2d 178, 182 (6th Cir. 1982). "Circumstantial evidence is entitled to the same weight as direct evidence." *Mack*, 808 F.3d at 1080 (quoting *United States v. Farley*, 2 F.3d 645, 650 (6th Cir. 1993)). Circumstantial evidence alone is sufficient to sustain a conviction and "need not remove every reasonable hypothesis except that of guilt." *Id.* (quoting ***746** *United States v. Wettstain*, 618 F.3d 577, 583 (6th Cir. 2010)).

Gary Wymer Sr. owned a salvage facility on Consaul Street. During a five-week period in late 2012, he assisted Michael Wymer by accepting seven stolen trailers for processing into scrap metal. Gary Wymer Sr. admitted to investigators that he stored trailers and loads of cargo for his brother Michael Wymer, knowing that they were stolen and knowing that he was taking part in an illegal activity. When Michael Wymer brought a stolen trailer and cargo loads to the Consaul facility, Gary Wymer Sr. was present to unlock the gate and allow him entrance. Michael Wymer's son testified that Gary Wymer Sr. came to the Sterling facility and obtained stolen items and cargo loads from stolen trailers. Gary Wymer Sr. also used his crushers and heavy machinery at the Consaul facility to break the stolen trucks and trailers into smaller pieces for scrapping. He enlisted his son, Gary Wymer Jr., to transport material to local scrapyards to convert it into cash. And, on one occasion, he assisted Robert Debolt in successfully transporting a load of stolen aluminum to Pennsylvania.

Thus, Gary Wymer Sr. was not only aware that his brother Michael Wymer was involved in an illegal chop-shop operation, he was an active participant in it. Looking at the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that Gary Wymer Sr. had joined a conspiracy to commit an offense against the United States. Accordingly, we affirm Gary Wymer Sr.'s conviction for conspiracy.

III. Procedural Reasonableness

Five of the six defendants attack the procedural reasonableness of their sentences: Terrance Wymer, Gary Wymer Sr., Gary Wymer Jr., Robert Debolt, and John Debolt.[1] Terrance Wymer attacks the district court's determination of the number of victims and the total loss inflicted by the conspiracy. Gary Wymer Sr. brings the same claim regarding the number of victims, as well as claims related to the district court's determination that he was responsible for the entire loss and a claim that the district court erred in imposing a role enhancement to his base offense level. Gary Wymer Jr. and John Debolt only bring claims related to the district court's determination that they were responsible for the entire loss inflicted by the conspiracy. Robert Debolt brings these claims as well, and additionally argues that the district court erred in denying him a reduction in his offense level for accepting responsibility.

We review the procedural reasonableness of a sentence for an abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). The district court must correctly calculate the applicable Guidelines range; must treat the Guidelines as advisory, not mandatory; must consider the statutory sentencing factors set forth in 18 U.S.C. § 3553(a); may not select a sentence based on clearly erroneous facts; and must adequately explain the chosen sentence to show that it has considered the parties' arguments and has a reasoned basis for the sentence. *United States v. Kamper*, 748 F.3d 728, 739 (6th Cir. 2014); *Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). We review the sentencing ***747** court's legal conclusions *de novo* and its

findings of fact for clear error. *United States v. Cunningham*, 669 F.3d 723, 728 (6th Cir. 2012).

A. The Victim Count

Terrance Wymer and Gary Wymer Sr. claim that the district court erred in imposing a four-level increase to their offense levels under U.S.S.G. § 2B1.1(b)(2)(B) for offenses of theft involving fifty or more victims.[2] They argue that the district court incorrectly included two categories of victims: (1) insurance companies and (2) individuals whose losses were not included in the loss amount calculated pursuant to U.S.S.G. § 2B1.1(b)(1).

"Whether a person is a victim under the Sentencing Guidelines is a legal conclusion [that appellate courts] review de novo." *United States v. Stubblefield*, 682 F.3d 502, 510 (6th Cir. 2012) (quoting *United States v. Ellisor*, 522 F.3d 1255, 1275 (11th Cir. 2008)) (alteration in original). The government bears the burden to "prove, by a preponderance of the evidence, that a particular sentencing enhancement applies." *United States v. Dupree*, 323 F.3d 480, 491 (6th Cir. 2003).

A victim for purposes of U.S.S.G. § 2B1.1(b)(2) is "(A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense." U.S.S.G. § 2B1.1, comment. (n.1). Actual loss is defined as "the reasonably foreseeable pecuniary harm." *Id.* at comment. (n.3(A)(i)). Pecuniary harm means harm that is "monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm." *Id.* at comment. (n.3(A)(iii)). Reasonably foreseeable pecuniary harm is "pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." *Id.* at comment. (n.3(A)(iv)).

i. Insurance Companies

[3] Terrance Wymer and Gary Wymer Sr. object to the district court's determination that twenty-two insurance companies were victims.[3] They argue that including both the insurance companies and the owners covered by the insurance policies double-counts the victims.

Not Double–Counting Because Both Have Losses. Terrance Wymer compares this case to *United States v. Yagar*, 404 F.3d 967 (6th Cir. 2005). In *Yagar*, the defendants had fraudulently obtained money from the bank accounts of forty-seven individuals. Because the banks immediately reimbursed the individuals, we ruled that the banks were victims but the individual account holders were not. *Id.* at 971. We stated that:

> In our view, these account holders are not "victims" under the Guidelines because they were fully reimbursed for their temporary financial losses. While there may be situations in which a person could be considered a "victim" under the Guidelines even though he or she is ultimately reimbursed, in situations such as this, where the monetary loss is short-lived and immediately covered by ***748** a third-party, we do not think that there has been "actual loss" or "pecuniary harm." In sum, the account holders here suffered no adverse effect as a practical matter from Yagar's conduct.

Id. Here, however, the thefts were not of fungible goods and the owners of the stolen property were not immediately reimbursed. *See United States v. Erpenbeck*, 532 F.3d 423, 442 (6th Cir. 2008) (distinguishing *Yagar* because "[i]n the present case, ... the homeowners had no contract with a third party to cover their loss, nor was the loss short-lived. The homeowners were saddled with many thousands of dollars of debt, often for great lengths of time, while they attempted to have the construction liens removed. Most of the homeowners eventually had to undertake a class-action lawsuit to seek relief"); *United States v. Lee*, 427 F.3d 881, 895 (11th Cir. 2005) (holding that persons can be counted as victims even if they were fully reimbursed for their losses as long as the losses were "neither short-lived nor immediately covered by third parties").

Insurance Companies Suffer Loss. Terrance Wymer argues that insurance companies are not victims because they do not suffer pecuniary harm. Specifically, he argues that "the insurance enterprise, by its very nature, is merely a loss-shifting mechanism," and so "an insurance company has

already recouped the gross value of its payouts—together with a profit—by collecting policy premiums from its policy holders, including those who sustain a loss and those who do not." T. Wymer Br. 11. This ignores the fact, however, that insurance companies *are* among those harmed—had the trucks and other insured items not been stolen, the insurance company would not have had to pay the owners. Paying the owners money that the insurance companies would otherwise have kept is, by definition, pecuniary loss.

He also argues that including insurance companies as victims would result in sentencing disparities and unfairness, because thefts of insured items would have twice as many victims as non-insured items. This is unpersuasive, because those who steal vehicles "knew or, under the circumstances, reasonably should have known" that this "was a potential result of the offense." U.S.S.G. § 2B1.1, comment. (n.3(A)(iv)). The Sentencing Commission chose to use the number of victims as the basis of the enhancement, not the number of items stolen. Insurance companies are not an unexpected victim when stealing semi-trucks, trailers, and cargo—items that are normally insured.

Therefore, insurance companies are victims under U.S.S.G. § 2B1.1(b)(2), and so the district court did not err in including the insurance companies in the victim count.

ii. Individuals Whose Losses Were Not Included in the Loss Calculation

[4] Terrance Wymer and Gary Wymer Sr. also object to the district court's inclusion of persons whose losses were not included in the district court's loss calculation under § 2B1.1(b)(1) as victims under § 2B1.1(b)(2). The contested victims are: three relatives of owners, four employees of owners, and eleven other individuals.

Because we hold that the insurance companies are victims, any error that may have occurred by including these eighteen individuals in the victim count is harmless. Even without these eighteen persons, the defendants would still be subject to the four-level increase for an offense involving fifty or more victims under U.S.S.G. § 2B1.1(b)(2)(B) because the district court found that there were seventy-three victims in total. *See United States v. Bivens*, 811 F.3d 840, 843 (6th Cir. 2016); ***749** *United States v. Davis*, 751 F.3d 769, 773 (6th Cir. 2014) ("Sentencing errors are harmless where this court is convinced that the 'error at sentencing did not cause the defendant to receive a more severe sentence' than would have existed without the error." (quoting *United States v. Gillis*, 592 F.3d 696, 699 (6th Cir. 2009))); Fed. R. Crim. P. 52(a).

B. Methodology to Calculate Pre–Indictment Loss

[5] Terrance Wymer challenges the methodology employed by the district court to estimate the loss imposed by the conspiracy in the time before the dates of the conspiracy count in the indictment. The district court need only make a reasonable estimate of the loss. U.S.S.G. § 2B1.1, comment. (n.3(C)); *United States v. Warshak*, 631 F.3d 266, 329 (6th Cir. 2010). Loss determinations for stolen items that are scrapped or rendered untraceable are entitled to particular deference due to the inherently difficult and fact-specific nature of the calculation. U.S.S.G. § 2B1.1, comment. (n.3, backg'd.). We review the district court's factual determination of the loss amount only for clear error. *See United States v. Collins*, 799 F.3d 554, 592–93 (6th Cir. 2015).

The government's active investigation did not begin until August 2012, and the indictment period did not start until June 2012. The conspiracy's illegal activities began, however, around June 2011. Because the stolen items were chopped up and sold for scrap with all identifying marks removed, law enforcement was unable to attribute particular thefts to the conspiracy during this pre-indictment period. The case agent, Special Agent Cruz, testified that he had developed a formula to determine the amount of loss caused by the conspiracy during the pre-indictment period. His formula was based on the assumptions that an unknown number of thefts had occurred during this period and that all of the revenue received by the lead conspirators from scrapyards during this period ($166,000) was derived from scrapping stolen trucks. Agent Cruz testified that the scrap value for any given stolen vehicle is a fraction of the vehicle's pre-scrap value. By evaluating three random thefts from the indictment period, he estimated that fraction to be between 10–20%. Using these ratios and the scrapyard revenue, Agent Cruz estimated that there were between $1,660,000 and $3,300,000 in stolen vehicles. The government proposed the low end of the range, $1,660,000. The district court reduced this proposed amount by approximately one-half, to $800,000.

Terrance Wymer challenges the assumption that all of the revenue received from the scrapyards by the lead conspirators during this period was from scrapping stolen trucks. However, Agent Cruz testified that he could identify pieces of trailers

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in photos of the scrap subpoenaed from the scrapyards. He also testified that there was no indication that the conspirators were making any money in any legitimate way during the pre-indictment period and that several of the cooperating conspirators had confirmed that there was no legitimate business during the pre-indictment period. The district court's determination that, "if anything was earned legitimately, it was such a miniscule amount that it simply plays no role in these calculations" is not clearly erroneous. R. 528, Presentencing Tr. at 183, Page ID 6081.

Terrance Wymer argues that Agent Cruz's formula results in "an absurdly high" estimate for the number of thefts during the pre-indictment period. T. Wymer Br. 20–21 ("Based on an average trailer pre-scrap value of $21,425.00, to reach [Agent Cruz's estimate of between $1,660,000 and $3,300,000] the conspirators ***750** had to steal *between 77 and 154 trailers during the seven month pre-investigation period*."). First, Agent Cruz used the revenue collected during a seven-month period to estimate the losses in a year-long period. That is, the $166,000 of revenue occurred from January through July 2012. The pre-indictment period, however, ran from June 2011 to June 2012. Second, the $166,000 is just for items redeemed on the account of Michael Wymer, and not any other co-conspirator. Additionally, Agent Cruz's loss estimate does not include any estimate for stolen cargo. And, most importantly, the district court took Agent Cruz's lower estimate and then halved it, resulting in a pre-indictment loss of $800,000. To reach $800,000 based on an average trailer pre-scrap value of $21,425, the conspirators would only have had to steal around thirty-two trailers during the one-year pre-indictment period (or during the seven-month period in which the revenue was received). This is hardly an unreasonable estimate, given that they stole twenty-four trucks during the six-month active investigation period.

Therefore, the district court did not clearly err in calculating the pre-indictment loss rendered by the conspiracy.

C. Relevant Conduct

Gary Wymer Sr., Robert Debolt, Gary Wymer Jr., and John Debolt all raise claims regarding the district court's determinations that they were subject to sentencing enhancements for the amount of loss and number of victims. A defendant is only responsible for "relevant conduct." U.S.S.G. § 1B1.3. Relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," and "in the case of a jointly undertaken criminal activity ..., all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1). Thus, "the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the conspiracy," *United States v. Swiney*, 203 F.3d 397, 402 (6th Cir. 2000), because "the scope of the criminal activity jointly undertaken by the defendant ... is not necessarily the same as the scope of the entire conspiracy," U.S.S.G. § 1B1.3, comment. (n.2). [4]

The district court determined a total loss of $3,081,405.48 and a total of seventy-three victims. This loss figure included an estimated $800,000 loss for the time period preceding the commencement date of the conspiracy count in the indictment. The court ruled that all defendants (except for Robert Debolt and Anthony Wymer) were accountable for the entire loss and total number of victims. Robert Debolt was not accountable for the pre-indictment loss. On appeal, Gary Wymer Sr., Robert Debolt, Gary Wymer Jr., and John Debolt raise similar claims, arguing that the district court failed to make sufficiently specific ***751** findings and then improperly held them responsible for the conduct of others.

i. Specific Findings

[6] At sentencing, the district court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3)(B). "As a threshold matter, the defendant must actively raise the dispute during the sentencing hearing before the district court's duty to find facts arises." *United States v. White*, 492 F.3d 380, 415 (6th Cir. 2007) (citations omitted). "Once the defendant calls the matter to the court's attention, the 'court may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence.' " *Id.* (quoting *United States v. Solorio*, 337 F.3d 580, 598 (6th Cir. 2003)). "Rather, the district court must affirmatively rule on a controverted matter where it could potentially impact the defendant's sentence." *Id.* (citing *United States v. Monus*, 128 F.3d 376, 396 (6th Cir. 1997)). We review a district court's compliance with this rule *de novo*,

id. at 414, and require "literal compliance" with the rule. *United States v. Treadway*, 328 F.3d 878, 886 (6th Cir. 2003).

Here, the district court ruled on the disputed issues.[5] The district court found all defendants (except for Anthony Wymer) responsible for all thefts that occurred during the entire indictment period, and found all defendants (except for Anthony Wymer and Robert Debolt) responsible for thefts that occurred during the pre-indictment period. R. 551, Loss Chart at 1–4, Page ID 7019–23.

After this finding, however, none of the four defendants now appealing objected to the specificity or sufficiency of the district court's finding. Nor did they raise this objection when asked the *Bostic* question. "[I]f a sentencing judge asks ... whether there are any objections not previously raised, in compliance with the procedural rule set forth in *United States v. Bostic*, 371 F.3d 865 (6th Cir. 2004)[,] and if the relevant party does not object, then plain-error review applies on appeal" to those procedural-reasonableness arguments that were not preserved in the district court. *United States v. Penson*, 526 F.3d 331, 337 (6th Cir. 2008) (alterations and internal quotation marks omitted) (quoting *United States v. Vonner*, 516 F.3d 382, 385 (6th Cir. 2008) (en banc)). To establish plain error, a defendant must show (1) error (2) that was obvious or clear, (3) that affected the defendant's substantial rights, and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

The district court could have been more specific as to why the thefts that the defendants were not directly involved in were still in furtherance of, and reasonably foreseeable in connection with, the criminal activity they jointly undertook. The defendants, however, have cited no authority indicating that the district court was obliged to go theft-by-theft to determine which thefts were within the scope of each ***752** individual defendant's responsibility. We hold that the district court did not commit plain error when it did not go theft-by-theft or defendant-by-defendant but rather found all the defendants (except for Anthony Wymer) responsible for thefts that occurred during the entire indictment period, and all the defendants (except for Anthony Wymer and Robert Debolt) responsible for thefts that occurred during the pre-indictment period.

Robert Debolt also argues that the district court did not make sufficiently specific findings when it rejected his value estimates for the stolen property. Again, Robert Debolt did not object to the specificity of the district court's finding, and so we review for plain error. The vast majority of loss amounts used by the district court came directly from the victims themselves, whether driver, owner, or insurance company. Most of those claims were submitted under oath, a few were submitted via testimony from the case agent, and for the remainder for which there was no information submitted the case agent consulted an online compendium. This online compendium served as the equivalent of the Kelley Blue Book and is relied upon by law enforcement agencies responsible for these types of cases. Robert Debolt alternatively offered his own valuation of the stolen property. The district court asked him if he could introduce any testimony to explain any discrepancies or assist the court in determining which values he was challenging, but he offered nothing, nor did he seek an adjournment. In fact, Robert Debolt's exhibit did not even identify which values he was challenging, or which theft events corresponded to which items in his list. The district court then accepted the case agent's proffered set of valuations. In doing so, the district court did not plainly err.

ii. Relevant Conduct

The Sentencing Guidelines instruct district courts to find facts by a preponderance of the evidence. U.S.S.G. § 6A1.3, comment. We review a district court's factual findings for clear error. *Erpenbeck*, 532 F.3d at 433. The Sentencing Guidelines provide guidance on relevant conduct:

> Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant ... is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others ..., the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct

> and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

U.S.S.G. § 1B1.3, comment. (n.2).

[7] *Gary Wymer Sr.* Gary Wymer Sr. argues that the district court erred in determining that he is responsible for the victims and losses for the entire conspiracy. He first argues that "the earliest possible inception date for Wymer Sr.'s alleged participation in the conspiracy is November [3], 2012." G. Wymer Sr. Br. 21–22.[6] ***753** Gary Wymer Sr. was found guilty of conspiracy "as charged in COUNT 1 of the Indictment," R. 342, Judgment at 3, Page ID 2759, which described the conspiracy as "[b]eginning as early as June, 2012 and continuing through February 7, 2013." R. 177, Second Superseding Indictment at 1, Page ID 1193. In his own post-arrest statement, Gary Wymer Sr. acknowledged that his involvement with the chop-shop operation had *increased* beginning in December 2012, and admitted that he had assisted Michael Wymer in his criminal activities on numerous occasions before that. Thus, the district court did not clearly err in finding that Gary Wymer Sr. was involved in the conspiracy from the beginning.

Gary Wymer Sr. also argues that any criminal activity arising out of the Sterling Street facility is outside of the scope of his involvement. First, Gary Wymer Sr.'s criminal activities were not limited to the Consaul Street facility. Trial evidence showed Gary Wymer Sr. at the scene of processing several thefts at the Sterling location, and Michael Wymer's son testified that Gary Wymer Sr. came to the Sterling facility and obtained stolen items and cargo loads from stolen trailers. Second, relevant conduct is not limited to a defendant's *own* conduct. "The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision." U.S.S.G. § 1B1.3, comment. (n.2). Gary Wymer Sr. was heavily involved in the conspiracy, storing stolen trailers and cargos at his facility, using his machinery at the Consaul Street facility to dismantle the stolen items for scrapping, recruiting his son to transport stolen materials to scrapyards, and assisting Robert Debolt in successfully transporting a load of stolen aluminum to Pennsylvania. Given this, the district court did not clearly err in determining that all of the conspiracy's thefts constituted "conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by" Gary Wymer Sr. U.S.S.G. § 1B1.3, comment. (n.2).

[8] *Robert Debolt.* Robert Debolt argues that he "was involved only in a discrete number of thefts and the district court should not have held him responsible for the thefts of others that Debolt did not participate in or facilitate." R. Debolt Br. 21. But a conspirator's relevant conduct is more than just his own conduct—it also includes "conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken." U.S.S.G. § 1B1.3, comment. (n.2). Although "the scope of the criminal activity jointly undertaken by the defendant ... *is not necessarily* the same as the scope of the entire conspiracy," U.S.S.G. § 1B1.3, comment. (n.2) (emphasis added), it certainly *can be*.

Robert Debolt pleaded guilty to having assisted in a number of thefts, and was shown to have assisted in several more. He helped haul loads of stolen scrap to Pennsylvania. He used his trailer to hide and transport stolen ATVs. And he used his trailer to help haul most of the stolen cargo loads. He also helped to dismantle and process some of the stolen loads. He would scout out items for Michael Wymer to steal while he was on trips as a truck driver.

***754** Robert Debolt argues that he was only in the conspiracy from September 22, 2012 to January 1, 2013. But evidence shows Robert Debolt's involvement outside of that time period. For example, Robert Debolt's cell phone records indicate that he was involved in a theft in Coldwater, Michigan on the night of August 8, 2012. And he signed a receipt for taking a load of stolen material for Michael Wymer to the scrapyard in Pennsylvania even earlier than that. There is no reason to believe that he exited the conspiracy on January 1, 2013, as his phone records suggest that he was still making runs and helping Michael Wymer after that date. Therefore, the district court did not commit clear error in

finding Robert Debolt responsible for all of the losses caused by the chop-shop enterprise during the period charged in the indictment.

[9] *Gary Wymer Jr.*[7] Gary Wymer Jr. maintains that he was only in the conspiracy on February 1, 2013, the date on which he and his cousin Terrance Wymer took a load of items from a stolen semi-truck to a scrapyard in Toledo. Gary Wymer Jr.'s scrapping of these stolen goods was captured on the scrapyard's video camera and was observed by law enforcement officers. Despite Gary Wymer Jr.'s claims, however, this was not the only evidence of his involvement in the conspiracy. Special Agent Cruz testified that he "believe[d] that [Gary Wymer Jr.] was involved the whole period" of the conspiracy. R. 507, Presentencing Tr. at 163, Page ID 4280. Special Agent Cruz based this conclusion on a conversation with Gary Wymer Sr. Gary Wymer Sr. stated that his son's ongoing role in the conspiracy was to take stolen items to local scrapyards. This was confirmed by another co-defendant, Dianna Vannes, who identified Gary Wymer Jr. as one of two individuals whose job in the conspiracy was to redeem stolen material at local scrapyards. When law enforcement attempted to conduct physical surveillance at the Consaul Street facility, Gary Wymer Jr. confronted the officers. When the chop-shop crew stole a trailer of diamond plated steel, Gary Wymer Jr. kept some for his personal use. Accordingly, the district court did not commit clear error when it found that all of the thefts by the conspiracy were relevant conduct for Gary Wymer Jr.

[10] *John Debolt.* John Debolt claims that the district court erred in holding him responsible for the entire loss, arguing that the conduct of others was not relevant conduct because they were not reasonably foreseeable acts taken in furtherance of the jointly undertaken criminal activity. He first argues that foreseeability "should be considered from the Defendant's viewpoint." J. Debolt Br. 21 (citing *United States v. Spotted Elk*, 548 F.3d 641, 674 (8th Cir. 2008)). But reasonable foreseeability is an *objective* test. *See United States v. Catalan*, 499 F.3d 604, 607 (6th Cir. 2007) (discussing a dangerous-weapon enhancement under U.S.S.G. § 2D1.1(b)(1)); *United States v. Cochran*, 14 F.3d 1128, 1132 (6th Cir. 1994) (using an objective test for the reasonable foreseeability of a co-conspirator's conduct). Thus, the district court did not err when it stated that:

> I have no doubt whatsoever that my determination of relevant conduct and ***755** the value caused the conspiracy [sic], which was entirely foreseeable on your part given the role you were playing, however occasional, however infrequent ... I have no doubt whatsoever that ... any reasonable person would have understood that massive losses were occurring on a routine and regular basis in the amount ultimately that I believe I have estimated.

R. 531, Sentencing Tr. at 176–77, Page ID 6553–54.

Despite John Debolt's claims, the district court did not equate mere knowledge with foreseeability. The district court found that John Debolt was not just aware of the conspiracy, but was "directly and significantly" involved in the criminal enterprise. *Id.* at 177, Page ID 6554. As the district court noted, "[w]ithout anybody to dismantle the trucks, the operation couldn't have gone forward. It's as simple as that." *Id.* As the district court properly reasoned, it was reasonably foreseeable to John Debolt that others would steal trucks and other items when he helped to dismantle the stolen vehicles. Shawn Wymer and others testified that John Debolt was their torcher. He used a torch to obliterate VINs from stolen goods and used a saw to dismantle trucks and cut up stolen cargo. Greg Rose made it clear that every time Michael Wymer stole trucks and trailers, he and John Debolt came to the shop to cut them up and process them. Michael Wymer described John Debolt as one of his two best workers, and one of the two best paid workers in the group.

John Debolt also argues that the district court disregarded "the length and frequency" of his involvement in the conspiracy. J. Debolt Br. 25. The district court, however, found that John Debolt "played a significant, substantial role for a substantial period during the lifetime of this conspiracy. Even if you weren't present day in and day out, that doesn't matter. You provided a useful and necessary service" in dismantling the stolen items. R. 531, Sentencing Tr. at 175, Page ID 6552. Michael Wymer's son, Shawn Wymer, testified that John Debolt was one of the first persons recruited to join the chop-shop enterprise in 2011. John Debolt was identified as helping unload stolen ATVs taken from Holiday City, Ohio on September 22, 2012. He was also shown helping to process the stolen cargo from three other thefts on different days in mid-November 2012. He injured himself cutting up

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three stolen aluminum trailers in early January 2013. He returned to work soon after, however, and was working for Michael Wymer in January and February when the group was processing thefts from Seville, Ohio and Holiday City, Ohio. Based on all of the evidence, it was not clear error for the district court to find John Debolt responsible for the entire loss caused by the conspiracy.

Therefore, although these four defendants argue that many of the thefts were perpetrated by others and so are not relevant conduct, they all base their arguments on the fact that they were not directly involved in all of the thefts. A defendant need not be directly involved in a theft, however, so long as the "conduct of others ... was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by" the defendant. U.S.S.G. § 1B1.3, comment. (n.2). The jointly undertaken criminal activity here was the chop-shop enterprise, not simply the thefts that the defendants directly played a role in. We hold that the district court did not clearly err in finding that all criminal activity during the indictment period was relevant conduct for all four defendants and that all criminal activity during the pre-indictment period was relevant conduct for Gary ***756** Wymer Sr., Gary Wymer Jr., and John Debolt.

iii. Restitution

[11] Gary Wymer Sr., Robert Debolt, and John Debolt all claim that the district court abused its discretion in ordering restitution. Title 18 U.S.C. § 3663A(a)(1) directs the district court to order "that the defendant make restitution to the victim of the offense." The government bears the burden to demonstrate "the amount of the loss sustained by a victim as a result of the offense." 18 U.S.C. § 3664(e). We review a district court's restitution order for abuse of discretion. *United States v. Johnson*, 440 F.3d 832, 849 (6th Cir. 2006). It is an abuse of discretion if the restitution order rests on an improper loss calculation. *United States v. Joseph*, 914 F.2d 780, 785 (6th Cir. 1990) (per curiam); *see also White*, 492 F.3d at 418 (noting that "a restitution award may not exceed the 'loss caused by the conduct underlying the offense' " (quoting *Hughey v. United States*, 495 U.S. 411, 420, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990))). The district court has the authority to order a defendant to pay restitution for losses caused by a conspiracy even if the defendant did not directly cause them. *Johnson*, 440 F.3d at 850. Because the district court did not clearly err in calculating the amount of loss for which each defendant was responsible, it did not abuse its discretion in ordering restitution in that amount.

D. Role Enhancement

[12] When calculating Gary Wymer Sr.'s Guidelines range, the district court imposed a two-level aggravating role enhancement. The Sentencing Guidelines authorize a two-level adjustment if the defendant was an organizer, leader, manager, or supervisor in any criminal activity that involves fewer than five people and was not otherwise extensive. U.S.S.G. § 3B1.1. With the two-level aggravating role enhancement, Gary Wymer Sr.'s offense level was 32. Without it, his offense level would be 30 and the applicable Guidelines range would be 97 to 121 months. Thus, even without the two-level enhancement, his Guidelines range would remain entirely above the 60–month statutory maximum for a conspiracy conviction. As a result, any error is harmless. *See Bivens*, 811 F.3d at 843; *Davis*, 751 F.3d at 773; Fed. R. Crim. P. 52(a).

E. Acceptance of Responsibility

[13] Robert Debolt claims that the district court erred in denying him credit for accepting responsibility under U.S.S.G. § 3E1.1. Robert Debolt was charged with conspiracy, two counts of interstate transportation of stolen vehicles, three counts of interstate transportation of stolen property, and two counts of stealing goods and property from an interstate freight shipment. His trial was scheduled to begin on September 22, 2014, but that morning he pleaded guilty to all of the charges against him. A defendant has the burden to show that he was entitled to the adjustment for accepting responsibility. U.S.S.G. § 3E1.1. The district court determined that Robert Debolt had not established that he had accepted responsibility. We review that determination for clear error. *United States v. Genschow*, 645 F.3d 803, 813 (6th Cir. 2011) (citing *United States v. Webb*, 335 F.3d 534, 537–38 (6th Cir. 2003)). Moreover, we apply a deferential scope of review because "§ 3E1.1 determinations involve an overall legal decision that is fact-bound, the district court has comparatively great expertise, and the value of uniform court of appeals precedent is limited." *United States v. Bolden*, 479 F.3d 455, 464 (6th Cir. 2007); *see* U.S.S.G. § 3E1.1 comment. (n.5).

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***757** *Admitting Conduct*. When Robert Debolt pleaded guilty, he conceded that there was a sufficient factual basis for the plea. He did not, however, agree with the government's recitation of the factual basis. When the district court asked him where the government "got it wrong," Robert Debolt did not provide any specifics. R. 533, Change of Plea Hearing Tr. at 29–30, Page ID 6653–54 ("How do you say half and half? I mean, half and half. I mean, that's the only answer I can give you. I cannot say that totally 100 percent they're true.").

Robert Debolt met with the probation officer once. A government witness testified that he believed that Robert Debolt had lied in his proffer statement about when he first became involved in the conspiracy. When the probation officer attempted to meet with Robert Debolt a second time in order to discuss the differences between what he proffered and what the government's representations of the evidence were, he refused.

It is an "appropriate consideration[ ]" whether Robert Debolt had "truthfully admitt[ed] the conduct comprising the offense(s) of conviction, and truthfully admitt[ed] or not falsely den[ied] any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)." U.S.S.G. § 3E1.1 comment. (n. 1(A)) (noting also that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility"). Thus, the district court appropriately considered the fact that Robert Debolt had refused to meet with the probation officer a second time.

Pleading Guilty the Morning of Trial. Robert Debolt pleaded guilty, but entry of a guilty plea does not entitle a defendant to an acceptance-of-responsibility adjustment as a matter of right. U.S.S.G. § 3E1.1 comment. (n. 3). The district court appropriately considered the last-minute nature of Robert Debolt's plea. *See* U.S.S.G. § 3E1.1 comment. (n.1(H)).

Robert Debolt argues that timeliness is only a factor in the decision of whether the defendant's acceptance of responsibility warrants a three-level decrease under U.S.S.G. § 3E1.1(b) and that "[t]imeliness is not an essential requirement for the two-point credit under U.S.S.G. § 3E1.1(a)." R. Debolt Br. 29. While it is not an essential requirement, it is explicitly an "appropriate consideration" "[i]n determining whether a defendant qualifies under subsection (a)." U.S.S.G. § 3E1.1 comment. (n.1). We recently had occasion to discuss the difference between the timeliness inquiries under § 3E1.1(a) and § 3E1.1(b) in *United States v. Hollis*, 823 F.3d 1045 (6th Cir. 2015) (per curiam). In *Hollis*, we held that the district court had improperly denied the defendant credit for acceptance of responsibility solely on the basis that the defendant's delay in pleading guilty had imposed preparation costs on the prosecution and the court. *Id.* at 1048–49. We specifically noted that:

> District courts may consider the timeliness of a defendant's plea under § 3E1.1(a) only to the extent that timeliness reflects the extent of the defendant's sincerity in accepting responsibility. Waste of government resources may not be considered under § 3E1.1(a). The Sentencing Commission included a mechanism for accounting for the effect that a late-in-time plea may have on wasting the government's resources, and it is found in subsection (b).

Id. at 1047 (internal citation omitted). Here, the district court considered the timeliness of Robert Debolt's plea in light of his sincerity in accepting responsibility, which is an appropriate consideration.

***758** The district court did not clearly err when it held that Robert Debolt was not entitled to an acceptance-of-responsibility adjustment based off of his refusal to meet a second time with the probation officer and the fact that he waited until the morning of his trial to plead guilty.

Late Returning to Court. Robert Debolt argues that the district court actually denied him an acceptance-of-responsibility adjustment because it was displeased with his tardiness returning to the courtroom during sentencing. The district court held hearings over three days to determine the appropriate sentences for Robert Debolt and other co-defendants. On the third day, the district court heard some testimony and then took a short recess before holding several sentencings, including Robert Debolt's. During the recess, Robert Debolt went outside to smoke a cigarette. He was about five minutes late returning to court. The district court reprimanded him, stating that he had "disregard[ed the court's] express order" and that it would "be a factor in [his] sentence and what happened after that." R. 531, Sentencing

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Tr. at 6, Page ID 6383 (observing that "[i]t's going to be a very expensive cigarette, young man").

Later, however, the district court reconsidered and told Robert Debolt that it would "play no role in my sentence, whatever sentence may be. I would trust my views, and that has nothing to do with the sentence. We're dealing with the crimes that he committed, and their consequences and the punishment appropriate." *Id.* at 198, Page ID 6575. We note, however, that this reconsideration occurred *after* the district court had already decided that Robert Debolt was not entitled to any credit under § 3E1.1 for accepting responsibility. *Id.* at 183, Page ID 6560.

But when denying Robert Debolt the acceptance-of-responsibility credit, the only reference the district court made to Robert Debolt's tardiness was when it discussed the lateness of his plea. The district court first noted that Robert Debolt's plea on the morning of trial occurred after the plea deadline set by the court in this case. Then the court stated:

> Again, he chose to act in his own clock rather than the one set by The Court. I don't think that somebody who in a case of this magnitude waits until the very last minute and decides then to plead guilty. Under all the circumstances, I don't believe he's entitled to acceptance of responsibility.

Id. This is the only evidence that Robert Debolt has provided to show that the court denied him the acceptance-of-responsibility credit *because* he was late returning to court. The district court's statement, however, focuses almost entirely on the lateness of his plea on the day of trial, and not his tardiness in returning to the courtroom. And as discussed above, the district court's consideration of the fact that Robert Debolt did not plead guilty until the morning of his trial was appropriate.

Thus, we hold that the district court did not clearly err in denying Robert Debolt an acceptance-of-responsibility credit.

IV. Substantive Reasonableness

Robert Debolt and Terrance Wymer both claim that their sentences are substantively unreasonable. Substantive reasonableness concerns the length and type of sentence. *United States v. Camacho–Arellano*, 614 F.3d 244, 247 (6th Cir. 2010). To qualify as substantively reasonable, a sentence "must be proportionate to the seriousness of the circumstances of the offense and offender, and sufficient but not greater than necessary, to comply with the purposes of § 3553(a)." *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008) ***759** (per curiam) (quoting *United States v. Vowell*, 516 F.3d 503, 512 (6th Cir. 2008)).

We review a sentence's reasonableness for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007); *United States v. Smith*, 516 F.3d 473, 477–78 (6th Cir. 2008). "A sentence falling within the Guidelines range is presumptively reasonable; one falling outside the Guidelines range carries no such presumption." *United States v. Jeter*, 721 F.3d 746, 757 (6th Cir. 2013) (citing *United States v. Herrera–Zuniga*, 571 F.3d 568, 582 (6th Cir. 2009)). We "take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *United States v. Bolds*, 511 F.3d 568, 581 (6th Cir. 2007) (quoting *Gall*, 552 U.S. at 51, 128 S.Ct. 586). "A sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008) (citing *United States v. Webb*, 403 F.3d 373, 385 (6th Cir. 2005)).

A. Robert Debolt

[14] Robert Debolt pleaded guilty to conspiracy, two counts of interstate transportation of stolen vehicles, three counts of interstate transportation of stolen property, and two counts of stealing goods and property from an interstate freight shipment. The district court determined Robert Debolt's Guidelines range to be 78 to 97 months. The statutory maximum for the conspiracy charge was 60 months, 18 U.S.C. § 371, and the statutory maximums for the remaining seven charges were each 120 months. 18 U.S.C. §§ 2312, 2314, 659. The district court sentenced Robert Debolt to 60 months' imprisonment for the conspiracy count and 120 months' imprisonment on each of the remaining seven counts, with the sentences to run concurrently.

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§ 3553(a) Factors. We "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at 51, 128 S.Ct. 586. Here, the district court focused on the following § 3553(a) factors to justify the twenty-three-month variance: the nature and seriousness of the offense; the history and characteristics of the defendants; and the need to afford adequate deterrence. The district court noted that "even though he's got a minor criminal history category, I'm troubled by ... the allegations of domestic violence." R. 531, Sentencing Tr. at 212, Page ID 6589. It also considered the serious nature of the offense and the "substantial financial deprivation" to the seventy-three victims. *Id.* at 212–13, Page ID 6589–90. It stressed the fact that Robert Debolt was a truck driver himself and so "kn[e]w what trucks mean to people who drive their own trucks." *Id.* And the district court focused on Robert Debolt's role in the conspiracy:

> Yours wasn't in the sense a one way sometime occasional participant. I have no doubt whatsoever that not only could you reasonably anticipate the damage and loss that you were causing, but that you knew full well and you didn't care. You continued to do what you did going out, quote, shopping with Mr. Wymer week after week after week after week or every other week, whenever it was. Nonetheless, you were fully engaged and fully committed to the success of that operation.... You played a crucial ***760** role in the long-term success of this endeavor.

Id. at 213, Page ID 6590. Additionally, the district court considered the deterrent purpose to the sentence—both for Robert Debolt himself, *id.* at 215, Page ID 6592 (imposing the sentence so that he would "never succumb to this kind of temptation again"), and for the public at large, *id.* ("I hope that ... this series of sentencings, but particularly yours, is publicized, so if there's anybody so inclined, whether in this area or elsewhere, to the extent that your sentence comes to their attention, realizes just how harsh and severely at least this Judge and this Court will deal with that kind of crime."). Given the reasoning that the district court gave for why the § 3553(a) factors justified imposing his sentence, it was not an abuse of discretion for the district court to have issued a sentence that exceeded the Guidelines range by 23 months.

Factors Already Considered by Guidelines. Robert Debolt argues that his above-Guidelines sentence is substantively unreasonable "because the upward variance was based on factors already considered within the [G]uidelines." R. Debolt Br. 36. He argues that his Guidelines range already encapsulated the amount of loss and the number of victims, and so the district court's concern over the hardships inflicted upon the victims was inappropriate.[8] We have previously rejected the argument that a sentence is substantively unreasonable because the § 3553(a) factors on which the district court relied to sentence the defendant above the advisory Guidelines range were already reflected in the Guidelines calculation. *See United States v. Tristan–Madrigal*, 601 F.3d 629, 636 n.1 (6th Cir. 2010). To hold otherwise "would preclude the district court from being able to comply with § 3553(a)'s mandate and would have the practical effect of making the Guidelines again mandatory, which is plainly not the law." *Id.*[9]

Tardiness. Finally, Robert Debolt argues that the district court gave an above-Guidelines sentence because he had been late returning to the courtroom after a recess. As discussed above, however, the district court explicitly stated that Robert Debolt's tardiness would "play no role in my sentence. I would trust my views, and ***761** that has nothing to do with the sentence. We're dealing with the crimes that he committed, and their consequences and the punishment appropriate." R. 531, Sentencing Tr. at 198, Page ID 6575.

Although the district court sentenced Robert Debolt to an above-Guidelines 120 months' imprisonment, its decision that the § 3553(a) factors, on a whole, justified the extent of the variance was not an abuse of discretion.[10] Accordingly, we hold that Robert Debolt's sentence is substantively reasonable.

B. Terrance Wymer

[15] Terrance Wymer pleaded guilty to conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371. The district court determined his Guidelines range to

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be 70 to 87 months, but the statutory maximum for conspiracy is 60 months. 18 U.S.C. § 371. Thus, his Guidelines range was 60 months. U.S.S.G. § 5G1.1(a) ("Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."). The district court sentenced Terrance Wymer to 60 months' imprisonment.

We presume Terrance Wymer's sentence to be reasonable. *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc). Terrance Wymer's arguments to the contrary are unpersuasive. First, he argues that his sentence is too severe because it is longer than his father's sentence of 40 months' imprisonment. A district court, however, is under no obligation to equalize sentences between co-defendants. *United States v. Presley*, 547 F.3d 625, 631 (6th Cir. 2008); *Simmons*, 501 F.3d at 623–24. Terrance Wymer also claims to have "virtually no criminal record." T. Wymer Br. 23. This was considered by the district court. *See* R. 528, Presentencing Tr. at 125, Page ID 6024 (discussing Terrance Wymer's previous offenses for driving without a license, driving slow, disorderly conduct, and littering, and then concluding that his criminal history category of III significantly over-represented the seriousness of his criminal history); R. 531, Sentencing Tr. at 114, 132–33, Page ID 6491, 6509–10 (noting that Terrance Wymer was a "criminal history category one, reduced from a three last week").

Terrance Wymer was significantly involved in this criminal enterprise. His primary role was to dismantle the stolen ***762** trucks and trailers. He helped to remove any identifying marks so that the stolen items could not be traced. He also scrapped much of the material. He opened the gate at night to facilitate the return of the stolen items. The district court also focused on the need for public deterrence in this case.

Given the above, the district court properly considered the sentencing factors, and it was not an abuse of discretion for the district court to sentence Terrance Wymer to 60 months' imprisonment. Therefore, we hold that his sentence is substantively reasonable.

V. Conclusion

Michael Wymer. Michael Wymer had no reasonable expectation of privacy in the areas that were viewable by passersby on public roads and that were captured by a camera located on the top of a public utility pole. We AFFIRM Michael Wymer's convictions for one count of conspiracy to defraud the government by committing theft of interstate shipments in violation of 18 U.S.C. § 371; four counts of interstate transportation of stolen vehicles in violation of 18 U.S.C. §§ 2, 2312; eight counts of interstate transportation of stolen goods in violation of 18 U.S.C. §§ 2, 2314; and two counts of theft of interstate shipments by carrier in violation of 18 U.S.C. §§ 2, 659.

Gary Wymer Sr. There was sufficient evidence to support Gary Wymer Sr.'s conviction for conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371, and so we AFFIRM his conviction. Insurance companies suffer a pecuniary loss when they must payout for stolen items, and so they are victims under U.S.S.G. § 2B1.1(b)(2). Any error that resulted from including eighteen victims under § 2B1.1(b)(2) without including their losses in the loss calculation under § 2B1.1(b)(1) was harmless. Gary Wymer Sr. failed to raise the issue of when he entered the conspiracy, and so the district court was not required to make a specific finding as to that date. The district court did make sufficient findings that all of the criminal activity was relevant conduct for Gary Wymer Sr. This finding was not clearly erroneous. Thus, the district court's restitution order was not an abuse of discretion. Any error the district court made in imposing a two-level increase for serving in a supervisory role under U.S.S.G. § 3B1.1 was harmless. Thus, Gary Wymer Sr.'s sentence is procedurally reasonable. We AFFIRM his sentence of 60 months' imprisonment, followed by a two-year term of supervised release.

Robert Debolt. The district court made sufficient findings that all of the criminal activity during the indictment period was relevant conduct for Robert Debolt. This finding was not clearly erroneous. Thus, the district court's restitution order was not an abuse of discretion. Robert Debolt did not plead guilty until the morning of his trial. An investigator testified to facts inconsistent with Robert Debolt's proffer, and when the probation officer attempted to meet with him a second time to discuss the inconsistencies, he refused to meet. Thus, the district court did not err in denying him a two-level credit for accepting responsibility under § 3E1.1. Although Robert Debolt was sentenced to an above-Guidelines sentence, the district court did not abuse its discretion in believing it was warranted given the seriousness of the offense, his job as a truck driver and greater awareness of the harm caused by the criminal enterprise, and the need for deterrence. Thus, Robert Debolt's sentence was substantively reasonable. We AFFIRM

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Robert Debolt's sentence of 120 months' imprisonment followed by a three-year term of supervised release.

***763** *Gary Wymer Jr.* The district court made sufficient findings that all of the criminal activity was relevant conduct for Gary Wymer Jr. This finding was not clearly erroneous. We AFFIRM Gary Wymer Jr.'s sentence of 48 months' imprisonment followed by a two-year term of supervised release.

Terrance Wymer. Insurance companies suffer a pecuniary loss when they must pay out for stolen items, and so they are victims under U.S.S.G. § 2B1.1(b)(2). Any error that resulted from including eighteen victims under § 2B1.1(b)(2) without including their losses in the loss calculation under § 2B1.1(b)(1) was harmless. The district court did not clearly err in finding that the pre-indictment loss equaled $800,000. Therefore, Terrance Wymer's sentence is procedurally reasonable. Terrance Wymer has not overcome the presumption that his in-Guidelines sentence is substantively reasonable. We AFFIRM Terrance Wymer's sentence of 60 months' imprisonment followed by a two-year term of supervised release.

John Debolt. The district court did not clearly err in finding John Debolt responsible for the total loss of the conspiracy. Thus, the district court's restitution order was not an abuse of discretion. We AFFIRM John Debolt's sentence of 60 months' imprisonment followed by a two-year term of supervised release.

All Citations

654 Fed.Appx. 735

Footnotes

* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

1 John Debolt characterizes his claim as one of substantive reasonableness. His argument, however, is one of procedural reasonableness, because he is arguing that his sentence is based upon an incorrect Guidelines range. *See United States v. Volkman*, 797 F.3d 377, 399 (6th Cir. 2015).

2 The 2014 Sentencing Guidelines are the relevant Guidelines in this case. 18 U.S.C. § 3553(a)(4)(A)(ii); *see also* U.S.S.G. § 1B1.11.

3 Terrance Wymer claims that there are twenty, twenty-one, or thirty-one insurance companies. T. Wymer Br. 5, 9, 10. The government states that there are twenty. T. Wymer Gov. Br. 15. After reviewing the record, we have identified twenty-two insurance companies.

4 Under the *Pinkerton* theory of liability, once a participant decides to join a conspiracy, he is responsible for any substantive offenses committed by his co-conspirators in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 647, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Gary Wymer Jr. claims that the probation officer and the district court conflated *Pinkerton* liability with the relevant conduct analysis under U.S.S.G. § 1B1.3. The district court here, however, *expressly stated* that it was not applying the *Pinkerton* rule. R. 507, Presentencing Tr. at 68, Page ID 4185. Rather, the district court made clear that its inquiry was specific to each defendant's involvement in the offense and rested on actions that were reasonably foreseeable to them given the scope of their jointly undertaken criminal activity. *Id.*

5 Gary Wymer Sr. argues that the district court failed to make a specific finding regarding when he joined the conspiracy, but he did not "actively raise" to the district court's attention any dispute regarding the date that he entered the conspiracy. Therefore, the district court was under no duty to specifically find that fact and so did not err. *See* Fed. R. Crim. P. 32(i)(3)(A); *White*, 492 F.3d at 415.

6 Gary Wymer Sr. states that the earliest date is November 5, 2012, but it becomes clear later in his brief that he meant November 3, 2012, the date of the Elyria, Ohio theft. During a five-week period beginning on November 3, 2012, Gary Wymer Sr. assisted Michael Wymer by accepting seven stolen trailers for processing into scrap metal at his Consaul Street facility.

7 Gary Wymer Jr. argues that this court and the district court are not permitted to consider any co-defendant's trial record because Gary Wymer Jr. pleaded guilty. He asserts that to rely on evidence from the trials in which he did not participate would "run[ ] afoul of the Confrontation Clause." G. Wymer Jr. Br. 25. This is incorrect, because a defendant does not have a Confrontation right at sentencing. *United States v. Paull*, 551 F.3d 516, 527–28 (6th Cir. 2009); *United States v. Alsante*, 812 F.3d 544, 547 (6th Cir. 2016).

8 Notably, the district court's reasoning did not rest solely on the hardship imposed on the victims, as Robert Debolt claims. As discussed above, the district court based the upward variance on the harm to the victims, but also on Robert Debolt's

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career as a truck driver and such knowledge of the seriousness of his offense, his role in the conspiracy and in committing the crimes, and the need for deterrence.

9 Robert Debolt cites to *United States v. Aleo*, 681 F.3d 290, 300 (6th Cir. 2012) for the proposition that "[t]he district court may not justify an upward variance based on factors already envisioned by the Guidelines." R. Debolt Br. 36. *Aleo*, however, does not stand for such a broad proposition. In *Aleo*, we held that because the Guidelines "took into account the very factors that the sentencing judge said that they did not[,] ... the belief that these factors were not envisioned by the creators of the guidelines is not a compelling justification for the judge's variance from the guidelines range" where the judge sentenced the defendant to almost *two and a half times longer* than the top of his Guidelines range. 681 F.3d at 301. We also noted that such a large variance would result in sentencing disparities, particularly when the defendant's actions were not "the worst possible variation of the crime." *Id.* at 302. Thus, we held that the sentence was substantively unreasonable. *Id. Aleo* does not stand for the proposition that a district court cannot under any circumstances consider § 3553(a) factors already accounted for in the Guidelines calculation to determine what sentence is appropriate. It is merely an example of the district court's giving an impermissible amount of weight to one of the § 3553(a) factors ("the nature and circumstances of the offense"). *Id.* at 300.

10 Robert Debolt also argues that "[i]t seems unfair for Debolt to get twice the sentence that his equally culpable co-defendants received simply because he delayed in pleading guilty." R. Debolt Reply Br. 5. He specifically references Gary Wymer Sr. and John Debolt as examples of those who "were permitted to plead guilty to Count 1" and so "limiting their maximum sentence to 60 months." *Id.* First, Gary Wymer Sr. and John Debolt did not plead guilty and were convicted by a jury. Secondly, they were *only charged* in the conspiracy count of the indictment, the statutory maximum for which is 60 months. 18 U.S.C. § 371. Robert Debolt, however, was charged with conspiracy, *as well as* two counts of interstate transportation of stolen vehicles, three counts of interstate transportation of stolen property, and two counts of stealing goods and property from an interstate freight shipment. The statutory maximum for each of the non-conspiracy convictions is 120 months. 18 U.S.C. §§ 2312, 2314, 659. A prosecutor has broad discretion in deciding whom to prosecute and which charges to bring. *See United States v. Batchelder*, 442 U.S. 114, 123–24, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). And regardless, § 3553(a)(6) "is concerned with national disparities among the many defendants with similar criminal backgrounds convicted of similar criminal conduct. It is not concerned with disparities between one individual's sentence and another individual's sentence, despite the fact that the two are co-defendants." *United States v. Simmons*, 501 F.3d 620, 623–24 (6th Cir. 2007) (internal citations omitted).

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