No. 16-4254

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VINCENT JONES,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Indiana (South Bend)
No. 3:15-CR-00048-JD-MGG-1
Judge Jon E. DeGuilio, Presiding

BRIEF AND REQUIRED SHORT APPENDIX
OF DEFENDANT-APPELLANT VINCENT JONES

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Dated: March 8, 2017

ORAL ARGUMENT REQUESTED

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Appellate Court No. 16-4254

Short Caption: United States of America v. Vincent Jones

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Attorney's Signature s/ Matthew S. Hellman Date: March 8, 2017

Attorney's Printed Name: Matthew S. Hellman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** __ **No** _X____

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STATEMENT OF JURISDICTION

This is a direct appeal from a final judgment of the United States District Court for the Northern District of Indiana, South Bend Division, in a criminal case. A jury in the United States District Court for the Northern District of Indiana found Defendant-Appellant Vincent Jones ("Jones") guilty of one count of possessing a firearm in violation of 18 U.S.C. § 922(g)(1). Dkt. 84.[1] The district court sentenced Jones to 97 months in prison, to run concurrently with a separate sentence he is serving in a state court case. Dkt. 100.

The district court entered its final judgment on December 19, 2016. Dkt. 101, A29-34. Jones timely appealed his conviction to this Court on December 27, 2016. Dkt. 102.

The district court had jurisdiction over the case pursuant to 18 U.S.C. § 3231. This Court has jurisdiction over this direct appeal, which appeals a final order or judgment that disposes of all Jones's claims, pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 3742.

This Court issued an Order on January 31, 2017, appointing the undersigned Counsel of Record to represent Jones in this appeal pursuant to the Criminal Justice Act. 7th Cir. Dkt. 6.

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[1] Citations to "Dkt. __" are to the district court docket in the case below, *United States v. Vincent Jones*, Case No. 3:15-CR-00048-JD-MGG-1 (N.D. Ind.). Citations to "7th Cir. Dkt. __" are to this Court's docket in this case, No. 16-4254. Citations to "A_" are to the required short appendix bound with this brief. Citations to "JA_" are to the joint appendix submitted with this brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1.) Whether the officers' warrantless search of Jones's safes was unconstitutional, because his co-tenant lacked both actual and apparent authority to consent to the search of the safes, as the police knew that only Jones kept the keys to and controlled the safes, the co-tenant never accessed the safes, and Jones had told the co-tenant not to enter the safes.

2.) Whether the officers' warrantless search of Jones's residence and safes was unconstitutional, because Jones objected to the warrantless searches or because the police removed Jones from the residence for the purpose of preventing him from further objecting, in contravention of *Georgia v. Randolph*.

3.) Whether the district court erred in finding that the inevitable discovery doctrine applied, because the government failed to meet its burden of establishing that the officers' subsequent decision to seek a warrant and the magistrate's decision to grant the warrant were uninfluenced by the fruits of their unconstitutional search.

STATEMENT OF THE CASE

On June 5, 2013, officers from the Westville Police Department and LaPorte County Sheriff's Department searched Jones's residence without a warrant and without his consent. The officers entered Jones's home, and they searched the home and two safes in it that they knew belonged only to Jones and were used only by him. Based on evidence uncovered in that search, Jones was charged with one count of possessing a firearm after having been convicted

of a felony, in violation of 18 U.S.C. § 922(g)(1). Jones repeatedly challenged the warrantless search in the district court,[2] and now appeals based on the district court's determination that the warrantless search did not violate his rights under the Fourth Amendment.

A. The Warrantless Search.

In June 2013, Jones lived with his girlfriend, Jennifer Kelley, and her children at 27 New Durham Estates in Westville, Indiana. A1. He had lived with Kelley at the residence for six years. JA23. Earlier that day, Westville officers had questioned Kelley in relation to a separate investigation of Jones.[3] During that questioning, Kelley told the officers that Jones was a convicted felon and that he had guns in their bedroom. A1. The officers ran a criminal history check, which confirmed that Jones had prior felony convictions. A2.

After questioning Kelley, Marshal James Gunning and Deputy Marshal Jason Yagelski decided to remove Jones from his home and search it. *Id.* Joined by three officers from the LaPorte County Sheriff's Department—Captain James Jackson, Sergeant Brian Piergalski, and Deputy Corey Chavez—Marshal Gunning and Deputy Marshal Yagelski departed the station

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[2] During the district court proceedings, Jones filed a motion to suppress the evidence, and two motions for reconsideration of the district court's denial of that motion to suppress. The court held two evidentiary hearings on this issue. As discussed further below, the testimony referenced herein came in through those two hearings and at trial.

[3] That investigation stemmed from a report by Kelley's daughter to police about Jones, as discussed further in footnote 8 below.

for 27 New Durham Estates. A2. The officers did not obtain a search warrant before departing to search Jones's residence, however.

The officers arrived at 27 New Durham Estates at the same time, *id.*, *see also* JA91, but their testimony conflicts as to what happened next. Two officers testified that someone knocked on the door and Jones answered. JA38, 92. One officer recalled that both Jones and Kelley opened the door. JA73. Another testified that Jones was already outside when they arrived. JA58. No officer remembered what Jones said during the initial exchange at the door, according to their testimony. JA48, 75-76, 92, 105. All officers agreed that no one asked Jones whether he consented to a search of his home. JA48-49, 52, 66, 69, 86, 98, 105. The officers testified that they told Jones to leave the house. JA38-39, 64, 76.

Jones testified in greater detail about what happened during this initial exchange. He testified that Marshal Gunning and Deputy Marshal Yagelski followed him inside as he collected his belongings. JA122-23. Hearing the officers enter his residence, Jones testified that he turned and said "I don't need any help finding my keys or wallet, and I didn't invite you in." JA123. Jones testified that Deputy Chavez then followed the others inside and headed toward the kitchen. *Id.* Jones then noticed that Deputy Chavez was "poking around through boxes and whatnot." *Id.* In response, Jones testified that he asked: "Don't you need a warrant?" *Id.* Jones testified that Marshal Gunning replied: "That's for a judge to decide." *Id.*

Both the officers and Jones agree that, following the initial exchange, Jones was handcuffed by officers and escorted to a picnic table on the property next door, which was approximately ten to twenty feet away.[4] JA39, 52, 65-66, 77; JA123-24. Jones was not placed under arrest at this time, nor was he told that he was under arrest or read his *Miranda* rights. JA39, 53; JA123. Officers testified that Jones was handcuffed for "officer safety." JA39, 66, 77. Deputy Marshal Yagelski testified that Marshal Gunning initially spoke with Jones and handcuffed him. JA38-39. But Marshal Gunning contradicted that testimony and testified that he "had no interaction with Mr. Jones" and that Deputy Marshal Yagelski handcuffed him. JA59, 66. No one asked Jones whether he consented to a search of his home, nor did they inform him of the search. JA125. Jones testified that, if he had been asked, he would have told the officers to "get a warrant." JA125-26.

Once Jones was handcuffed, removed, and at the picnic table, the officers asked Kelley for her consent to search the residence. JA40, 57, 65-66, 94. Kelley signed a form giving the officers general consent to search the residence, including "enclosed boxes, safes, et cetera." JA81. The officers then entered the residence to conduct the search. Deputy Marshal Yagelski testified that no one informed Jones of the search, and that Jones did not know it was happening. JA52.

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[4] One officer, Deputy Chavez, testified instead that Jones and the officers were on the front porch. *See* JA103. This is inconsistent with the other officers' and Jones's testimony, however.

According to officer testimony, three officers—Piergalski, Jackson, and Gunning—then entered Kelley and Jones's residence. JA51, 58, 79, 93-94. Kelley escorted them into the residence to show them the bedroom. JA94. In the bedroom, the officers saw boxes of ammunition, empty holsters, and two safes—a smaller safe stacked on top of a larger safe. JA57-58, 79, 96. When asked about the safes, Kelley told Sergeant Piergalski that they belonged to Jones, that she had no involvement with them, and that Jones had the keys to the safes. JA84-85. Sergeant Piergalski testified that, at the time, he believed that Jones alone controlled the safes. JA85.

In his testimony in this case, Sergeant Piergalski gave two different and wholly incompatible accounts of what happened next. Specifically, his story changed with respect to whether one of the safes was ajar, or whether it was closed until he opened it. At the first hearing on Jones's motion to suppress, Sergeant Piergalski initially testified that the top, smaller safe was "unlocked or might have even been opened," and that he looked inside the safe and saw firearms. JA79-80. As his testimony proceeded at this hearing, though, he testified that the top safe was partially open. JA86-88, 108. Piergalski testified that he could see guns inside that safe before opening it, and that he then opened it further and saw more guns inside. JA82, 86-88, 108. Captain Jackson gave a similar account. JA98-99. Marshal Gunning, who was also present in the bedroom, testified only that he saw ammunition, empty holsters, and a gun safe. JA57-58, 63-64.

When pressed at trial, though, Sergeant Piergalski significantly changed his story. Sergeant Piergalski admitted at trial, based on his police report detailing the search, that he found keys on top of the smaller safe, that it was closed but unlocked, and that he "pulled the door open for officer safety and immediately observed several handguns." JA158. This was consistent with his police report, which stated: "There was a key in the top smaller safe and the safe was unlocked, so I pulled the door open for officer safety and immediately observed several handguns and much ammunition." JA158-59; JA107-08. After reviewing his police report, Sergeant Piergalski admitted that he did not see guns until he opened the safe. JA157-59. He said that he opened the safe to ensure there were "no booby traps or anything like that going on" in the safes. JA159.

In any event, after seeing the guns, the officers then decided to seek a search warrant. They stopped their search and consulted with Deputy Prosecutor James Ambers, who had recently arrived at the residence. JA80. Ambers advised the officers to stop their search and wait for "an actual search warrant." *Id.*

The police then sought a warrant by oral application to the LaPorte County Superior Court. The recording of the warrant hearing malfunctioned, and, as a result, only the beginning of that hearing was transcribed. However, shortly before the recording malfunction that ended the transcription, the magistrate judge asked Marshal Gunning: "And you had an occasion today to begin an investigation at 27 New Durham Estates Avenue, is that correct?"

JA175. The LaPorte County Superior Court issued a warrant to search the residence and the contents of the safes for evidence of firearms. A3. The officers then conducted a full search, seizing multiple firearms, rounds of ammunition, clips, and firearm scopes. *Id.*

B. Procedural History.

Based on the fruits of this search, Jones was charged in the U.S. District Court for the Northern District of Indiana with one count of possessing a firearm in violation of 18 U.S.C. § 922(g)(1). Dkt. 1.

Jones filed his first motion to suppress the evidence from the search of his residence and safes on September 14, 2015. Dkt. 12. In his motion, Jones argued that officers seized evidence without a warrant and without valid consent, violating the Fourth Amendment. Jones asserted that he did not consent to any search, that the officers improperly removed him to prevent him from refusing to consent, and that he properly objected to the search under *Georgia v. Randolph*, 547 U.S. 103 (2006). Dkt. 12.

The court referred the motion to a magistrate judge, who held an evidentiary hearing on October 19, 2015 concerning the motion to suppress. A1; *see* JA9. At the hearing, the court heard testimony from Kelley and the five officers who were at the scene during the search. JA10. Jones did not testify at this hearing. *Id.*

Based on the testimony at this hearing, the court denied Jones's motion to suppress. JA1-8. The court had not heard Jones's account of the facts, and noted that there was no evidence presented that Jones had objected to the

search. A5; JA6. Additionally, the court found that the officers did not improperly remove Jones from the residence to prevent him from objecting. A5. Instead, the court concluded that Jones "was not taken away from the property"[5] and remained ten to twenty feet from the door. A2, 5. Based on these facts, the court concluded that Jones was present, but not objecting, under *Georgia v. Randolph*. A5-6.

A few months later, Jones's attorney filed a motion for reconsideration of the motion to suppress. Dkt. 39. In the motion for reconsideration, Jones's counsel stated that he had not fully informed Jones of his constitutional right to testify prior to the suppression hearing, and that this failure to advise influenced Jones's decision not to testify. Dkt. 39 at 1. In response, the court reopened the evidentiary hearing on the motion to suppress. Accordingly, on April 27, 2016, the court heard testimony from Jones for the first time.[6] JA117, 120-32.

After this hearing, the district court issued an opinion denying Jones's motion for reconsideration. In its reasoning, the court noted that, despite

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[5] At a subsequent hearing, Jones explained that the picnic table was on an adjacent lot in the trailer park. That lot did not have a trailer at the time, and the picnic table was on the concrete slab on top of which a trailer would rest. JA124.

[6] At the reopened hearing, the court also heard brief testimony from Detective Rhine-Walker and Agent Solan, who interviewed Jones following his arrest. They testified that Jones denied living at the residence or owning the firearms during those interviews. JA134-35, 139-40.

"discrepancies" in the officers' testimony, all five officers had testified that Jones did not object. A16. The court then found that Jones lacked credibility. To reach that conclusion, the court relied on false statements that Jones had made outside of court and while not under oath.[7] A16-17. Because these statements were false, and because the court found that Jones's testimony conflicted with a statement from Jones's attorney, the court concluded that Jones changed his story to suit his interests. A17. Additionally, the court found Jones's conduct during and after the search was inconsistent with his having objected. *Id.* The court reasoned that, if Jones had objected, he should have continued to complain after he was removed from the residence. *Id.* Finally, the court found that—even if Jones's testimony was credible—his statements did not amount to an objection as a legal matter. A17-18.

On July 13, 2016, Jones filed another motion for reconsideration. *See* A22. In it, Jones argued that the officers entered the residence before they had Kelley's consent to search; that he was unlawfully detained; and that the district court erred in disbelieving his testimony. Dkt. 66. Jones highlighted contradictions between the officers' testimony at the evidentiary hearing and at a related state trial.[8] In a third opinion, the district court denied his motion for

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[7] Specifically, the district court relied on testimony from officers that, during their investigation, Jones had denied living at the residence or owning the firearms.

[8] This separate state court trial, in the State of Indiana, stemmed from Kelley's daughter's report that Jones had sexually assaulted her. Jones was convicted in state court of one count of child molestation and two counts of sexual misconduct with a minor, for which he was sentenced to a total of 40 years of imprisonment. A3 n.1.

reconsideration. A22. The court rejected the argument that the officers improperly entered the residence while Jones gathered his belongings, finding that it had no effect on the subsequent search. A23-25. The court also concluded that Jones voluntarily stepped outside his house and the officers lawfully detained him. A24. Finally, the court again rejected Jones's argument that he had objected to the search, noting that the officers had no obligation to ask for his consent. A25-26.

Jones thus sought to suppress the evidence on three separate occasions, and the district court denied each of his motions. The case was tried over two days in August 2016 before a jury. Dkts. 83-84. At trial, Jones again raised objections to the admission of the evidence on Fourth Amendment grounds. The court overruled each of these objections.

As noted above, Sergeant Piergalski materially changed his testimony at trial, testifying that the safe had not been ajar with guns in plain view and that, instead, he had opened the closed safe before seeing the guns. JA157-59. This was contrary to what he had testified at the hearing on the motion to suppress. The court stated on the record that it found Sergeant Piergalski's trial testimony "inconsistent" and "vague as to the order of events." JA168-69. Nevertheless, the district court also stated that this would not change its ruling on the motion to suppress, finding that Sergeant Piergalski's testimony at trial was less credible than his testimony at the suppression hearing. JA168.

Following the trial, the jury found Jones guilty of one count of possessing a firearm in violation of 18 U.S.C. § 922(g)(1). Dkt. 88. The trial court

sentenced him to 97 months in prison, to be served concurrently with a separate state court sentence. A29-30. Jones timely filed his notice of appeal on December 27, 2016. Dkt. 102.

SUMMARY OF ARGUMENT

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause." U.S. CONST. amend IV. Absent a warrant, the police can only conduct a search under a set of narrowly prescribed exceptions to the warrant requirement. In this case, the government sought to justify its warrantless search of Jones's residence and safes on the grounds that Jones's girlfriend and co-tenant, Kelley, had consented to the search. Kelley's consent was not valid for Fourth Amendment purposes, however, for several independent reasons. This Court therefore should reverse the decision below and suppress the fruits of the officers' unconstitutional search.

First, Kelley lacked both the actual and apparent authority to consent to the search of Jones's safes. Kelley lacked the actual authority to enter Jones's safes, because it is undisputed that only Jones had the keys to the safes, Kelley never entered the safes, and Jones had made clear to Kelley that she was not permitted to enter the safes. Moreover, Kelley also lacked the apparent authority to enter Jones's safes, because it is undisputed that Kelley told the police that she did not have the keys to the safes and that she never entered the safes. Because consent is only a valid exception to the Fourth Amendment

when the consenting party has either actual or apparent authority to consent, and Kelley lacked both, this Court erred in denying Jones's motion to suppress.

Second, the district court erred in holding that Jones failed to object to the searches of his residence and safes, because Jones was present and refused to consent to the search under *Georgia v. Randolph*, 547 U.S. 103 (2006). The district court clearly erred in refusing to credit Mr. Jones's uncontroverted testimony that he told the police that he "didn't invite [them] in" and "[d]on't you need a warrant" to conduct a search, and the court's rationale for refusing to credit this testimony is baseless. Either of Mr. Jones's statements constitutes a refusal to consent to the search under *Randolph*.

Third, even assuming Jones did not refuse to consent, the officers' search was still unconstitutional, because the officers removed Jones from his home "specifically to avoid a possible objection." 547 U.S. at 105. Accordingly, the Court should reverse the decision below because, regardless of whether Kelley consented to the search, the search was unconstitutional and runs afoul of *Randolph*.

Finally, the Court should reverse the decision below, because the district court incorrectly relied on the inevitable discovery doctrine as an alternative basis for upholding the warrantless search. The inevitable discovery doctrine excuses warrantless searches only in situations where the fruits of the search influenced neither the decision to apply for a warrant nor the magistrate's decision to grant a warrant. Here, as the government conceded in the briefing below, the deputy prosecutor arrived at the scene "and advised officers to get a

search warrant based upon . . . the finding of the firearms for a complete search of the residence." *See* Dkt. 23 at 3. Further, it appears that the magistrate's decision was based in part on the fruits of the unconstitutional search. Additionally, even assuming that the fruits of the unconstitutional search influenced neither the officers' decision to apply for a warrant nor the magistrate's decision to grant the warrant, the discovery would still not be inevitable, because Kelley was in the process of evicting Jones from the residence, and Jones likely would have lawfully removed the firearms from the residence before the police arrived. As the inevitable discovery is a very narrow exception to the warrant requirement, and the district court allowed it to excuse sweeping police overreach that could provide perverse incentives to police in the future, the Court should reverse the decision below.

STANDARD OF REVIEW

"When reviewing the denial of a motion to suppress evidence obtained during a warrantless search, [this Court] review[s] legal conclusions de novo and factual findings for clear error. Mixed questions of law and fact are reviewed de novo." *United States v. Alexander*, 573 F.3d 465, 472 (7th Cir. 2009).

The question of whether the district court misapplied the law concerning the scope of inevitable discovery to the facts on the record creates a mixed question of fact and law reviewed *de novo. Id.*

ARGUMENT

In order to conduct a legal search, the police must either have a warrant, or their actions must fall within a valid exception to the Fourth Amendment. U.S. CONST. amend. IV ("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."). One such exception is consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."). But as the Supreme Court explained in *Jones v. United States*, "[t]he exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn." 357 U.S. 493, 499 (1958). Here, the police did not have valid consent for their warrantless searches, and the district court thus erred in denying Jones's motion to suppress.

I. Kelley Lacked the Authority to Consent to the Search of the Safes and, Therefore, the Search Was Unconstitutional and the Court Should Reverse the Decision Below.

In the proceedings below, the government sought to justify its warrantless search on the ground that it obtained consent from Jones's girlfriend, Kelley, with whom he lived at the residence. Even assuming for sake of argument that Kelley's consent to search the residence was valid to override Jones's objection—which it was not, as discussed in Section II below—Kelley lacked both actual and apparent authority to consent to the search of Jones's

safes, where the firearms were located. Accordingly, the search of the safes was unconstitutional and the evidence should be suppressed.

In order to provide valid consent under the Fourth Amendment, a person must have either actual or apparent authority over the item to be searched. *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000). When a person lacks authority to consent to the search of a closed container, the search is unconstitutional. *See United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000) (citing *United States v. Fultz*, 146 F.3d 1102, 1106 (9th Cir. 1998) (holding that search was unconstitutional when boxes did not belong to consenter); *United States v. Welch*, 4 F.3d 761, 765 (9th Cir. 1993) (finding that search was unconstitutional when purse did not belong to consenter). The government "carries the burden of proof by a preponderance of the evidence that the officers reasonably believed that [the co-tenant] had sufficient authority over" the safes to consent to their search. *United States v. Richards*, 741 F.3d 843, 850 (7th Cir. 2014). Because Kelley lacked both actual and apparent authority to consent to the search of Jones's safes, the search was unconstitutional.

A. The district court's factual finding that a safe was open when the officers arrived is clearly erroneous, as the very officer who conducted the search testified to the contrary.

Although this court gives deference to a district court's findings as to facts and credibility, the authority of the district court to make such determinations is not unlimited, and will be overturned when clearly erroneous. *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 216 (1931)

(holding that it is error for a fact finder "under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt"); *Ray v. Clements*, 700 F.3d 993, 1013 (7th Cir. 2012) (finding clear error where "the district court made no finding concerning Ray's demeanor or presentation, and instead based its 'credibility' finding on nothing more than a string of speculative doubts, none of which were based on any competent contradictory evidence presented by the state"); *accord United States v. Alvarado-Zarza*, 782 F.3d 246, 251 (5th Cir. 2015) (holding that it was clear error for the district court to find testimony lacking credibility where "the factors identified by the court were irrelevant"); *Krizek v. Cigna Grp. Ins.*, 345 F.3d 91, 100 (2d Cir. 2003) (holding that it was clear error for the district court to disregard testimony when "the record before the court [was] simply devoid of any basis for the court's conclusion").

The district court clearly erred in making the factual finding that one of the safes was open when the officers arrived, and that Sergeant Piergalski saw firearms inside that safe before opening the safe further, because this is contrary to Sergeant Piergalski's own sworn testimony about what happened. In his police report detailing the search, Sergeant Piergalski wrote: "There was a key in the top smaller safe and the safe was unlocked, so I pulled the door open for officer safety and immediately observed several handguns and much ammunition." JA158-59; JA107-08. Despite this, Sergeant Piergalski offered inconsistent testimony at the hearing on the motion to suppress as to whether the safe was in fact open, first testifying that this smaller safe was "unlocked or

might have even been opened" when the officers arrived, *see* JA79-80, and later testifying that it was in fact partially opened, *see id.* JA86-88, 108. Sergeant Piergalski changed his story on cross-examination at trial, however. After being confronted with the police report, he admitted that it was only *after* he opened that safe that he "immediately observed several handguns and much ammunition." JA158-59 (stating that he "pulled the door open for officer safety and immediately observed several handguns").

Thus, both Sergeant Piergalski's police report and his sworn testimony at the trial in this case—the last time he testified in the case—stated that he only saw the firearms *after* he opened Jones's safe. The district court acknowledged on the record at trial that Sergeant Piergalski had changed his story about the search in his trial testimony, but nevertheless stated that Sergeant Piergalski's trial testimony was "inconsistent," "vague as to the order of events," and less credible than his testimony at the suppression hearing. JA168-69. The trial court committed clear error by rejecting the officer's own admissions that he in fact had opened Jones's safe, and had not seen any firearms in plain view before doing so. *Ray*, 700 F.3d at 1013.

B. Kelley lacked actual authority to consent to the search of the safe and, therefore, the consent was invalid.

Because Kelley lacked the actual authority to consent to the search of the safes, the search was unreasonable and this Court should suppress the

evidence.[9] This Court's decision in *United States v. Richards*, 741 F.3d 843 (7th Cir. 2014), is instructive. In *Richards*, this Court held that a co-tenant lacked actual authority over the defendant's bedroom, when the defendant "had been staying with [the co-tenant] approximately three times a week for eight months," and the defendant "frequently locked the door with a padlock." *Id.* at 850. Additionally, the co-tenant in *Richards* "did not have a key and had no access to the room unless [the defendant] unlocked it." *Id.* On these bases alone, the Court concluded that the co-tenant "lacked actual authority to consent to a search of the [defendant's] bedroom." *Id.*

Kelley had even less actual authority over the safes than the co-tenant in *Richards*. As in *Richards*, where the defendant was the only one with access to the bedroom as he was the sole owner of a key, 741 F.3d at 850, here, Jones was the only person with access to the safes, as he was the only person with a key. JA25, 85. In *Richards*, the defendant "frequently locked the door with a padlock," but not always. 741 F.3d at 850. Conversely, Jones *always* kept the safes locked. JA126-27; JA25, 27. Similarly, in *Richards*, the co-tenant "had no access to the room unless [the defendant] unlocked it." 741 F.3d at 850. The

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[9] The trial judge acknowledged that Kelley may have lacked the authority to consent to the search: "[I]f the safes were Ms. Kelley's and not [Mr. Jones's], then Ms. Kelley would have clearly had authority to consent to their search." A17 n.1. However, because the trial judge credited the officers' testimony in its entirety and ignored Jones's testimony, the trial judge never analyzed the issue of authority, despite Jones's arguments on that issue. A19 ("Finally, Mr. Jones argues that even if the officers had consent to enter the home, Ms. Kelley did not have authority to consent to a search of his safes.").

same is true here: Kelley had no access to the safes unless Jones unlocked them. *See* JA171-72 (testifying that nobody other than Jones had keys to the safe). As the Court in *Richards* found that the co-tenant lacked the actual authority to consent to the search of the defendant's bedroom, so too should this Court find that Kelley lacked the actual authority to consent to the search of Jones's safes.

C. Kelley lacked apparent authority to consent to the search of the safes and, therefore, the consent was invalid.

Because Kelley also lacked apparent authority to consent to the search of Jones's safes, the Court should suppress the evidence. Apparent authority requires that "the government must show that a reasonable person, with the same knowledge of the situation as that possessed by the government agent to whom consent was given, would reasonably believe that the third party had authority over the area to be searched." *Basinski*, 226 F.3d at 834. In the context of closed containers, "mere possession of the container by a third party does not necessarily give rise to a reasonable belief that the third party has authority to consent to a search of its contents." *Id.* Instead, "apparent authority turns on the government's knowledge of the third party's use of, control over, and access to the container to be searched." *Id.* The determination of whether a person has apparent authority "entails the consideration of. . . . the nature of the container." *Id.* ("Thus . . . it is less reasonable for a police officer to believe that a third party has full access to a defendant's purse or a briefcase than, say, an open crate."). Finally, "precautions taken to ensure privacy, such as locks or the government's knowledge of the defendant's orders

not to open the container" are relevant to the analysis, as are "whether the defendant provided the third party with a combination or key to the lock." *Id.* at 835.

Kelley lacked apparent authority to consent to a search of the safes. For the reasons outlined above, Kelley did not have the actual authority to enter Jones's safes, and the officers knew this. *See supra* § II(B). Sergeant Piergalski testified that when "a few of us" were talking with Kelley, Kelley told the officers that the safes belonged to Jones. JA83, 85. Kelley also told the officers that only Jones had the keys to the safes, and that Kelley "didn't get involved with the gun safe at all." JA85. Finally, when Sergeant Piergalski filled out the consent form that Kelley would later sign, he had a "belief that the safe was controlled by Mr. Jones." *Id.* These facts make clear that Kelley did not have authority over the safes. *Basinski*, 226 F.3d at 834.

Additionally, once the police arrived at the safe and saw that it was closed or locked, they should have reasonably understood that they did not have the authority to open it. *Id.* Therefore, as was the case in *Basinski*, "the only possible conclusion is that [Kelley] had no authority over the interior of the [safes], and no reasonable agent could have believed otherwise." 226 F.3d at 835. For these reasons, the Court should reverse the decision below.

II. The Court Should Reverse the District Court's Decision, Because Jones Objected to the Search and the Police Removed Him So He Could Not Further Object.

The officers' reliance on Kelley's consent to search the residence fails for another reason: Kelley's consent did not override Jones's refusal to consent to

the search under *Georgia v. Randolph*, 547 U.S. 103 (2006), and the search of Jones's home thus was unconstitutional. In *Randolph*, the Supreme Court held that "a warrantless search of a shared dwelling . . . over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120. Moreover, if there is "evidence that the police have removed the potentially objecting tenant from the entrance [of their home] for the sake of avoiding a possible objection," *id.* at 121–22, then a search is unconstitutional for that reason. Either because Jones refused to consent when the officers initially came to the door, or because the police subsequently removed Jones from his home to prevent him from further objecting, the search was unconstitutional.

A. Jones was a present objector under *Randolph* and, therefore, the warrantless search violated the Fourth Amendment.

Because Jones was present and objected to the search of his home, the search violated the Fourth Amendment and this Court should reverse the decision below. Under *Randolph*, a warrantless search purportedly justified by consent is unreasonable and unconstitutional as to a co-tenant who is: (1) present, and (2) refusing to consent. *Randolph*, 547 U.S. at 120. The Supreme Court uses the terms "object" and "refuse[] to consent" interchangeably in this context. *Id.* at 103. In determining whether a co-tenant refused to consent, the Supreme Court's analysis considers social custom, rather than formal property rights. *Id.* at 104. The Court in *Randolph* emphasized the "great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules." *Id.* at 111.

This means that "the reasonableness of a disputed consent search should be evaluated from the standpoint of the social expectations of a third party faced with an invitation from one cotenant to enter and an order from another to remain outside." *United States v. Henderson,* 536 F.3d 776, 780 (7th Cir. 2008). Accordingly, when one tenant consents and the other objects, a police officer would have "no better claim to reasonableness in entering than the officer would have absent any consent." *Randolph*, 547 U.S. at 104. Jones refused to consent to the search and, therefore, the search was unconstitutional.

1. The district court's decision to disregard Jones's uncontroverted testimony about his statements to the officers was clearly erroneous.

As explained above, a district court's factual findings should be overturned when they are clearly erroneous. *See, e.g., Ray*, 700 F.3d at 1013; *Alvarado-Zarza*, 782 F.3d at 251; *Krizek*, 345 F.3d at 100. That is the case here, as the district court clearly erred in disregarding Jones's uncontroverted testimony that he told the officers "I didn't invite you in" and "[d]on't you need a warrant."

Jones testified in the proceedings below that he made two separate statements to the officers when the police arrived at his residence. The first was after two of the officers followed him inside as he was collecting his belongings. JA122-23. Jones testified that, hearing the officers enter his residence, he turned and said "I don't need any help finding my keys or wallet, and I didn't invite you in." JA123. Jones testified that Deputy Chavez then entered the

residence and headed toward the kitchen. *Id.* Jones then noticed Deputy Chavez "poking around through boxes and whatnot." *Id.* Jones testified that he asked in response: "Don't you need a warrant?", and that Marshal Gunning responded: "That's for a judge to decide." JA123. The district court committed clear error by disregarding this testimony, because Jones's testimony on these points was uncontroverted, the court's stated reasons for disregarding Jones's statements are erroneous, and the court ignored major discrepancies in the officers' testimony.

As a threshold matter, Jones's testimony was uncontroverted by any other witness.[10] Although the other witnesses present, namely the arresting officers, did not explicitly corroborate Jones's testimony, they did not contradict it either. Instead they merely claimed that they did not ask for

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[10] The fact that this testimony was uncontroverted is further evidence the district court committed clear error in rejecting it, in light of the other serious issues with the district court's credibility findings as discussed herein. *See, e.g., Chicago, Rock Island & Pac. Ry. Co. v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968) ("[T]estimony concerning a simple fact capable of contradiction, not incredible, and standing uncontradicted, unimpeached, or in no way discredited by cross examination, must be taken as true. And no judgment can be permitted to stand against it.") (citing *Chesapeake & O. Ry. Co.*, 283 U.S. at 209); *accord Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893, 899 (8th Cir. 1946) ("[T]he law does not permit the oath of credible witnesses testifying to matters within their knowledge to be disregarded because of suspicion that they may be lying. There must be impeachment of such witness or substantial contradiction, or . . . circumstances . . . inconsistent with the positive sworn evidence on the exact point.").

Jones's consent and that he did not object.[11] This does not contradict Jones's testimony, however, insofar as the officers' testimony that he did not object is still compatible with Jones having made the statement "[d]on't you need a warrant" and the officers merely being unwilling to recognize that statement as an objection. In fact, Sergeant Piergalski's testimony that "Mr. Jones was very agitated about the whole process," JA152, corroborates Jones's testimony that he did not blithely submit to the officers' search efforts.

Moreover, the trial court's stated reasons for refusing to credit Jones's uncontroverted testimony are erroneous. The court refused to credit Jones's uncontroverted testimony based on his conclusions that: (1) Jones's testimony conflicted with a statement his attorney had made at the first hearing, and (2) Jones had lied to officers at the scene about unrelated matters.[12] The trial court's finding that Jones's testimony conflicted with a statement from his trial counsel at an earlier hearing is unfounded, however. The purported conflict was based on the following exchange during the first day of the suppression hearing between the district court and Jones's trial counsel:

> THE COURT: Whether or not he was asked, is there any evidence that he objected? Because you can object without being asked. He

[11] The only officer to testify about whether Jones said anything about a warrant was Deputy Chavez. He testified that Jones didn't say anything about a warrant in their conversation *after* Jones had been removed from the residence and the search had already commenced. JA103. This does not contradict Jones's testimony that he asked about the warrant prior to being removed from the residence.

[12] Specifically, the district court relied on testimony that Jones told officers during the investigation that he did not live in the residence and that there were no firearms in the residence. A16. These statements were not part of Jones's testimony under oath, and do not pertain to the facts at issue.

> could say, hey, wait a minute. What's going on? Whoa, whoa, stop. He doesn't have to be asked. He can offer his objections unilaterally, can't he?
>
> MR. COHEN: Well, yes.
>
> THE COURT: All right. I heard no evidence that he objected, asked or unasked; isn't that correct? Isn't that a fair statement of the record?
>
> MR. COHEN: There is no direct evidence that he objected.

JA113-14.

Characterizing this exchange as evidence that Jones changed his story is clearly erroneous. The trial judge specifically characterized the "evidence" and asked counsel if he agreed with the judge's account of what was in "the record"—which, at that point, contained no testimony from Jones, as he had chosen not to testify. Counsel thus answered in those terms, referring to the "evidence" before the court on the motion to suppress. The court thus was not asking, and counsel was not stating, what Jones would have testified had he decided to take the stand. Jones later testified after the court reopened the suppression hearing, and he never gave conflicting testimony regarding his statements to the officers.

Second, the court's further statements about the credibility of Jones's testimony center on statements that Jones made to the officers at the time of the search on issues wholly unrelated to his consent, namely his contemporaneous denials that he lived in the residence and had firearms. *See supra* n.12. However, these reasons have nothing to do with the in-court testimony that the district court heard from Jones under oath. In *Ray*, this

Court held that a district court's findings are not entitled to deference when "the district court made no finding concerning [a witness's] demeanor or presentation, and instead based its 'credibility' finding on nothing more than a string of speculative doubts." 700 F.3d at 1013. That is akin to what happened in this case, though. Rather than basing its credibility finding on the testimony it heard, the court ignored Jones's uncontroverted testimony in favor of its mere speculative doubts based on unrelated out-of-court statements. As in *Ray*, this Court should not give deference to such a finding.

Finally, the fact that the court disregarded Jones's uncontradicted testimony based on this speculative rationale is even more troubling when considered together with the glaring and serious problems with the officers' testimony, which the court noted on the record. The officers repeatedly contradicted themselves in their testimony, even with respect to basic facts, such as which one of them initially spoke to Jones at the residence (*compare* JA38-39 (Yagelski testifying that Gunning initially spoke with Jones), *with* JA59, 66 (Gunning testifying that he "had no interaction with Mr. Jones")); which one of them handcuffed Jones and led him away from the residence (*compare* JA38-39 (Yagelski testifying that Gunning handcuffed Jones), *with* JA65-66 (Gunning testifying that Yagelski handcuffed Jones)); and even where they took Jones during the search (*compare* A2; JA39, 52, 65-66, 77 (multiple officers testifying that Jones and the officers sat at a picnic table on the property next door, approximately ten to twenty feet away), *with* JA103 (Chavez testifying that Jones sat on the front porch)). The trial court even acknowledged

inconsistencies in Sergeant Piergalski's story about whether or not he opened the safe both in its opinion on the motion to suppress (*see* A10) and on the record at trial (*see* JA167-69 ("The Court does acknowledge, however, that Sergeant Piergalski's testimony today is potentially inconsistent with his testimony at the suppression hearing and with the Court's findings.")). Because the court below did not give any valid reason to disbelieve Jones's uncontroverted testimony, and ignored the serious inconsistencies in the officers' testimony when weighing their credibility, the court's disregard of Jones's uncontroverted testimony was clear error.

2. Jones's statements to the officers constitute a refusal to consent under this Court's precedent.

Jones's statements amount to a refusal to consent under this Court's jurisprudence and, therefore, the district court's contrary conclusion was in error. When analyzing whether a person has consented to a search, the Court looks to both explicit words and implicit actions. *See United States v. Walls*, 225 F.3d 858, 863 (7th Cir. 2000) ("[C]onsent may be manifested in a non-verbal as well as a verbal manner."); *accord United States v. Rosario*, 962 F.2d 733 (7th Cir. 1992) (upholding consent where occupant of motel room opened door, gestured for officers to enter, and stepped back). When analyzing a refusal to consent, the Court does not require a defendant to employ any particular magic words: individuals need not say that they refuse to consent or even that they acknowledge that they have the ability to refuse consent. *See United States v. Henderson*, 536 F.3d 776, 777–78 (7th Cir. 2008); *accord United States v. Tatman*, 397 F. App'x 152, 158 (6th Cir. 2010) (defendant

telling the police that they "had no right to be there" constituted a refusal to consent). All the person must do is evince an intent for the police not to enter their home. *See Henderson,* 536 F.3d at 777, 786 (finding a refusal to consent when defendant told the police to "get the fuck out of my house").[13] *Cf. United States v. Hicks*, 539 F.3d 566, 568–69 (7th Cir. 2008) (finding that statement "[w]hat are you doing here" did not constitute a refusal to consent, because "[i]t was reasonable for the district court to understand [the defendant's] remarks as responsive to the police who were there arresting him" and not as a refusal to consent to a search); *accord United States v. McKerrell*, 491 F.3d 1221, 1226–27 (10th Cir. 2007) (concluding that defendant shutting door in officers' faces did not amount to a refusal to consent, because it was an attempt to avoid arrest, not to refuse consent to search).

Jones was present and objected to the search, as demonstrated by his words and actions and, therefore, this Court should suppress the unconstitutionally seized evidence. It is undisputed that Jones was present when the police first arrived at the trailer. JA121. Accordingly, at issue is only whether Jones refused to consent, and he did.

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[13] The defendant's motion to suppress in *Henderson* was ultimately denied for an independent reason: he was lawfully arrested and, therefore, was no longer "present" to object. This is consistent with the Supreme Court's later decision in *Fernandez v. California*, 134 S. Ct. 1126 (2014). However, both of these cases are distinguishable from the case here on the facts, because Jones was not arrested. Nonetheless, the Court's finding in *Henderson* that "get the fuck out" amounted to a refusal to consent remains instructive. 536 F.3d at 777, 786.

Jones first told the police that he did not "need any help finding [his] keys or wallet, and [he] didn't invite [the police] in," and then told the officer who had entered his house and started poking around "[d]on't you need a warrant?" *See id.* JA123, 128. Either of these statements amount to a refusal to consent because, as a matter of social custom, this was enough for the police to understand that Jones refused to consent. Any reasonable person in a social setting being told by one co-tenant that they can enter and by another that they are not invited in would understand Jones's first statement that he "didn't invite [the police] in," JA128, as an objection. As the Court in *Tatman*, 397 F. App'x at 157–58, construed the remark that the police "had no right to be" in the defendant's house as an objection, so too should this Court construe Jones's statement that he "didn't invite [the police] in" as a refusal to consent, because people in a social setting would understand either of these statements as indicating a refusal to consent.

Jones's second statement, "[d]on't you need a warrant," also independently amounts to a refusal. This question was not merely rhetorical. Jones, knowing that the police could not constitutionally conduct a search without a proper warrant, was telling the police that he did not consent to their actions. This case thus is akin to *Henderson*, in which the mere fact that the defendant said "[g]et the fuck out of my house" one time was sufficient to

constitute a refusal to consent. 536 F.3d at 777–78.[14] Instead, Jones's questioning was in direct response to seeing Deputy Chavez "poking around through boxes," JA123, and Jones intended for the police to cease their search until they properly complied with the Constitution and obtained a warrant. Either of Jones's two statements amounts to a refusal to consent to the officers' search. Consequently, the district court erred in not construing Jones's statements and actions as objections and, therefore, the Court should reverse.

B. The police removed Jones from his home for the purpose of preventing him from objecting and, therefore, the search violated the Fourth Amendment under *Randolph*.

Even if Jones had not objected at the door, the search would still be unreasonable for an independent and alternative reason: the police removed Jones from his home to prevent him from objecting to their warrantless search. This argument still prevails even if the Court accepts the officers' testimony in totality and rejects Jones's in totality, as the district court did.[15] If "the police have removed the potentially objecting tenant from the entrance [of their house] for the sake of avoiding a possible objection," then a consent-based police search will be unconstitutional, even absent a refusal. *Randolph*, 547 U.S. at 121–22. As the Supreme Court recently explained in *Fernandez v.*

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[14] This case is distinguishable from *Hicks*, 539 F.3d at 568–69, and *McKerrell*, 491 F.3d at 1226–27, because the defendants' objections in those cases were in response to the officers' imminent arrests of the defendants. In contrast, Jones's refusal to consent was undoubtedly in response to the officers' search as Jones was not under arrest.

[15] The inquiry is one of objective reasonableness, and the testimony of the officers does not give rise to an objectively reasonable rationale for removing Jones from his home to the adjoining property under the circumstances.

California, this rule from *Randolph* is best understood "to refer to situations in which the removal of the potential objector is not objectively reasonable." 134 S. Ct. 1134 (2014) ("[A]n occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason"). As is the case with other exceptions to the Fourth Amendment requirements, the government bears the burden of proving that their removal of a defendant was objectively reasonable. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990) (government bears the burden to establish that a third party had authority to consent to a search); *United States v. Cordero-Rosario,* 786 F.3d 64, 73 (1st Cir. 2015) (government bears the burden to prove inevitable discovery); *United States v. Mallory*, 765 F.3d 373, 383 (3d Cir. 2014) (government bears the burden of demonstrating exigent circumstances exception).

The Court should reverse the decision below, because the officers' removal of Jones from his home constitutes removal "for the sake of avoiding a possible objection." *Randolph*, 547 U.S. at 121–22. The officers' action—taking Jones to an adjoining property—was not objectively reasonable and, therefore, violated the standard established by the Supreme Court in *Fernandez*. Additionally, unlike in *Fernandez*, Mr. Jones "was not under arrest," JA39, nor was he read his *Miranda* rights. JA53. But rather, "[h]e was just being detained at this time," on an adjacent property away from where the search was taking place, under the guise of "officer safety." JA39. The question, therefore, is

whether the officers' removal of Jones to the adjacent property passes the *Fernandez* "objective reasonableness" test. It does not.

The officers' asserted "officer safety" rationale for removing Jones to the adjacent property is insufficient,[16] because it was not objectively reasonable under the circumstances. First, Jones followed the officers' instructions to step out of the house. JA150. Second, nothing in the record suggests that Jones was threatening, violent, or uncooperative. JA122. Third, Jones was handcuffed. JA152. Fourth, he was guarded by two officers. JA150. Fifth, the officers moved Jones twenty feet away to the adjoining property, so that he could not see or hear what was happening on his property.[17] JA52. Indeed, the

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[16] Officer safety, as a rationale for the police to take an otherwise unconstitutional act absent a warrant, is a very limited doctrine. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that an officer can conduct a stop-and-frisk only when he suspects "that his safety or that of others was in danger"); *Michigan v. Long*, 463 U.S. 1032, 1033 (1983) (holding that an officer can conduct a protective search for weapons in the passenger compartment of a car absent probable cause, only when the officer possesses "a reasonable belief based on specific and articulable facts . . . that the suspect is dangerous and the suspect may gain immediate control of weapons"); *Riley v. California*, 134 S. Ct. 2473, 2477 (2014) (holding that an officer's interest in safety does not warrant a frisk of an arrestee to search a cell phone, severely narrowing the scope of the officer safety exception).

[17] As further evidence of the excessive use of the "officer safety" rationale in this case, Sergeant Piergalski testified that he "opened the door [to the safe] for officer safety." JA159. But Sergeant Piergalski also testified that he was worried there would be "booby traps or anything like that going on" in the safe. *Id.* If an officer were truly worried about "booby traps or anything like that," he surely would *not* have opened the safe; instead, a reasonable officer would call an expert from the police force to ensure that the safe was not booby trapped.

officers never explained *why* they had safety concerns that necessitated taking the additional step of removing Jones from the property, despite the other precautions they had taken. And were "officer safety" always an objectively reasonable justification for officers to detain a co-tenant away from his or her residence during a search, the *Randolph* rule would evaporate.[18]

The officers thus put forth no "specific and articulable facts" for why they needed to detain Jones so far away from his residence during the search, especially in light of the other precautions they had taken. *See, e.g.*, *Long*, 463 U.S. at 1033. Mere incantation of the words officer safety, absent any corroboration or justification, does not pass constitutional muster. *See, e.g.*, *Riley*, 134 S. Ct. at 2486 ("[T]he interest in protecting officer safety does not justify dispensing with the warrant requirement across the board."). The search was unreasonable and unconstitutional under *Randolph*, and the Court should reverse the decision below.

III. The Trial Court Erred in Holding that the Doctrine of Inevitable Discovery Provided an Alternative Basis for Upholding the Warrantless Search.

The inevitable discovery doctrine does not apply to the facts as found below, and the trial court's reliance on this doctrine as alternative grounds for

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[18] In an extreme example, the police could then remove any co-tenant on "officer safety" grounds to prevent him or her from objecting, gutting the narrow holdings of *Terry* and *Long*. The Court thus should pierce the officers' stated reasons and consider whether, under the circumstances, it was objectively reasonable to take the further step of removing Jones to the adjoining property, in light of the other precautions they had taken.

denying the motion to suppress is mistaken. Absent specified exceptions, evidence obtained in an illegal search must be suppressed under the exclusionary rule. *See,* e.g.*, Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963); *accord United States v. Swart*, 679 F.2d 698, 700 (7th Cir. 1982) (finding that when "evidence [is] obtained pursuant to [a] search warrant . . . [which is] obtained by exploitation of [an] initial, allegedly illegal, search" then "the evidence obtained with the warrant must also be excluded."). The inevitable discovery doctrine is a narrow exception to the exclusionary rule, providing that when "the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Nix v. Williams*, 467 U.S. 431, 448 (1984). In this case, the district court found that the inevitable discovery doctrine was an alternative ground for upholding the warrantless search, concluding that the government inevitably *would have* obtained a warrant and discovered the firearms. A11-12. The inevitable discovery doctrine is inapplicable here, however.

Although the Supreme Court has endorsed the application of the inevitable discovery doctrine to warrantless searches on the theory that a legal warrant would inevitably have been obtained, the Supreme Court has put strict limitations on such applications. In *Murray v. United States*, 487 U.S. 533 (1988), the Court laid out two specific scenarios under which courts may not apply the inevitable discovery doctrine to excuse an initial warrantless search:

(1) "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry," or

(2) "if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Id.*

The government carries the "onerous burden of convincing a trial court that *no information* gained from the illegal entry *affected either* the law enforcement officers' decision to seek a warrant *or* the magistrate's decision to grant it." *Id.* at 540 (emphases added). This Court has interpreted this test to include the requirement that the government "prove that a warrant would *certainly*, and not merely probably, have been issued had it been applied for." *Cf. United States v. Tejada*, 524 F.3d 809, 813 (7th Cir. 2008) (emphasis added) (holding that inevitable discovery applied when officers were lawfully conducting a search and found a bag they knew to contain cocaine in plain view).[19] If the fruits of the search affect *either* the officers' decision to apply for

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[19] The decisions of sister circuits further demonstrate that the *Murray* test should be followed strictly. *See, e.g.*, *United States v. Howard*, 972 F.2d 1345, at *2 (9th Cir. 1992) (vacating and remanding where "no determination was made as to whether the agents would have sought a warrant if they had not earlier obtained incriminating evidence in the illegal entry"); *United States v. Campbell*, 945 F.2d 713, 716 (4th Cir. 1991) ("[T]he record is incomplete as to whether the agents' decision to secure the warrant was prompted by what was observed at the residence . . . . Accordingly, we remand for findings as to whether the subsequent search of [the defendant's] residence pursuant to the search warrant was, in fact, an independent source of the challenged evidence in the sense described above."); *United States v. Rhiger*, 315 F.3d 1283, 1294–95 (10th Cir. 2003) ("The inevitable discovery doctrine should not apply if the 'agents' decision to seek the warrant was prompted by what they had seen

a warrant *or* the magistrate's decision to grant the warrant, the inevitable discovery claim must fail, as demonstrated by the fact that the Supreme Court remanded the case for further consideration on the first *Murray* factor, despite having found the second *Murray* factor satisfied on the facts in that case.

The court below erred on a number of grounds. Namely, the court erroneously: (1) considered evidence uncovered by the illegal search when analyzing whether the police certainly would have sought a warrant, (2) found that the initial search certainly did not affect the officers' decision to seek a warrant, (3) found that the initial search did not affect the magistrate's decision to issue a warrant, and (4) found that, had the officers obtained a warrant before searching, the discovery of the guns was inevitable. Jones need only prevail on one of these grounds for the Court to reverse the trial court's application of the inevitable discovery doctrine. *Murray*, 487 U.S. at 533. Additionally, the inevitable discovery doctrine should be particularly narrowly construed in situations, like this case, where there is an unusual danger of

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during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.'") (citation omitted); *United States v. Restrepo*, 966 F.2d 964, 971–72 (5th Cir. 1992) ("[U]nlike the objective test of whether the expurgated affidavit constitutes probable cause to issue the warrant, the core judicial inquiry before the district court on remand is a subjective one: whether information gained in the illegal search prompted the officers to seek a warrant."); *accord, United States v. Siciliano*, 578 F.3d 61, 69 (1st Cir. 2009). Courts have further found that a district court's mere assertion as to the existence of the *Murray* factors alone is not to be given dispositive weight, but instead must "be supported by adequate findings by the district court." *Campbell*, 945 F.2d at 716 (citing *Murray,* 487 U.S. at 543).

police misconduct. Here, the government failed to meet its burden on any of these points, though, and the district court clearly erred by holding otherwise.

A. The district court misapplied the law by considering evidence uncovered during the illegal search when analyzing whether the police certainly would have sought a search warrant.

The district court's holding that the police inevitably would have sought a warrant was erroneous because the court relied at least in part on evidence obtained during the warrantless search. The question of what evidence a court may appropriately consider in applying the inevitable discovery doctrine is a legal question, meriting *de novo* review. *Alexander*, 573 F.3d at 472.

Murray forbids application of the inevitable discovery doctrine "[i]f the agents' decision to seek the warrant was prompted by what they had seen during the initial entry." 487 U.S. at 542. That is just what occurred in this case, though. The government acknowledged in the briefing below that the decision to get a warrant was prompted by what the officers had seen during the warrantless search, stating that "[a] deputy prosecutor arrived at the scene and advised officers to get a search warrant based upon . . . *the finding of the firearms* for a complete search of the residence." *See* Dkt. 23 at 3 (emphasis added).

Moreover, part of the rationale under which the trial court held that discovery was inevitable was that,

> [P]rior to seeing inside the first safe, officers observed boxes of ammunition and empty holsters in the bedroom, which . . . indicated that firearms were likely nearby. The gun safes the officers observed in the room would be a natural location for those firearms. It is implausible to think that under these circumstances, the officers

would not have sought the search warrant had they not seen inside the first safe.

A12. Here, the district court fundamentally misapplied the law. Everything that the court listed as corroborating Kelley's initial allegation (including the safe, ammunition, and holsters) was discovered during the initial unconstitutional search. In analyzing the certainty of the officers' subsequent application, any reliance on facts discovered during the initial warrantless search necessarily would mean that the "'decision to seek the warrant was prompted by what [the officers] had seen"' in their initial illegal search. *United States v. Markling*, 7 F.3d 1309, 1315–16 (7th Cir. 1993) (citation omitted). Thus, the court erred by taking into account evidence that is disallowed under *Murray* and *Markling*.

B. The district court clearly erred in holding that the results of the warrantless search certainly had no influence on the officers' decision to seek a search warrant.

When the government relies on the inevitable discovery doctrine based on the fact it obtained a warrant after the initial search, the government bears the "burden of convincing a trial court that *no information* gained from the illegal entry affected . . . the law enforcement officers' decision to seek a warrant." *Murray*, 487 U.S. at 540 (emphasis added). This inquiry turns on whether "the agents' decision to seek the warrant was prompted by what they had seen

during the initial entry."[20] *See id.* at 542. The government failed to carry its burden, and the court below clearly erred in finding otherwise.

In the original order on the motion to suppress (which was upheld in each subsequent order), the court below found that, after discovering some firearms from the initial warrantless search, the police then paused the search to get a warrant, which they succeeded in obtaining and upon which they subsequently relied to complete the search. JA1; A2-3; JA151. The fact that the officers stopped the search after initial success in order to obtain a search warrant suggests that it is not "certain" that they would have applied for a warrant absent the search. *See, e.g., Tejada*, 524 F.3d at 813. It is also relevant here that Marshal Gunning, who was involved with the search itself, was then involved with obtaining the subsequent warrant, *see* JA152, as this increases the probability that the decision to apply for a warrant was influenced by the initial warrantless search.

As noted above, the government acknowledged in its briefing that "[a] deputy prosecutor arrived at the scene and advised officers to get a search warrant based upon . . . the finding of the firearms for a complete search of the residence." *See* Dkt. 23 at 3. Moreover, the testimony of the officers themselves, which the trial court credited, further indicates that the decision to

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[20] As discussed in Section III(C) below, the fact that the warrant application was successful is relevant only to the second prong of the *Murray* test—namely, that the warrant application would certainly have been successful had the officers otherwise applied for a warrant. The government must meet both prongs of the test.

apply for a search warrant was influenced by the search. The testimony of Marshal Gunning at the initial suppression hearing regarding the timing of the application for a warrant proceeded as follows:

> Q. After you had seen things in the trailer, what did you do then?
>
> A. We backed out, and we felt that it would be necessary to contact the deputy prosecutor. He arrived, and we informed him of the activities and observations that we had, and he felt there was probable cause for a search warrant.
>
> Q. Now, did you go and swear out for a search warrant?
>
> A. Yes, I did.

JA58. At the very least, this testimony, combined with the fact that the person obtaining the search warrant was involved in the initial search, casts doubt on the government's claim that the initial search did not influence the decision to apply for a warrant. It thus was clear error by the court to find that the government had fulfilled its burden to prove that the warrant application was "certainly" not influenced by the warrantless search.

C. The district court erred in holding that the magistrate's decision to grant the warrant was certainly unaffected by the prior search.

When the government relies on the inevitable discovery doctrine based on a warrant obtained subsequent to the initial search, the government takes on the "burden of convincing a trial court that no information gained from the illegal entry affected . . . the magistrate's decision to grant it." *Murray*, 487 U.S. at 540. The government failed to carry its burden, and the court below clearly erred in finding otherwise.

The key reason that the court in *Murray* found the magistrate's grant of the warrant was unaffected by the initial search was that "the agents did not reveal their warrantless entry to the Magistrate and that they did not include in their application for a warrant any recitation of their observations in the warehouse." *Murray*, 487 U.S. at 543 (internal citation omitted). In contrast, here, the government made no such showing. Marshal Gunning testified that he did not prepare a warrant application, and that the warrant was granted after an oral hearing. *See* JA67-69. The transcript of that oral hearing is incomplete due to a recording malfunction which ends the transcript before it is possible to tell whether Marshal Gunning presented anything to the magistrate which he found out through the initial search. JA174-78.

Moreover, the few pages of transcript that are available from that warrant hearing call into question the independence of the warrant. For instance, shortly before the recording malfunction that ended the transcription, the magistrate asked Marshal Gunning, "[a]nd you had an occasion today to begin an investigation at 27 New Durham Estates Avenue, is that correct?" JA175. This statement suggests that, unlike in *Murray*, the magistrate in this case was at least informed of the initial search. The danger that the magistrate may have been exposed to even more than the fact of the initial search is compounded by the fact that the officer whom the magistrate orally questioned to ascertain probable cause was one of the officers who participated in the warrantless search, and thus could easily have informed the magistrate of the confirmatory search and evidence found during that search. JA152. The burden was on the

government to prove a lack of effect of the initial search on the magistrate's determination of probable cause. They failed, and the district court erred in finding otherwise.

D. Even assuming that *Murray* were surmountable, and it is not, discovery of the firearms nevertheless was not inevitable.

Even if it were certain the police would have applied for a warrant absent the warrantless search, and it were certain that the warrant would have been issued, the discovery of the firearms would still not have been inevitable. Under the counterfactual scenario in which the police applied for and obtained a warrant prior to attempting any search, there is a reasonable possibility that the firearms may have been legally moved prior to the time the police executed the warrant. The trial court's ruling on inevitable discovery was in error on this ground, as well.

Although Jones and Kelley undisputedly were co-tenants, the trailer was leased in Kelley's name, and Kelley had been considering demanding that Jones move out. JA66-69. At trial, Deputy Marshal Yagelski testified that the initial reason that the police came to the residence was based on Kelley's request that they help evict Jones. JA145-46. This conversation with the police demonstrates that Kelley had imminent intent to require Jones to leave the residence. Had Kelley been successful in her efforts to force Jones to leave the residence, with or without the intervention of authorities, Jones would have taken the firearms with him. Thus, it was not truly inevitable that the police would have found the firearms had they obtained and later executed a valid warrant.

This scenario is crucially different from that at issue in *Segura v. United States*, 468 U.S. 796, 816 (1984), in which the Supreme Court rejected the argument that the potential for a defendant to *destroy* evidence prior to the execution of a valid search warrant by the police could defeat the application of the inevitable discovery doctrine. The Supreme Court held that ruling to the contrary would protect criminal activity in which the defendant had no right to engage. In the instant case, however, the reason that the firearms may not have been at the location of the search has nothing to do with the intentional and illegal destruction of evidence designed to frustrate government search efforts. Instead, there was a real possibility that the guns would have been moved for a lawful reason, had Kelley demanded that Jones leave the residence. Consequently, it was not truly inevitable that the police would have found the firearms, even with a properly executed warrant. The district court thus erred in applying this exception to the Fourth Amendment.

E. Application of the inevitable discovery doctrine poses particular risks of officer misconduct, and the Court should be vigilant in limiting the doctrine.

Expanding the inevitable discovery doctrine to cover the facts of this case presents particularly strong dangers of police misconduct. The inevitable discovery exception to the exclusionary rule, as developed by the Supreme Court in *Nix v. Williams*, 467 U.S. 431 (1984), relied heavily on the justification that police should be put in the same position as if they had no exposure to illegally obtained evidence. The Supreme Court in *Nix* seriously considered the need to deter police misconduct, noting that, “extending the exclusionary rule

to evidence that is the fruit of unlawful police conduct . . . is needed to deter police from violations of constitutional and statutory protections." *Id.* at 442–43. Given those important considerations, the Court should consider whether its application in this context would affect the incentives for police misconduct. Here, permitting the inevitable discovery doctrine as an exception to the warrant requirement under the circumstances of this case would provide perverse incentives for police to forego constitutionally required warrant applications.

First, an officer would be able to triage the cases for which he or she wants to go through the process of obtaining a warrant by knowing in advance which searches will yield evidence. Second, information, once known, cannot be "unknown." This provides a strong danger of tainting the warrant application by providing the police with prior knowledge of what scope of search to apply for to the magistrate. Because of these dangers, this Court should be particularly cautious in applying the inevitable discovery doctrine to cases such as this one. *United States v. Jones*, 72 F.3d 1324, 1334 (7th Cir. 1995) ("Inevitable discovery is not an exception to be invoked casually, and if it is to be prevented from swallowing the Fourth Amendment and the exclusionary rule, courts must take care to hold the government to its burden of proof.").

Other circuits have recognized that *Murray* is a floor, not a ceiling, and that even a search that satisfies *Murray*'s limitations on inevitable discovery may still be suppressed because of the potential for police misconduct if, given

the specific facts of the case, "there is 'evidence that the agents . . . exploited their presence.'" *United States v. Madrid*, 152 F.3d 1034, 1040 (8th Cir. 1998) (quoting *Segura,* 468 U.S. at 812 (plurality opinion)). In such an instance, it is necessary to deny the police the protection of the inevitable discovery doctrine, because the warrant requirement only serves its purpose if the police cannot constitutionally "exploit their presence simply because the warrant application process has begun." *Madrid*, 152 F.3d at 1040. Accordingly, "[w]hatever balance is to be achieved by the inevitable discovery doctrine, it cannot be that police officers may violate constitutional rights the moment they have probable cause to obtain a search warrant." *Id.* at 1041. This conclusion conflicts neither with *Segura* nor with *Murray*, because, "[t]he government's intrusion in this case far exceeds that in either *Segura* or *Murray,* and we do not read those cases as requiring the application of the inevitable discovery doctrine without regard to the severity of the police misconduct." *Id.* at 1040. The police in this case exploited their presence by detaining Jones where he could not observe or further object to a search, and then undertaking an illegal confirmatory search to decide whether they needed a warrant. Therefore, the district court erred in extending the protection of the inevitable discovery rule to the officers. The Court therefore should reverse the district court.

CONCLUSION

For these reasons, the Court should vacate the judgment of conviction and order the suppression of the unconstitutionally seized evidence.

Dated: March 8, 2017

Respectfully submitted,

VINCENT JONES

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because, according to the word count function of Microsoft Word 2013, the Brief contains 12,719 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Bookman Old Style font.

Dated: March 8, 2017

s/Sarah M. Konsky
Sarah M Konsky

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I, Sarah M. Konsky, an attorney, certify that all materials required by Circuit Rule 30(a) and (b) are included in Defendant-Appellant's required short appendix and Joint Appendix respectively.

Dated: March 8, 2017

s/Sarah M. Konsky
Sarah M. Konsky

CERTIFICATE OF SERVICE

I, Sarah M. Konsky, an attorney, hereby certify that on March 8, 2017, I caused the foregoing **Brief And Required Short Appendix Of Defendant-Appellant Vincent Jones** and **Joint Appendix** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the **Brief And Required Short Appendix Of Defendant-Appellant Vincent Jones** and 10 copies of the **Joint Appendix** to be transmitted to the Court via hand delivery within 7 days of that notice date.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 3:15-CR-048 JD
	)	
VINCENT JONES	)	

OPINION AND ORDER

This matter is before the Court on the defendant Vincent Jones' motion to suppress. Mr. Jones is facing a one-count indictment for possessing firearms as a felon, and argues in his motion that the firearms and ammunition discovered during a search of his home should be suppressed. The Court referred the motion to Magistrate Judge Christopher A. Nuechterlein, who held an evidentiary hearing and issued a Report and Recommendation, recommending that the motion be denied. Mr. Jones filed objections to that Report and Recommendation, and those objections have now been fully briefed. For the following reasons, the Court adopts the Report and Recommendation and denies the motion to suppress.

I. FACTS

On June 5, 2013, Marshal James Gunning and Deputy Marshal Jason Yagelski of the Westville Police Department were dispatched to 27 New Durham Estates, Westville, Indiana, in reference to a reported sexual assault at that residence. Upon arriving on the scene, they encountered Jennifer Kelley and Ms. Kelly's daughter, who had called to report the incident. Ms. Kelley expressed that she was afraid, so the officers offered to bring them to the police department. Once there, Ms. Kelley's daughter informed the officers that she had been sexually assaulted by Mr. Jones, her mother's boyfriend who lived with them in the home. Ms. Kelley also told the officers she was afraid of Jones, that he was a convicted felon who had tendencies of being violent and aggressive, that he had guns in their bedroom, and that she was in fear for

her life and the lives of her children. Officers then ran a criminal history check on Mr. Jones and confirmed that he had prior felony convictions.

After questioning the Kelleys at the police station, Marshal Gunning and Deputy Yagelski were joined by three officers from the LaPorte County Sheriff's Department—Captain James Jackson, Sergeant Brian Piergalski and Deputy Corey Chavez—to return to the residence to remove Mr. Jones and to search it. Upon arrival, the officers were greeted by Mr. Jones who opened the door. Marshal Gunning informed Mr. Jones that he needed to vacate the premises. Marshal Gunning saw knives laying on the kitchen counter. He asked Mr. Jones if there were any drugs or weapons in the residence and Mr. Jones replied "no just those knives over there." The officers then allowed Mr. Jones to retrieve some of his personal belongings and he returned outside where he was handcuffed for officers' safety. Mr. Jones sat and remained at a picnic table located ten to twenty feet from the entrance to the residence, and two of the officers remained with him.

Sgt. Piergalski then asked Jennifer Kelley to sign a Consent to Search Form for her mobile home. [Exhibit #3]. Ms. Kelley agreed and signed the consent form. The Consent to Search Form permitted a warrantless search of her "trailer residence and all rooms including enclosed boxes, safes etc. . . ." Mr. Jones was not asked for his consent to search the trailer or the safe, nor was he shown the Consent to Search Form that Ms. Kelley had signed. Sgt. Piergalski then entered the residence to conduct the search, followed by Captain Jackson and Marshal Gunning. Once he entered the bedroom, Sgt. Piergalski saw two gun safes, a small one on top of a larger one, in the bedroom shared by Ms. Kelley and Mr. Jones. The officers also saw boxes of ammunition and empty gun holsters on the floor and on top of the safes. Sgt. Piergalski testified that the door to the smaller safe was partially open, and he could see several firearms inside the

safe. He then opened the door further to better see the firearms, which were handguns. Captain Jackson confirmed that the door to the smaller safe was open by a few inches when he and Sgt. Piergalski entered the room.

At that point, a deputy prosecutor arrived at the scene. In consultation with the prosecutor, the officers decided to seek a search warrant, so they ceased the search and stepped outside the residence while Marshal Gunning went to secure a warrant. A search warrant was issued shortly thereafter by the LaPorte County Superior Court to search the mobile home and the contents of the safe for evidence of sexual assault and of firearms. Officers then conducted a full search of the residence and, according to the government, seized thirteen firearms, over a thousand rounds of ammunition, seventeen clips, and several firearm scopes. Mr. Jones was subsequently indicted for possessing firearms having previously been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1).[1]

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 636(b)(1)(B), a magistrate judge may conduct an evidentiary hearing and submit proposed findings of fact and recommendations for the disposition of a motion to suppress. A party may then file an objection to the magistrate judge's proposed findings and recommendations. *Id.* § 636(b)(1)(C). Thereafter, "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*

[1] Ms. Jones was separately charged and convicted in state court on one count of child molesting and two counts of sexual misconduct with a minor, for which he was sentenced to a total of 40 years of imprisonment.

III. DISCUSSION

Mr. Jones seeks to suppress all of the evidence seized at his home, arguing that the evidence was seized as a result of an unlawful search without a warrant. The Fourth Amendment prohibits unreasonable searches and seizures and provides that a warrant may not issue without probable cause. U.S. Const. amend. IV. The Supreme Court has interpreted those provisions as meaning that police may not enter or search a home without a warrant except in certain circumstances. *Fernandez v. California*, 134 S. Ct. 1126, 1131–32 (2014); *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). Where the government obtains evidence in a warrantless search, it bears the burden of proving by a preponderance of the evidence that an exception to the warrant requirement applies. *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000). One common exception is that police need not obtain a warrant to search a home where an occupant of the home consents to the search. *Fernandez*, 134 S. Ct. at 1132 ("'Consent searches are part of the standard investigatory techniques of law enforcement agencies' and are 'a constitutionally permissible and wholly legitimate aspect of effective police activity.'" (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 231–32 (1973)). Typically, the consent of any occupant with actual or apparent authority is sufficient to authorize a search; police need not seek out or inquire with any other co-occupants for their consent. *Id.* at 1129 ("Our cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents.");

Here, Mr. Jones does not dispute, and the evidence is clear, that Ms. Kelley freely gave her consent for the officers to search their home and that she had the authority to do so, which would ordinarily suffice. However, the Supreme Court carved out a narrow exception to that rule in *Randolph*, holding that where a co-occupant is both present at the time of the search and objects to the search, that co-occupant's "express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." 547 U.S. at 122–23. In

emphasizing that its holding was confined to situations where the co-occupant both was present and objected to the search, the Court explained: "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." 547 U.S. at 121. Mr. Jones acknowledges that he never actually objected to the search, so his argument does not fit into that framework, either. The Court also noted in *Randolph*, though, that its rule would apply "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection . . . ." *Id.* Seizing upon this language, Mr. Jones insists that the officers removed him for the purpose of preventing him from objecting to the search, and that Ms. Kelley's consent was thus invalid as to him.

Mr. Jones' argument fails first, though, because his factual premise is mistaken: he was not removed from the premises during the search. Mr. Jones voluntarily stepped outside when asked by the officers, after which he remained on the property and sat just feet from the front door throughout the search. He was not taken away from the property at that time or even placed in a squad car. He surely saw that officers were inside his home, and he had every opportunity to object, as he even conversed with the officers standing with him. Had he done so, his objection would have preempted Ms. Kelley's consent, as he would have been both present and objecting. *Randolph*, 547 U.S. at 121. He declined to object, but he was still present. Thus, this case does not raise the question from *Randolph* about when police remove an individual to prevent them from objecting—it instead presents the same circumstances as in *Matlock* and *Rodriguez*, which *Randolph* reaffirmed, where the defendants were present or nearby but were not asked and did not object. In short, Mr. Jones was precisely the "potential objector" described in *Randolph*,

who, "nearby but not invited to take part in the threshold colloquy, loses out." Accordingly, the Court finds that Ms. Kelley's consent was effective to permit the search because Mr. Jones was present but failed to object, so officers did not violate the Fourth Amendment by entering the home pursuant to that consent.[2]

In any event, what Mr. Jones refers to as the question left open in *Randolph* has already been answered by the Supreme Court:

> We first consider the argument that the presence of the objecting occupant is not necessary when the police are responsible for his absence. In *Randolph,* the Court suggested in dictum that consent by one occupant might not be sufficient if "there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." 547 U.S., at 121, 126 S.Ct. 1515. We do not believe the statement should be read to suggest that improper motive may invalidate objectively justified removal. Hence, it does not govern here.
>
> The *Randolph* dictum is best understood not to require an inquiry into the subjective intent of officers who detain or arrest a potential objector but instead to refer to situations in which the removal of the potential objector is not objectively reasonable. . . . We therefore hold that an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason.

Fernandez v. California, 134 S. Ct. 1126, 1134 (2014). Here, Mr. Jones argues at length that the subjective intent of the officers was to prevent him from objecting to a search, but *Fernandez* establishes that that is irrelevant as long as any detention or arrest is lawful. *Id.* Mr. Jones never directly addresses that question, and has provided no reason to believe that the officers unlawfully detained or arrested him. Mr. Jones voluntarily exited the residence at the request of the officers when they arrived. Since Ms. Kelley reported that there were weapons inside and that Mr. Jones might be violent, it was reasonable for officers to then handcuff Mr. Jones for their safety while they were at the home. *United States v. Parker*, 469 F.3d 1074, 1078 (7th Cir.

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[2] As stated by the magistrate judge, "because Kelley voluntarily gave police officers consent to search the residence she shared with Jones and Jones did not object, *though present*, the consent to search was valid." [DE 31 p. 7 (emphasis added)].

2006) (holding that a co-occupant's consent was valid even though the defendant was absent because the police detained him upon arriving at the scene). And given the allegation that Mr. Jones had sexually assaulted a minor and Ms. Kelley's statements that Mr. Jones possessed weapons inside their home, which he was prohibited from doing based on his felony convictions (which the officers confirmed), officers had probable cause to arrest Mr. Jones, too. Accordingly, regardless of whether the officers subjectively wanted to circumvent any objection by Mr. Jones to a search, they did not unlawfully detain or remove him, so Ms. Kelley's consent was valid even as to Mr. Jones.

Mr. Jones next argues that even if Ms. Kelley's consent allowed officers to enter the home, she did not have the authority to authorize a search of the safe, and the firearms in the safe were not visible in plain view. Thus, he argues that the firearms found in the safe should be suppressed as the product of an unlawful search even if the initial entry into the home was proper. Like the magistrate judge, the Court need not address the question of the scope of Ms. Kelley's authority to consent to a search of the safes, as the Court finds that the officer observed the firearms in plain view inside the safe prior to opening it further. When officers observe an object in plain view from a location where they have a legal right to be, that observation does not constitute a search and thus does not require a warrant. *Horton v. California*, 496 U.S. 128, 133 (1990); *United States v. Brandon*, 593 F. App'x 553, 558 (7th Cir. 2014). Likewise, when officers observe contraband in plain view and its incriminating nature is immediately apparent, they are entitled to seize that contraband. *Horton*, 496 U.S. at 136–37; *United States v. Cellitti*, 387 F.3d 618, 623 (7th Cir. 2004) ("[A]n officer may . . . seize an incriminating item not within the scope of the consent [to search] if it is in 'plain view.'"); *United States v. Brown*, 79 F.3d 1499, 1508 (7th Cir. 1996). The incriminating nature of the object must be apparent without

needing to manipulate or further expose the object, though, unless the officers are otherwise entitled to take those actions. *Horton*, 496 U.S. at 136–37; *United States v. Schmidt*, 700 F.3d 934, 939 (7th Cir. 2012); *Brown*, 79 F.3d at 1508 ("[I]t is critical, if somewhat obvious, that a plain view seizure involve an identifiable object actually in plain view.").

Here, the government asserts that the safe was partially open and that the firearms were visible to Sgt. Piergalski inside the safe before he opened the door the rest of the way. Sgt. Piergalski was questioned on that topic at length during the hearing by the government, the defendant, and the magistrate judge, and his testimony was consistent that he could see the firearms inside the safe before he opened it further. During questioning by the magistrate judge, Sgt. Piergalski testified:

> Q: Also, you said when you went into the bedroom, you saw two safes?
>
> A: Yes, sir.
>
> Q: Were the safes closed?
>
> A: I believe the bottom one was. The top one, I believe, was partially open.
>
> Q: It was partially open, and you said you saw guns in the safe?
>
> A: Yes, sir.
>
> . . . .
>
> Q: So the door was ajar; you could look into the safe?
>
> A: Yes, sir.
>
> Q: And you did?
>
> A: Yes.
>
> Q: And you saw guns inside?
>
> A: Yes, sir.
>
> . . . .

Q: The safe was open, you could see guns in the safe, you then opened the door further, and you could see them better?

A: Yes, sir.

Q: But you had already seen them in there before you had done anything?

A: Yes, sir.

[DE 34 p. 78, 84–85]. Officer Piergalksi testified likewise on questioning by defense counsel:

Q. Could you describe how that small safe appeared when you first got into the bedroom. You said it was open a little bit?

A. Yeah. It was open enough to see into initially, yes.

Q. And you peeked in there?

A. That's correct.

Q. Did you do that for officer safety purposes or for what?

A. I looked into it to see what was in there, and I saw firearms.

. . . .

Q. So, to clarify, if you pulled the door open, then the door was closed when you first saw that small safe?

A. The door was initially ajar. It was partially open.

Q. Partially open?

A. Yes.

Q. You couldn't see in there?

A. No, that's not correct. I told you before I could see in there.

. . . .

Q: So I guess that's my question: Apparently you didn't really see the handguns and ammunition until you opened the door further?

A. No, sir, I saw it initially when the door was initially ajar on the top safe.

Q. And how far ajar was it?

> A. Just a few inches, enough to see in there and see the weapons and ammunition in there

[DE 34 p. 85, 105–06]. Moreover, Captain Jackson, who followed Sgt. Piergalski into the room, confirmed that the door to the safe was open "a few inches" or a "couple inches" and that it would have been possible to see inside it, though he did not look inside it himself until it was opened entirely. [DE 34 p. 96–97].

In arguing to the contrary, Mr. Jones relies entirely on a report Sgt. Piergalski wrote after the search, in which he stated, "There was a key in the top smaller safe and the safe was unlocked, so I pulled the door open for officer safety and immediately observed several handguns and much ammunition." [DE 34 p. 107]. However, to the extent there is an inconsistency between that statement and the testimony at the hearing, the Court finds the testimony at the hearing more probative and persuasive, as Sgt. Piergalski testified consistently in response to precise questions about the order of events, and Captain Jackson confirmed that the safe was ajar when they entered the room.[3] Accordingly, the Court finds that the firearms were visible in plain view inside the safe, so the officers did not conduct an unlawful search when they observed those firearms.

Finally, the Court notes that even if Mr. Jones was correct that officers unlawfully opened the safe prior to securing the search warrant, that would not necessarily result in the suppression of any evidence, much less all of the evidence. First, officers had already observed boxes of

[3] For what it's worth, neither party raised the applicability of the plain view exception prior to the hearing—the government's pre-hearing filing did not address the validity of any search of the safe at all, and argued only that Ms. Kelley's consent authorized the search in its entirety. Not until after the close of evidence did the magistrate judge ask counsel about the plain view doctrine, so Officer Piergalski and Captain Jackson likely had little reason to believe this testimony would be important such that they would have a motive to misstate the sequence. And if the officers were embellishing, they could have just said the safe was wide open when they entered the room, yet they both testified the door was open by a few inches.

ammunition and holsters in the bedroom, so that evidence would not be suppressed. Moreover, evidence discovered and seized after the safe was opened could still be admitted under the inevitable discovery exception to the exclusionary rule. Under that exception, evidence will not be excluded notwithstanding an unlawful search where the government proves (1) that it had an independent, legal justification for conducting a search that would have led to the discovery of the evidence; and (2) that it would have conducted a lawful search absent the challenged conduct. *Nix v. Williams*, 467 U.S. 431, 444 (1984); *United States v. Pelletier*, 700 F.3d 1109, 1116 (7th Cir. 2012). "In other words, the government must show not only that it *could* have obtained a warrant, but also that it *would* have obtained a warrant." *Id.*; *see also United States v. Brown*, 64 F.3d 1083, 1085 (7th Cir. 1995) ("What makes a discovery 'inevitable' is not probable cause alone . . . , but probable cause plus a chain of events that would have led to a warrant (or another justification) independent of the search."). As to the second factor, the government "need only show that 'it would be unreasonable to conclude that, after discovering all of the information, the officers would have failed to seek a warrant.'" *Pelletier*, 700 F.3d at 1117 (quoting *United States v. Marrocco*, 578 F.3d 627, 640 (7th Cir. 2009)).

Here, as to the first element, there is no question that the officers had probable cause for a search warrant even prior to their initial entry—Mr. Jones expressly conceded as much in his post-hearing brief. [DE 26 p. 2 ("After Jennifer Kelley and her daughter told Marshal Gunning and Deputy Yagelski about the sex crimes and that the defendant was a convicted felon in possession of guns, the police had sufficient probable cause to obtain a search warrant.")]. There is likewise little question that the officers would have still sought the warrant even if they had not seen the firearms inside the safe during their initial entry. Officers were investigating a reported sexual assault of a minor by Mr. Jones; Ms. Kelley was fearful for her and her

daughters' safety and reported that Mr. Jones kept firearms inside their home and could be dangerous; officers confirmed that Mr. Jones had a criminal record and could not lawfully possess a firearm; and prior to seeing inside the first safe, officers observed boxes of ammunition and empty holsters in the bedroom, which further corroborated Ms. Kelley's statement and indicated that firearms were likely nearby. The gun safes the officers observed in the room would be a natural location for those firearms. It is implausible to think that under these circumstances, the officers would not have sought the search warrant had they not seen inside the first safe.

And of course, the officers *did* seek and receive a search warrant that authorized them to search the premises, including the safes.[4] Thus, even if the Court found that it was improper for the officers to have opened the first safe initially, that improper search would not have tainted the evidence subsequently seized pursuant to the warrant (including the evidence seized from the open safe) such that exclusion of that evidence from trial would be justified. Accordingly, Mr. Jones' motion to suppress is denied for that reason, too.

IV. CONCLUSION

For those reasons, the Court OVERRULES Mr. Jones' objections [DE 32] to the Magistrate's Report and Recommendation; ADOPTS the Report and Recommendation [DE 31]; and DENIES the motion to suppress [DE 12].

[4] The closely related independent source doctrine would thus apply equally under these circumstances, as the evidence was seized pursuant to a warrant for which probable cause existed prior to any potentially unlawful search, and the officers would have sought that warrant even if they had not seen the contraband inside the first safe. *See Murray v. United States*, 487 U.S. 533, 541–43 (1988).

SO ORDERED.

ENTERED: January 27, 2016

/s/ JON E. DEGUILIO
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA)
)
v.) Case No. 3:15-CR-048 JD
)
VINCENT JONES)

OPINION AND ORDER

Defendant Vincent Jones is facing a one-count indictment for possessing firearms as a felon. Through counsel, he moved to suppress the firearms and ammunition found during a search of his home, but the Court denied that motion, finding that the search was lawful. Mr. Jones then moved to reconsider that ruling and to reopen the evidentiary hearing so that he could testify on his own behalf. The Court granted that motion insofar as the Court reopened the evidentiary hearing. At the hearing, Mr. Jones testified and the government presented rebuttal evidence. Having now considered the supplemented record, the Court finds that the additional evidence does not alter its original conclusions. Accordingly, the Court denies the motion to reconsider and will not suppress the evidence in question.

Mr. Jones asks the Court to suppress firearms and ammunition discovered through a search of his home, arguing that the search was unlawful. The facts of that search are set forth in the Court's prior orders. It is undisputed that Ms. Kelley validly consented to the search of the home, so the questions are whether that consent was effective as to Mr. Jones and whether the search fell within the scope of that consent. In his previous motion, Mr. Jones argued that while he did not object to the search, the officers removed him from the premises for the purpose of preventing him from objecting, which he believed made the search unlawful. The Court disagreed, finding first that the officers had not actually removed him from the premises since he remained only ten to twenty feet away from the door throughout the search, and second, that the

officers' subjective intentions were immaterial so long as the defendant was not unlawfully detained (which he does not claim). *Fernandez v. California*, 134 S. Ct. 1126 (2014) (rejecting the argument that *Randolph* invited "an inquiry into the subjective intent of officers" and holding that "an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason").

In his present motion, Mr. Jones argues that he did in fact object to the search, so he was the "present and objecting" occupant described in *Georgia v. Randolph*, 547 U.S. 103 (2006) as to whom the other occupant's consent was invalid. In *Randolph*, officers arrived at a home to investigate a domestic dispute, and the wife informed them that the husband had drugs inside the house. One of the officers asked the husband for permission to search the house, and the husband "unequivocally refused." 547 U.S. at 107. The officer then asked the wife, who readily consented, and the officer entered the home, where he found cocaine. *Id.* The husband moved to suppress the evidence, arguing that his wife's consent was invalid in light of his refusal. The Supreme Court agreed, holding that "a warrantless search of a shared dwelling for evidence over the *express refusal of consent* by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120 (emphasis added).

At the initial suppression hearing, there was no evidence that Mr. Jones had objected to any search, so this exception did not apply. [*See* DE 34 p. 115–16]. However, Mr. Jones now argues based on his testimony at the reopened hearing that he did object. Mr. Jones testified that when the police returned to the home after speaking with Ms. Kelley and her daughter at the station, they knocked on the door and he answered. They told him that he needed to leave the property, but that he could gather his things, so Mr. Jones went back inside to grab his keys and

wallet. As he was walking across the living room, two of the officers stepped inside. Mr. Jones testified that he then told them that he did not need any help finding his keys or wallet and that he did not invite them in. Mr. Jones further testified that a third officer then stepped inside and started poking around, at which point he asked, "don't you need a warrant?" Mr. Jones then exited the home and was placed in handcuffs. He was never asked for consent to search the home, and said nothing more about the officers' presence in his home, even though he knew they were inside.

On that basis, Mr. Jones argues that he did object to the search, so Ms. Kelley's consent was not valid as to him. For multiple reasons, the Court cannot agree. First, all five officers who were present at the scene testified at the original suppression hearing. Though there were some discrepancies as to which officers did what, as can be expected, every officer testified that Mr. Jones never objected to any search or told the officers they could not be inside the home. In addition, Mr. Jones has already lied on multiple occasions in multiple respects in relation to this matter. When Mr. Jones first greeted officers at the door, they asked him if there were any weapons in the house. He said no, except for some knives in the kitchen. The following day, Mr. Jones was interviewed twice by law enforcement officers: first, by a detective with the LaPorte County Sheriff's Office, and second, by an agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives. During both interviews, Mr. Jones was asked whether he lived at the home, and both times he said no. In fact, he told the detective five times that he did not live there. Mr. Jones was also asked by the ATF agent about any firearms or ammunition, and Mr. Jones told them that he never saw any firearms in the home. Those statements were each false. Mr. Jones was living at the home at the time, and had been living there for more than four years. Likewise, the officers found many firearms inside the home, and Mr. Jones admitted on cross-examination that

they were his. In other words, when Mr. Jones perceived it to be in his interests to deny that he lived at the house or that he had firearms there, he did so on multiple occasions. Now that his interests have changed,[1] so has his story. And needless to say, Mr. Jones has a substantial self-interest at stake, as he is asking the Court to suppress evidence, which would weaken the government's case against him.

Moreover, Mr. Jones' conduct during and after the search was inconsistent with having objected to the search or to the officers' presence in his home. After he exited the home and was placed in handcuffs, Mr. Jones remained only feet away from the entrance and was standing next to two officers. However, he never told them that he objected to the other officers being inside his home, as might be expected if he had actually just refused consent, as he now claims. Likewise, in multiple interviews with law enforcement officers the following day, he never complained that the officers entered his home against his wishes. To the contrary, he insisted that he did not even live there and that the firearms were not his. Thus, rather than objecting to the search of his home, thereby asserting his personal interest in the premises, it is apparent that he was taking the opposite tack and attempting to disassociate himself from the home altogether. In light of each of those circumstances, the Court cannot credit Mr. Jones' testimony.

Moreover, even if the Court did credit Mr. Jones' testimony, his statements to the officers would still not amount to an express refusal of consent under *Randolph*. It was undisputed in *Randolph* that the husband had "unequivocally refused" consent to search, so the Court had no occasion to consider what conduct would suffice to override a co-occupant's consent. 547 U.S. at 107. However, the Court based its holding on the "widely shared social expectations" of a visitor

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[1] If Mr. Jones was not living at the home, he might not have standing to challenge the search, and if the safes were Ms. Kelley's and not his, then Ms. Kelley would have clearly had authority to consent to their search.

to a jointly occupied home. *Id.* at 111. The Court observed that "a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.'" *Id.* at 113. Applying those same expectations to an officer in that situation, the Court held that the officer would not have valid consent to enter. *Id.* at 114.

Mr. Jones never told the officers to "stay out" or unequivocally refused consent, though; he stated (at best) that *he* had not invited them in and essentially asked whether they were allowed to be there. The social expectations in those circumstances are a far cry from *Randolph*. If a visitor to a home was asked by an occupant whether they have permission to be there, the visitor would not perceive themselves as unwelcome and feel compelled to leave. Rather, as long as they did have permission from another occupant, they would feel free to remain. Here, the officers did receive permission from an occupant, Ms. Kelley, prior to commencing their search. Therefore, Mr. Jones' question as to whether they were allowed to be there would not have reasonably conveyed that he intended to override another occupant's invitation or to object to the officers' presence, and thus would not have invalidated the search under *Randolph*. *See United States v. Fletcher*, No. 2:09-cr-82-JVB, 2010 WL 893793 (N.D. Ind. Mar. 9, 2010) (finding that the defendant did not expressly refuse consent under *Randolph* by asking the officers if they had a warrant); *United States v. Foster*, 654 F. Supp. 2d 389 (E.D.N.C. 2009) (finding that a defendant did not expressly refuse consent by telling officers "that he was going to make officers 'earn their pay'").

Mr. Jones last argues on that topic that the search was invalid because the officers should have asked him for his consent and advised him of his rights. However, the Supreme Court has expressly declined to require officers to seek out consent from other occupants once they have

valid consent from one occupant. *Randolph*, 547 U.S. at 122. In addition, Mr. Jones' reliance on *Pirtle v. Indiana*, 323 N.E.2d 634 (Ind. 1975) is misplaced. In *Pirtle*, the Indiana Supreme Court held that "a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent," and that the person must be advised of that right prior to waiving it. 323 N.E.2d at 640. However, the search at issue here was not authorized by Mr. Jones' consent, but by Ms. Kelley's (who was not in custody), so *Pirtle* is inapplicable. *Ward v. Indiana*, 903 N.E.2d 946, 957 (Ind. 2009) (holding that *Pirtle* did not apply where "the search by police was not based upon the defendant's consent"). Accordingly, because Ms. Kelley validly consented to the search, and because Mr. Jones did not object or refuse consent, the Court finds that the consent was valid as to Mr. Jones.

Finally, Mr. Jones argues that even if the officers had consent to enter the home, Ms. Kelley did not have authority to consent to a search of his safes. He further argues that the safes were closed and locked, and that by opening one of the safes and seeing the firearms inside, the officers exceeded the scope of the consent and thus conducted an illegal search. The Court found in its prior order that the door to the safe was actually ajar, and that Sgt. Piergalski saw the handguns inside before opening the door further. Because the firearms were visible in plain view prior to opening the safe, Sgt. Piergalski's observation did not constitute a search. *Horton v. California*, 496 U.S. 128, 133 (1990); *United States v. Schmidt*, 700 F.3d 934, 939 (7th Cir. 2012); *United States v. Brown*, 79 F.3d 1499, 1508 (7th Cir. 1996). And once the incriminating items were apparent, the officers were entitled to seize them regardless of whether they were within the scope of the consent to search. *United States v. Cellitti*, 387 F.3d 618, 623 (7th Cir.

2004) ("[A]n officer may . . . seize an incriminating item not within the scope of the consent [to search] if it is in 'plain view.'").

The only new evidence on this point is Mr. Jones' testimony that his safes were actually locked at the time. As between Mr. Jones and the officers, though, the Court finds the officers to be more credible. Sgt. Piergalski testified consistently in response to persistent and precise questioning as to how he observed the firearms inside the safe before he opened the door the rest of the way. Captain Jackson corroborated that the door was slightly ajar when they entered the room. Meanwhile, Mr. Jones has ample motive to lie, and has shown himself willing to do so when he perceives it to be expedient, as discussed above. Therefore, the Court again finds that Sgt. Piergalski observed the firearms inside the safe prior to opening the door, and that his observation fell within the plain view doctrine.

Moreover, the Court also held in its prior order that, even if the officers had unlawfully searched the safe during their initial search, suppression of the firearms would not be warranted. As again conceded by counsel, the officers had probable cause for a search warrant even prior to entering the home. In addition, the officers were investigating allegations of serious offenses committed by Mr. Jones against a minor; Ms. Kelley had expressed to them that she was afraid for her safety, that Mr. Jones had violent and aggressive tendencies, and that he had weapons in the home that she was afraid he would use against her; officers confirmed that Mr. Jones had a criminal record and could not lawfully possess a firearm; and prior to seeing inside the first safe, officers observed boxes of ammunition and empty holsters in the bedroom, which further corroborated Ms. Kelley's statement and indicated that firearms were likely nearby. It is unthinkable that the officers would not have sought a search warrant if they had not seen the firearms inside the first safe, especially since they did seek and receive a warrant prior to

opening the second, locked safe. None of the evidence at the reopened hearing affects that conclusion. Therefore, for this additional reason, the Court finds that suppression is not warranted.

In conclusion, the Court DENIES Mr. Jones' motion to reconsider, [DE 39], and will not suppress the evidence in question.

SO ORDERED.

ENTERED: June 21, 2016

/s/ JON E. DEGUILIO
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 3:15-CR-048 JD
	)	
VINCENT JONES	)	

ORDER

Now before the Court is a motion filed by defendant Vincent Jones in which he asks for the second time that the Court reconsider its order denying his motion to suppress. [DE 66]. At the request of counsel, the Court held oral argument on the motion on July 21, 2016. The underlying facts are set forth extensively in prior orders, and the Court does not restate them here. For the following reasons, the Court denies the motion, as the additional arguments and materials do not alter this Court's findings, and Mr. Jones has presented no grounds to justify reconsideration of an order the Court has already considered and reconsidered.

Mr. Jones first argues that suppression is warranted because the officers briefly entered the trailer when they asked him to leave, which was before Mr. Kelley executed the consent to search. Mr. Jones argues that the initial entry was unlawful and justifies suppression, and he suggests that the Court must have found in its previous orders that the officers had not actually entered the home at that point. The Court made no such finding, though. What the Court did find was that Ms. Kelley executed the consent to search before the officers commenced the search of the bedroom that led to the discovery of the firearms. That finding is amply supported by the record, and the additional materials Mr. Jones now submits do not speak to that fact.

As to whether the officers actually entered the home prior to receiving the consent to search, that is immaterial since the initial entry had no effect on the subsequent search pursuant to consent. For example, in *United States v. Smith*, 108 F. App'x 402, 404 (7th Cir. 2004), the

defendant argued that evidence discovered during a search of his apartment should be suppressed because officers illegally entered his apartment to conduct a protective sweep prior to conducting the search. The Seventh Circuit disagreed, stating that "whether or not the initial entry is defensible, suppression is warranted only where police seize evidence illegally." *Id.* at 404. The officers there did not seize any evidence during the initial entry, and did not conduct the search that led to the seizures until after receiving a warrant, which provided a lawful basis for the search unconnected to the initial entry. Thus, suppression was not warranted. Similarly, in *United States v. Etchin*, 614 F.3d 726 (7th Cir. 2010), the Seventh Circuit found that officers illegally entered a home prior to the search, yet it ruled that suppression was not warranted because that initial entry did not affect the subsequent search pursuant to lawful authority. Likewise here, even if the officers briefly entered the trailer initially, they did not conduct the search that led to the seizure of the evidence in question until after they received the consent from Ms. Kelley, so the initial entry does not taint the search or justify suppression.

Mr. Jones relatedly argues that officers unlawfully detained him prior to the search because they did not have a warrant for his arrest. He further argues that this unlawful detention prevented him from objecting to the search, thus invalidating Ms. Kelley's consent as to him under *Fernandez v. California*, 134 S. Ct. 1126 (2014). In arguing that his detention was unlawful, he cites *Payton v. New York*, 445 U.S. 573, 576 (1980), in which the Supreme Court held that the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." Nothing prevents officers from knocking on a person's door, though, even if for the purpose of seeking to arrest them without a warrant. *United States v. Berkowitz*, 927 F.2d 1376, 1386 (7th Cir. 1991) ("Courts have generally upheld arrests . . . where the police go to a person's home without a

warrant, knock on the door, announce from outside the home the person is under arrest when he opens the door to answer, and the person acquiesces to the arrest."); *see United States v. Santana*, 427 U.S. 38, 42 (1976) (holding that a warrantless arrest was lawful when it was initiated while the resident was standing at the threshold of the home). And if the person who opens the door acquiesces to the officers' request or steps outside the home, the police may detain that person. *Sparing v. Village of Olympia Fields*, 266 F.3d 684, 690 (7th Cir. 2001) ("Without a warrant, this arrest could only be completed if [the arrestee] opened his screen door, and stepped outside of his home . . . ."); *Berkowitz*, 927 F.2d at 1387 ("When the police assert from outside the home their authority to arrest a person, they have not breached the person's privacy interest in the home. If the person recognizes and submits to that authority, the arrestee, in effect, has forfeited the privacy of his home to a certain extent. At that point, it is not unreasonable for the police to enter the home to the extent necessary to complete the arrest.").

Here, the officers knocked on Mr. Jones' door, and he answered. From outside the home, they asked him to leave, and he agreed to do so. After retrieving his keys from inside, he voluntarily exited the trailer, at which point he was placed in handcuffs. His detention at that point was lawful, both for officers' safety during their inquiry into the presence of weapons and also because the officers had probable cause to arrest him. That the officers may have stepped inside the home in the interim when Mr. Jones went to retrieve his keys—which was after they asked him to leave and he agreed—does not alter that analysis. Mr. Jones had agreed to leave the premises even prior to the alleged entry, and he does not suggest that the officers detained him inside his home or that the entry had any effect on his willingness to leave. *See Berkowitz*, 927 F.2d at 1387 (noting that "a slight entry after the defendant has submitted to the police is legal"). Mr. Jones could have refused to leave, but he did not. Therefore, *Payton* does not apply, and Mr.

Jones was lawfully detained outside of the home.[1] *Sparing*, 266 F.3d at 690; *McKinney v. George*, 726 F.2d 1183, 1188 (7th Cir. 1984) (holding that a warrantless arrest of an individual at his home was lawful because "[w]hen [the arrestee] opened the door to [the officers'] knock they told him to come along with them and he did so").

Mr. Jones next argues that the Court was mistaken in finding that he did not object to the search of the trailer. His arguments raise nothing that the Court did not already consider and address, though. Therefore, for the same reasons previously stated, the Court does not credit Mr. Jones' testimony about his alleged objection, and even if it did, the Court does not find that those claimed statements rise to an express refusal of consent to search, as is required to invoke *Georgia v. Randolph*. *See United States v. Hicks*, 539 F.3d 566, 569 (7th Cir. 2008) (disagreeing that "an objection to police presence should be equated to an objection to a search" when the defendant objected to the officers being present during his arrest but said nothing—and was not asked—about a search).

Further, Mr. Jones' repeated argument that the officers had an obligation to ask him for consent is squarely contradicted by *Georgia v. Randolph*, and is unsupported by *Pirtle v. Indiana*. The Supreme Court took great pains in *Randolph* to clarify that once officers receive consent from one occupant, they have no obligation to seek consent from another tenant or advise them of their desire to search. 547 U.S. at 122 ("[I]t would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-

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[1] Mr. Jones has not shown that his detention interfered with his ability to object to any search, either. Mr. Jones was not removed from the scene or placed out of earshot so that he could not object; he remained only feet away from the entrance to the trailer, sitting next to two officers. It is implausible that Mr. Jones did not know that the officers were searching, too, as the officers were alone inside the house at that point.

tenant before acting on the permission they had already received."); *id.* at 121 (noting that "the potential objector, nearby but not invited to take part in the threshold colloquy, loses out"); *see also United States v. Parker*, 469 F.3d 1074, 1079 (7th Cir. 2006) ("That [the defendant (who was detained upon the officers' arrival at the home)] was not asked for his consent and did not have an opportunity to object to the search does not render invalid [the co-tenant's] voluntary consent."). And *Pirtle* held only that if officers seek consent from an individual who is in custody, that individual's consent is only valid if he is first advised of his right to counsel. 323 N.E.2d 634, 640 (Ind. 1975). *Pirtle* says nothing about requiring officers to seek consent from such an individual when they have already received valid consent from someone else.

Mr. Jones last argues that no record was made of the oral application for the search warrant that was issued. He never identifies what impact that should have on suppression, though. It is too late in the game to argue that the warrant itself is unlawful. To the extent Mr. Jones argues that this argument undercuts the inevitable discovery doctrine, that doctrine does not require a valid warrant to actually issue—only that probable cause existed and that the officers would have sought a warrant even absent any unlawful search or seizure. *United States v. Pelletier*, 700 F.3d 1109, 1117 (7th Cir. 2012) ("The government is not required to show that investigators *in fact* obtained or sought a warrant in order to prove that they *inevitably would* have done so." (internal quotation omitted)). Also, the Court's holding as to the inevitable discovery doctrine was an alternative holding, and was not dispositive in light of the Court's factual findings on the preceding issues, so this argument could not warrant granting the motion to suppress anyway.

Finally, as an independent basis for denying the motion, the Court finds that Mr. Jones has failed to present grounds for reconsideration at this stage, as he has already had extensive

opportunity to present evidence and argument in support of his motion to suppress. Mr. Jones filed a motion to suppress and a brief in support of that motion on September 14, 2015. The Court referred the motion to the magistrate judge, who held a hearing on October 19, 2015. At that hearing, Mr. Jones presented evidence and argument in support of his motion. Thereafter, he filed a supplemental brief in support of his motion, and he later filed a reply brief, also. The magistrate judge then issued a report and recommendation recommending that the motion to suppress be denied. Mr. Jones filed an objection to the report and recommendation and also filed a reply in support of his objection. The Court then issued an order overruling the objection and denying the motion to dismiss. Mr. Jones filed a motion to reconsider in which he requested that the Court reopen the evidentiary hearing. At the Court's request, he subsequently filed a brief in support of that motion. The Court agreed to reopen the hearing, at which Mr. Jones testified on his own behalf, and counsel offered additional argument in support of his motion. Thereafter, Mr. Jones filed another brief in support of his motion. Finally, on June 21, 2016, the Court denied the motion to reconsider, finding that the additional evidence did not alter its conclusions.

Plainly, Mr. Jones has already had ample opportunity to present arguments and evidence to the Court in support of his motion to suppress. He has filed nearly ten briefs and presented evidence and argument at multiple hearings. His instant filing offers no reason why it could not have been raised earlier, and the Court need not permit a defendant to endlessly argue matters that the Court has already considered at length. Therefore, absent a valid basis for reconsideration, the Court denies the motion.

For those reasons, the Court DENIES Mr. Jones' motion to reconsider. [DE 66].

SO ORDERED.

ENTERED: August 1, 2016

/s/ JON E. DEGUILIO
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA **Plaintiff,** **vs.** **VINCENT JONES** **Defendant.**	**CASE NUMBER: 3:15CR048-001** **USM Number: 14417-027** **WILLIAM J COHEN** **DEFENDANT'S ATTORNEY**

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT was found guilty by a jury on count 1 of the Indictment on August 16 2016.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title, Section & Nature of Offense	Date Offense Ended	Count Number(s)
18:922(g)(1) FELON IN POSSESSION OF FIREARM	June 5, 2013	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in economic circumstances.

December 19, 2016
Date of Imposition of Judgment

s/ Jon E. DeGuilio
Signature of Judge

Jon E. DeGuilio, United States District Judge
Name and Title of Judge

December 19, 2016
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **97 months (to run concurrent to the undischarged sentence imposed in state court).**

The Court makes the following recommendations to the Bureau of Prisons, to the extent the defendant is ever under their control: That the Bureau of Prisons designate as the place of the defendant's confinement, if such placement is consistent with the defendant's security classification as determined by the Bureau of Prisons, a facility where he may receive anger management counseling; and that the defendant be placed in a facility as close as possible to his family in the Northern District of Indiana to facilitate regular family visitation.

The Court leaves it to the BOP to calculate any credit for time served.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered ____________________ to ______________ at ______________, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By: ______________________________
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **1 year.**

CONDITIONS OF SUPERVISION

1. The defendant shall not commit another federal, state, or local crime.

2. The defendant shall not unlawfully possess a controlled substance.

3. The defendant shall not unlawfully use any controlled substance, including marijuana, and shall submit to one drug test within 15 days of the beginning of supervision and at least 2 periodic tests after that for use of a controlled substance.

4. The defendant shall cooperate with the probation officer with respect to the collection of DNA.

5. The defendant shall report to the probation officer in the manner and as frequently as the court or the probation officer directs, and shall notify the probation officer within 48 hours of any change in residence, employer, position or location of employment and within 72 hours of being arrested or questioned by a police officer.

6. The defendant shall not knowingly travel outside the district without the permission of the probation officer, who shall grant such permission unless the travel would hinder the defendant's rehabilitation or present a public safety risk.

7. The defendant shall answer truthfully any inquiry by the probation office pertaining to the defendant's supervision and conditions of supervision, and shall follow the instruction of the probation officer pertaining to the defendant's supervision and conditions of supervision. This condition does not prevent the defendant from invoking the Fifth Amendment privilege against self-incrimination.

8. The defendant shall permit a probation officer to meet the defendant at home or any other reasonable location and shall permit confiscation of any contraband the probation officer observes in plain view. The probation officer shall not conduct such a visit between the hours of 11:00 p.m. and 7:00 a.m. without specific reason to believe a visit during those hours would reveal information or contraband that wouldn't be revealed through a visit during regular hours.

9. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon (meaning an instrument designed to be used as a weapon and capable of causing death or serious bodily harm).

10. Unless an assessment at the time of release from imprisonment or commencement of probation indicates participation to be unnecessary, the defendant shall participate in an anger management treatment program or aftercare program. The court will receive notification of such assessment. The defendant shall abide by all treatment program requirements and restrictions, consistent with the conditions of the treatment provider. The defendant will be required to participate in drug and /or alcohol testing, not to exceed 85 drug and/or alcohol tests per year. Upon the request of the defendant, treatment provider, or probation, the court may revise those conditions. The defendant shall pay all or a part of the costs for participation in the program, not

to exceed the sliding fee scale as established by the Department of Health and Human Services and adopted by this court. Failure to pay these costs will not be grounds for revocation unless the failure is willful.

Within 72 hours of defendant's release from prison, the probation officer is to meet with and remind the defendant of the conditions of his supervision and also to consider whether to recommend to the Court any modifications of or additions to those conditions in light of any changes in the defendant's circumstances since the sentencing hearing. Consistent with *United States v. Siegel* (7th Cir. May 29, 2014), the Court also directs the Probation Office to notify the Court within 30 days of defendant's placement on supervision so that it may consider any appropriate modifications to the defendant's supervised release and schedule a hearing on that topic, if necessary. The defendant may also request a modification of these conditions at any time by filing a written motion with the Court.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

Total Assessment	Total Fine	Total Restitution
$100.00	NONE	NONE

The defendant shall make the special assessment payment payable to Clerk, U.S. District Court, 102 Robert A. Grant Courthouse, 204 South Main Street, South Bend, IN 46601. The special assessment payment shall be due immediately.

Again, to the extent applicable, the defendant may also make payments for his financial obligations imposed herein from any wages he may earn in prison in accordance with the Bureau of Prisons Financial Responsibility Program, although participation in that program is voluntary. The defendant should note that failure to participate in the Financial Responsibility Program while incarcerated may result in the denial of certain privileges to which he might otherwise be entitled while imprisoned, and that the Bureau of Prisons has the discretion to make such a determination.

FINE

No fine imposed.

RESTITUTION

No restitution imposed.

Name: VINCENT JONES
Docket No.: 3:15CR048-001

ACKNOWLEDGMENT OF SUPERVISION CONDITIONS

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I have reviewed the Judgment and Commitment Order in my case and the supervision conditions therein. These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant	Date
U.S. Probation Officer/Designated Witness	Date