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 Division.
No. 3:15-cr-48 — Hon. Jon E. DeGuilio, *Judge*.

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is complete and correct.

ISSUE STATEMENTS

1. Convicted felon Vincent Jones molested his girlfriend's daughter. After learning this fact, Jones' girlfriend consented to a search of their shared home. Officers found firearms inside a safe. Did the district court clearly err in finding that, when officers arrived, the safe was open and firearms inside were plainly viewable?

2. Did the district court clearly err in crediting officer testimony that Jones never objected to the search and finding that Jones was not removed to prevent him from objecting?
3. Alternatively, did the district court err in concluding that the inevitable discovery doctrine applied because officers certainly would have obtained a search warrant and inevitably found the firearms based on the molestation allegations and Jones' girlfriend's report that he had guns in her home?

STATEMENT OF THE CASE

I. Nature of the case

A jury convicted Jones after a two-day trial of being a felon unlawfully in possession of firearms. (R. 84).[1] Jones appeals the denials of his motions to suppress firearms found in his home. The district court judge denied Jones' motions to suppress four times, crediting officer testimony that Jones never objected to his girlfriend's consent to search and the firearms were found in plain view during that search. (A1-13, A14-21, A22-28, JA167-70; *see also* JA1-8). The district court sentenced Jones to a 97-month term of imprisonment to run concurrently to his 40-year state child molestation conviction. (A29-34). See generally *Jones v. State*, 59 N.E.3d 361 (Ind. Ct. App. 2016) (unpublished)

[1] Citations to the district court record are designated as "R." followed by the PDF page number, to the first evidentiary hearing transcript (R. 34) as "Evid. Hrg," to the supplemental hearing transcript (R. 81) as "Supp. Hrg.," and to the trial transcripts (R. 108, 109) as "Tr.1" and "Tr.2" followed by the page number. Citations to Jones' brief as "Def. Br.," to his appendix as "A," and to his "Joint Appendix" as "JA."

II. The police officers' search and discovery of Jones' firearms.

In denying Jones' motions to suppress, the district court made the following findings:

On June 5, 2013, Jennifer Kelley and her teenage daughter, MK, called Westville, Indiana, police officers to report that Kelley's live-in boyfriend, Jones, had sexually abused MK. (A1). The department dispatched Marshal James Gunning and Deputy Marshal Jason Yagelski to Kelley's residence. (A1). Kelley was afraid to talk there, so officers took them to the station. (A1). MK said Jones had sexually assaulted her, and Kelley told officers that she was afraid for her life and the lives of her children since Jones had violent and aggressive tendencies. (A1-2). Kelley also said Jones was a convicted felon who had firearms in their bedroom. (A1). Officers ran a criminal history check and confirmed Jones had prior felony convictions. (A2).

The Westville officers, along with LaPorte County Sheriff Captain James Jackson, Sergeant Brian Piergalski, and Deputy Corey Chavez, escorted Kelley and MK back to the residence for the purpose of removing Jones from the residence. (A2). When Jones answered the door, Marshal Gunning told him he needed to leave. (A2). Gunning saw knives on the kitchen counter and asked if there were any weapons in the residence. (A2). Jones said "no just those knives over there." (A2). Jones retrieved a few personal items and then voluntarily went outside where the officers handcuffed him. (A2, A5, A24). They escorted

him to a picnic table 20 feet from the doorway where he sat throughout the search conversing with two officers. (A2, A5, A25 n.1 (noting Jones remained within "earshot" of the trailer)).

Sergeant Piergalski asked Kelley to sign a Consent to Search Form, which she freely did. (A2, A4, A14). The form permitted a warrantless search of her "residence and all rooms including enclosed boxes, safes etc." (A2). Jones never objected to the search. (A5, A16-18, A25). Sergeant Piergalski and Captain Jackson entered and saw in the bedroom two gun safes—a small one on top, a larger one on bottom—boxes of ammunition, and empty gun holsters. (A2). The door to the smaller safe was partially open and Sergeant Piergalski saw several firearms inside. (A2-3, A8, A10). He then opened the door further to better see the firearms. (A3).

At that point, a state prosecutor arrived and they all decided to stop the search and seek a warrant. (A3). A LaPorte County judge issued the warrant, allowing officers to search the home and the safe for evidence of sexual assault and firearms. (A3). Officers seized 12 firearms, over a thousand rounds of ammunition, seventeen clips, and several firearm scopes. (A3; *see also* R. 94 at ¶¶ 11, 15).

In custodial interviews, Jones claimed he did not live at Kelley's home and never saw any firearms there. (A16-17). However, he later confessed that

numerous firearms were his, and he had been living there for more than four years. (A16-17).

III. The district court denies Jones' pretrial motion to suppress and two motions to reconsider.

A. The district court denies Jones' motions to suppress.

After being indicted for being a felon unlawfully in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (R. 1), Jones moved to suppress the evidence seized in the June 2013 search. (R. 12). Jones claimed he had objected to the search, thereby invalidating Kelley's consent under *Georgia v. Randolph*, 547 U.S. 103 (2006). (R. 13). Acting by referral, (R. 14), a magistrate judge held an evidentiary hearing on October 19, 2015. (R. 24). All five officers present at the search testified. (R. 34). Relevant to the *Randolph* issue, they testified as follows:

- Deputy Yagelski confirmed Jones "at no time asked about searching the trailer, or what's going on with the trailer, or [said] you can't go in the trailer or anything like that";
- Marshal Gunning stated he had no interaction with Jones;
- Sergeant Piergalski testified that Jones never said "'[y]ou can't search this place. I live here. You can't go in,' or anything like that";
- Captain Jackson confirmed Jones never made "any comments about the search of the trailer or whether anybody could search the trailer or not"; and
- Deputy Chavez stated that Jones did not "at any time object to anybody searching or going into the trailer" and Jones did not have any "conversations concerning a search of the trailer or consent to search or search warrants or anything like that."

(JA39-40, JA59, JA77, JA93, JA103-04).

Sergeant Piergalski further testified that he searched the bedroom, where he saw a "smaller safe stacked on top of a larger safe," as well as "loose accessory items," like holsters and ammunition. (JA79). He recalled that the "smaller safe was unlocked or might have even been opened" and he "looked inside." (JA79).

This testimony prompted the magistrate to ask Sergeant Piergalski more questions about the safes. (JA81-82; *see also* JA87). The magistrate directly asked if the safes were closed, and Sergeant Piergalski responded "the bottom one was. The top one, I believe, was partially open." (JA81). Sergeant Piergalski specifically denied using a key to open the top safe. (JA87). He agreed with the magistrate that the "safe was open, you could see guns in the safe," and he opened the safe further to see the guns better. (JA88; *see also id.* ("It was open enough to see into initially, yes."); JA110 ("The door was partially ajar when I initially saw the guns, and then I opened it the rest of the way.")).

Captain Jackson confirmed that he and Sergeant Piergalski entered the bedroom and "it was obvious to see there was a safe that had the door open and there was holsters sitting there." (JA94). Captain Jackson was following behind Sergeant Piergalski and could see from his position that the safe was open and a holster exposed. (JA95-96). Because it had been over two years since the search, Captain Jackson had trouble remembering specific details,

such as exactly which safe was open and which was closed. (JA96, JA98). But, he was certain that one safe door was ajar a few inches, somewhat exposing the contents. (JA99-100).

At the end of the hearing, the magistrate raised on his own the issue of whether the plain view doctrine applied to the firearms inside the safe. (Evid. Hrg. 111-19). After additional briefing, (R. 26-28), the magistrate recommended denying the motion to suppress. (JA1-8). He found Kelley freely consented to the search and "there is no evidence whatsoever that Jones had any objection." (JA6-7). Once lawfully inside, Sergeant Piergalski "saw guns in the open safe," so the plain view doctrine applied to their discovery. (JA7-8).

Jones did not dispute the magistrate's factual findings, but objected to the recommendation and argued the magistrate did not address various legal arguments. (R. 32). The district court overruled Jones' objections. (A1-13). The court found that Kelley consented and Jones "never actually objected to the search," though he had "every opportunity" when he was outside and watching. (A5). The court also rejected Jones' contention that officers removed him to avoid objection, finding Jones voluntarily went outside and remained "nearby." (A5-6). Moreover, since "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" and they even had probable cause to arrest him. (A6-7).

Next, the court found the firearms were plainly visible inside the open safe. (A7-10). Sergeant Piergalski, who "was questioned on that topic at length during the hearing," was "consistent that he could see the firearms inside the safe before he opened it further." (A8). Captain Jackson corroborated Sergeant Piergalski's testimony that the safe was open. (A10). The court acknowledged Sergeant Piergalski's incident report, which he was questioned about, stated "[t]here was a key in the top smaller safe and the safe was unlocked, so I pulled the door open … and immediately observed" firearms. (A10). To the extent the report could be seen as inconsistent with Sergeant Piergalski's testimony, the court credited the hearing testimony. (A10). The court found this testimony particularly persuasive because, unlike the *Randolph* issue, neither party had briefed the plain view issue prior to the hearing. (A10 n.3). For that reason, the officers had "little reason to believe this testimony would be important such that they would have a motive to misstate" their testimony. (A10 n. 3). Because the firearms were in plain view, the district court declined to decide whether Kelley had the authority to consent to a search of the safe. (A7).

Even if the firearms were not in plain view, the court found they would have been admissible under the inevitable discovery doctrine. (A10-12). Officers had probable cause to search based on the sexual assault and firearms allegations, and it was "implausible to think" that they would not have sought a warrant. (A11-12).

B. The district court reopens the proceedings to allow Jones to testify and then denies his two motions to reconsider.

Jones moved to reopen suppression proceedings so he could testify, and the district court granted the motion. (R. 39, 43, 46). Jones then testified that Marshal Gunning and Deputy Yagelski followed him inside while he gathered his personal belongings and he told them he "didn't invite [them] in." (JA123). Then Deputy Chavez stepped inside, and Jones asked "don't you need a warrant?" (JA123; *see also* A16). The government presented two agents who confirmed Jones told them during interviews that he did not live at the residence and had not seen firearms inside. (JA133-40).

The court denied Jones' motion to reconsider and declined to credit Jones' testimony. (A14-21). The court noted that even "[t]hough there were some discrepancies as to which officers did what," the officers "testified that Mr. Jones never objected to any search or told the officers they could not be inside the home." (A16). Conversely, Jones "lied on multiple occasions in multiple respects," especially when he "perceived it to be in his interests." (A16-17). Finally, "Jones' conduct during and after the search was inconsistent with having objected," since he did not object while watching the search or raise the issue during interviews the next day. (A17). The court found that even if it credited Jones' testimony, "his statements to the officers would still not amount to an express refusal of consent." (A17).

The court also credited the officers' testimony that the gun safe was open, noting that "Sgt. Piergalski testified consistently in response to persistent and precise questioning" and Captain Jackson corroborated that the safe was open. (A20). Jones, conversely, "has ample motive to lie, and has shown himself willing to do so when he perceives it to be expedient." (A20).

Jones filed a second motion to reconsider, asserting the court should have credited his testimony and the officers unlawfully seized him when they removed him from the residence. (R. 66). The court denied the motion, reiterating its credibility findings and that Jones consensually left and officers lawfully kept him outside "both for officers' safety during their inquiry into the presence of weapons and also because the officers had probable cause to arrest him." (A24).

IV. The district court denies Jones' oral motion to suppress at trial.

On direct examination at Jones' August 2016 jury trial, Sergeant Piergalski testified that during the June 2013 search the "top safe was also cracked open, ajar just a bit" and he "saw some firearms" inside. (JA151; *see also* JA153). On cross-examination, he confirmed the safe was open and he could see inside. (JA156-57). Defense counsel then showed Sergeant Piergalski his incident report and asked:

> **Q:** So apparently you didn't see the handguns in there until you opened the door of that smaller safe: is that correct?

> **A:** Apparently. I just remember looking inside there with a flashlight first before I pulled the safe open just to make sure there was nothing, no booby traps or anything like that going on.

(JA159). During redirect, Sergeant Piergalski confirmed the "top safe door was ajar," and there "was at least one gun that was in there." (JA162-63).

Shortly after Sergeant Piergalski left the stand, the government sought to admit the first recovered firearm through another witness. (JA164). Defense counsel objected "for the same reasons that I set forth in my previous memos and briefs …" (JA164). The court dismissed the jury. (JA166). After a recess, the court denied the motion in an oral order spanning four transcript pages. (JA167-70). The court acknowledged that Sergeant Piergalski's cross-examination testimony was "potentially inconsistent with his testimony at the suppression hearing and with the Court's findings" since he "suggested that he may not have seen the handguns inside that safe until he opened the door." (JA168). However, the court found it "possible to interpret his testimony as saying that while he saw contraband inside the safe before opening it he immediately saw all of the firearms inside the safe once it was opened." (JA168). The court found that the "appropriate" interpretation in light of Sergeant Piergalski's other testimony. (JA168-69).

To the extent there was an inconsistency, "the previous testimony [was] more credible" because Sergeant Piergalski testified "consistently at the

suppression hearing in response to precise and repeated questioning." (JA169). Piergalski's hearing testimony was "about ten months ago, and his recollection of events was likely better then than it is now." (JA169).

In addition to testimony from the officers and Kelley, (*e.g.,* Tr.1 at 112-13), the government introduced pictures of Jones holding and shooting guns, (Tr. 1 at 115-22), and witnesses who regularly saw Jones with guns, bought guns from him, and sold him guns. (Tr. 1 at 113-14, 129-36; 140; Tr.2 at 16-17). The jury convicted Jones, (R. 88), and the district court sentenced him to 97 months' imprisonment to run concurrently with the undischarged portion of his 40-year state molestation sentence. (A29-34).

SUMMARY OF THE ARGUMENT

The district court did not clearly err by crediting the officers' testimony that the safe was ajar and the firearms were in plain view. Nothing the officers said was so inconsistent or implausible that no reasonable factfinder could credit it. The court reconciled Sergeant Piergalski's testimony on cross-examination with the other testimony and evidence. It alternatively found that if the statements were inconsistent, the cross-examination testimony—based not on personal recollection but review of a three-year old report—was likely wrong. That finding was not contrary to the laws of nature or clearly erroneous.

The district court also did not clearly err in crediting the officers' testimony that Jones never objected to the search rather than Jones' self-

serving claim that he did. The court further found correctly that it was objectively reasonable for the officers to detain and handcuff Jones near the residence during the search. None of this violated the Fourth Amendment.

Even had there been a Fourth Amendment violation, the district court properly concluded in the alternative that the officers would have inevitably discovered the firearms. The court properly found the officers would have obtained a warrant based on MK's allegations that Jones molested her and Kelley's statements that Jones was a felon who had numerous firearms in her home. The exclusionary rule therefore does not apply.

ARGUMENT

I. The district court did not clearly err by finding that the officers plainly viewed firearms inside the open safe.

This Court reviews the district court's decisions denying Jones' motions to suppress under a dual standard. *United States v. Jackson*, 598 F.3d 340, 344 (7th Cir. 2010). Legal conclusions are reviewed *de novo* and factual findings for clear error. *Id.* A factual finding is clearly erroneous "only if, after considering all the evidence, [this Court] cannot avoid or ignore a definite or firm conviction that a mistake has been made." *Id.* (internal citations and quotations omitted). Whether Jones objected to the search and whether the firearms were in plain view are both factual findings reviewed for clear error. *United States v. Hicks*, 539 F.3d 566, 569 (7th Cir. 2008) (objection to search); *United States v.*

DiModica, 468 F.3d 495, 499 (7th Cir. 2006) (consent to search); *United States v. Kenerson*, 585 F.3d 389, 393 (7th Cir. 2009) (plain view); *United States v. Smallwood*, 188 F.3d 905, 911 (7th Cir. 1999) (same).

This Court gives "special deference" to a district court's credibility determinations and will "uphold them unless 'completely without foundation' in the record." *United States v. Nichols*, 847 F.3d 851, 857 (7th Cir. 2017) (internal citation omitted). This Court only reverses if the "trial court has credited testimony that is contrary to the laws of nature or so internally inconsistent or implausible on its facts that no reasonable factfinder would credit it." *United States v. Contreras*, 820 F.3d 255, 263 (7th Cir. 2016) (internal quotation and bracket omitted). A choice between "two permissible views of the evidence … cannot be clearly erroneous." *Id.* Even if there are inconsistencies in a witness' testimony, it "can virtually never be clear error" if the district court credits one version and explains why. *United States v. Acosta*, 534 F.3d 574, 584 (7th Cir. 2008); *Contreras*, 820 F.3d at 265-66.

Jones first argues that Sergeant Piergalski violated his Fourth Amendment rights by searching for the firearms inside the safe. (Def. Br. 15-21). Jones does not dispute that the court applied the proper legal standard in reviewing his motions to suppress. Nor does he challenge as contrary to the laws of nature the officers' testimony that the safe was open. Jones instead argues that the court clearly erred by crediting the suppression hearing

testimony of Sergeant Piergalski and Captain Jackson and finding as fact that the safe was open when the officers arrived. (Def. Br. 16-18).

An officer does not conduct a Fourth Amendment "search" if he observes an item in plain view. *Horton v. California*, 496 U.S. 128, 134 n.5 (1990). Therefore an officer can seize any item in plain view if the officer is lawfully present and the item's incriminating character is immediately apparent. *Id.* at 136-37; *Contreras*, 820 F.3d at 262. Jones does not dispute that, once the safe was open, the guns were plainly visible and their illegal nature (based on his felony convictions) was immediately apparent. The only relevant question is whether the court clearly erred by crediting the officers' testimony that the safe was already open when they arrived. This argument boils down to two plausible conclusions: the safe was ajar or it was not. The court therefore had in front of it "two permissible views of the evidence." *Contreras*, 820 F.3d at 263. Jones cannot show the officers' testimony was "contrary to the laws of nature or so internally inconsistent or implausible on its facts that no reasonable factfinder would credit it," so he cannot show clear error. *Id.*; *see also Nichols*, 847 F.3d at 857-58 (finding no clear error where court resolved "straightforward credibility contest").

Jones' entire argument rests on Sergeant Piergalski's trial testimony on cross-examination that, based on a review of his police report, he "[a]pparently" did not see any firearms until after opening the safe. (JA159). But the district

court gave solid reasons for rejecting the conclusion that this testimony contradicted prior testimony from the suppression hearing and on direct and redirect at trial that the safe was ajar. (JA79-82, JA87-88, JA110, JA151, JA153, JA162-63). Instead, the court deemed it "appropriate" to find the statements reconcilable and to interpret Sergeant Piergalski's report as saying he saw contraband (*e.g.*, at least one firearm) inside the already ajar safe and then immediately saw all the firearms once he opened the safe further. (JA168-69). This is a plausible interpretation of the testimony, and certainly not clear error. *Contreras*, 820 F.3d at 265-66 (affirming court's credibility finding because court could find "variations were not significant nor even contradictory").

Furthermore, the court was within its rights to find that, if the statements were irreconcilable, it would credit Sergeant Piergalski's statements on direct and redirect and during the earlier evidentiary hearing. (JA169). By acknowledging a potential inconsistency and explaining why it chose to believe one version over the other, the court did not commit clear error. *See, e.g., United States v. Common*, 818 F.3d 323, 329-30 (7th Cir. 2016) (affirming credibility determination where court acknowledged police report was potentially inconsistent but reconciled statements); *see also Acosta*, 534 F.3d at 583. Sergeant Piergalski's testimony that the safe was open was clear, consistent, and ten months closer in time to the search. *United States v. Tapia*,

610 F.3d 505, 512 (7th Cir. 2010) ("Timing is valid consideration when assessing the reliability and credibility of witnesses."). It was also consistent with Captain Jackson's unequivocal testimony that "it was obvious to see there was a safe that had the door open." (JA94; *see also* JA95-96 (Captain Jackson "saw one of the safes that was open," and the "door was open on the safe")).

Even if there was some potential inconsistency in Sergeant Piergalski's testimony, the court addressed the matter head-on. It was well within its rights to decide, based on the entire record, that the safe was ajar. *Acosta*, 534 F.3d at 583-84; *see also United States v. Terry*, 572 F.3d 430, 435 (7th Cir. 2009) (affirming credibility determination despite "regrettable" mistakes in officers' testimony).

Because the firearms were in plain view in the ajar safe, Sergeant Piergalski did not conduct a "search" when he saw them, the Fourth Amendment was not implicated, and there was no basis to suppress any evidence. Kelley's ability to consent to a search of the safe, (Def. Br. 15-16, 18-21), is therefore irrelevant and this Court should affirm.

II. The district court did not clearly err by crediting officer testimony that Jones did not object to the search.

No warrant is needed to search a home when a homeowner or occupant consents to the search. *Fernandez v. California*, 134 S. Ct. 1126, 1132 (2014). Jones does not contest that, standing alone, Kelley could validly consent to a

search of her own home. However, if a physically present co-occupant expressly and unequivocally objects to the search, that objection invalidates another co-occupant's consent. *Id.* at 1333; *Georgia v. Randolph*, 547 U.S. 103, 107 (2006). This Court reviews the court's finding that Jones did not object for clear error. *Hicks*, 539 F.3d at 569.

A. The district court did not clearly err in rejecting Jones' testimony.

Jones argues he objected, which, if true, would render Kelley's consent invalid and the officers' search of the residence a violation of the Fourth Amendment. (Def. Br. 21-31). But the district court found that Jones' testimony that he objected was false, and that finding was not clear error.

By the time of the second evidentiary hearing, the district court had heard two versions of whether Jones objected to the search. The officers testified at the first hearing that Jones never objected. (JA39-40, JA59, JA77, JA93, JA103-04). Jones testified at the second hearing that he did object. (JA123). Both versions were plausible since there is nothing "contrary to the laws of nature" or "so internally inconsistent or implausible on its facts" about either scenario. *Contreras*, 820 F.3d at 263. Faced with "two permissible views of the evidence," the court's decision to credit the officers was not clearly erroneous. *Id.*

In arguing clear error, Jones incorrectly characterizes his hearing testimony as "uncontroverted." (Def. Br. 23-28). True, after Jones asserted at the second hearing that he objected to Deputy Yagelski, Marshal Gunning, and Deputy Chavez, the government did not recall those officers to refute Jones' tale. But there was no need to do so. Each officer had already provided testimony that directly controverted Jones' claims. Deputy Yagelski testified Jones never said "you can't go into the trailer or anything like that"; Marshal Gunning said he never interacted with Jones; and Deputy Chavez confirmed that Jones never "object[ed] to anybody searching or going into the trailer." (JA39-40, JA59, JA103-04). This testimony directly contradicted Jones' later assertions that he objected and provided the court an "evidentiary basis" for its finding. *Ray v. Clements*, 700 F.3d 993, 1017 (7th Cir. 2012) (finding clear error where state presented no evidence to rebut petitioner's assertions).

Without acknowledging the court's reliance on the officers' testimony, Jones argues the court "ignored the serious inconsistencies" in their statements, namely who spoke to Jones first, who handcuffed him, and where officers took him. (Def. Br. 27-28). Yet the district court acknowledged there were "discrepancies as to which officers did what," but those "can be expected," and the court chose to credit the officers' uniform testimony that Jones never told any of them he objected to the search. (A16). While a court should weigh minor inconsistencies when assessing credibility, such inconsistencies "do not

render the credibility determination clearly erroneous." *United States v. Jones*, 614 F.3d 423, 425-26 (7th Cir. 2010); *see also United States v. Freeman*, 691 F.3d 893, 900 (7th Cir. 2012) (noting "small inconsistencies" and "[m]inor inconsistencies like this do not justify reversal").

Instead of explaining why it was clear error to accept the officers' testimony, Jones argues it was clear error to discredit his testimony. (Def. Br. 23-28). Yet, as the district court noted, Jones lied to the officers before and after the search about whether he lived there and had firearms in the house. (A16-17; *see* JA38-39, JA76, JA135, JA139-40). Jones admitted under oath that he lied. (JA131). Though Jones argues his lies were irrelevant because they pertained to "unrelated matters," (Def. Br. 25), the court properly determined those lies showed Jones was willing to change his story when it benefited him. (A16-17, A20). Jones surely had a strong incentive to lie about whether he objected to the search, as the lie might induce the court to grant his motion. *Cf. United States v. Gregory*, 795 F.3d 735, 744 (7th Cir. 2015) (affirming credibility determination based in part on witness' incentives to lie).

Moreover, the court found Jones' testimony was contrary to common sense. If he really had a problem with the search, he would have voiced that while watching the officers search the area or during the interviews the next day. (A17). Jones did neither, further supporting the court's finding. *Cf. United States v. Gonzalez-Ruiz*, 794 F.3d 832, 835-36 (7th Cir. 2015) (noting "crucial

fact" in determining ambiguous consent was defendant's "failure to protest" when officers began to search). Because the district court took a permissible view of the evidence, it did not commit clear error. *Contreras*, 820 F.3d at 263.

B. Jones' testimony did not establish an objection to the search.

Even if this Court thought the district court was compelled to accept Jones' testimony as truthful, it should affirm. Contrary to Jones' arguments on appeal, (Def. Br. 28-31), the district court did not clearly err in concluding that Jones' claimed statements that he did not invite the officers in and asked "don't you need a warrant?" were not unequivocal objections. (A17-18).

Jones has not shown a definite or firm conviction that a mistake has been made since, at best, the statements are equivocal. *See Hicks*, 539 F.3d at 568-69 (finding statement "What are you doing here?" did not constitute objection). Jones' statement that he did not invite the officers in is a factual assertion, not an unequivocal objection to their presence. Similarly, "don't you need a warrant?" is a question not an objection. *Cf. United States v. Wysinger*, 683 F.3d 784, 794-95 (7th Cir. 2012) (collecting cases and noting "Do I need a lawyer before we start talking?" is not unequivocal request for lawyer). Again, "[t]o the extent that there was any residual ambiguity," about the character of Jones' purported objections, "it was eliminated when [officers] began the search and [Jones] did not object." *Gonzalez-Ruiz*, 794 F.3d at 835-36.

C. The district court did not clearly err in finding that officers had an objectively reasonable basis to remove Jones from the home.

Alternatively, Jones contends that if this Court disagrees with his argument that he objected, it should still reverse because the officers removed him to prohibit him from registering an objection. (Def. Br. 31-34 (citing *Rodriguez* and *Randolph*)). But Jones does not dispute the district court's finding that Jones "voluntarily exited the residence at the request of the officers." (A5-6; *see* JA39, JA50). He even cites that finding, (Def. Br. 11), and concedes that he "followed the officers' instructions to step out of the house." (Def. Br. 33). Jones' argument fails from the get-go since he left voluntarily. Nor was he "removed" from the premises. Rather, he was only 20 feet away from the searching officers and could see and hear what they were doing. (A5). Since he was "nearby but not invited to take part in the threshold colloquy," Jones was not removed and "loses out." *Randolph*, 547 U.S. at 121; *cf. United States v. Lopez*, 547 F.3d 397, 400 (2d Cir. 2008) (holding defendant on premises during search was not removed).

Even assuming the officers removed Jones, the test is whether "the removal of the potential objector is … objectively reasonable," and Jones' removal was. *Fernandez*, 134 S. Ct. at 1134. When the officers arrived they knew that MK had accused Jones, a convicted felon, of molesting her, that Kelley had accused Jones of illegally possessing weapons inside her house, and

that Kelley feared Jones might be violent. (A6-7). Trial counsel rightfully conceded that these reports of credible victims provided officers with probable cause to arrest Jones for multiple crimes. (A6-7); *see also United States v. Pelletier*, 700 F.3d 1109, 1116-17 (7th Cir. 2012) (discussing probable cause). Add in the knives the officers saw when Jones opened the door, and they had strong objective reasons to remove him from the residence. *United States v. Walden*, 146 F.3d 487, 491 (7th Cir. 1998) ("[A] criminal record in conjunction with other information can form the basis of a reasonable suspicion.").

Jones asserts that his case is unlike *Fernandez* because he was not under arrest. (Def. Br. 32-33). But *Fernandez* did not say the only reasonable basis for removal is an "arrest." Rather, the Supreme Court's decision covered officers who "detain or arrest a potential objector," and the Court looked at a "removed" "occupant who is absent due to a *lawful detention* or arrest," without limiting its holding to arrested defendants. 134 S. Ct. at 1134 (emphasis added); *cf. United States v. Brewer*, 588 F.3d 1165, 1169-70 (8th Cir. 2009) (applying *Randolph* "removal" analysis when police did not arrest defendant but told him he had to leave house because of "ex parte order of protection"). At any rate, since the analysis is objective and it would have been objectively reasonable to arrest Jones on these facts, it was equally reasonable for the officers to handcuff and detain him outside the residence while they searched pursuant to Kelley's consent. Because the officers' actions complied with

Randolph and *Fernandez*, the district court did not err in denying the motions to suppress.

III. The district court did not err by finding the officers would have inevitably discovered the firearms based on the evidence of sexual abuse and Jones' unlawful possession of firearms.

Even if this Court finds the district court clearly erred in making its credibility determinations, and even assuming the officers violated Jones' Fourth Amendment rights, Jones still cannot prevail because the district court properly concluded that the evidence would be admissible under the inevitable discovery doctrine.

An exception to the exclusionary rule, the inevitable discovery doctrine permits introduction of unconstitutionally obtained evidence. *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016). The doctrine applies if the government shows by a preponderance of the evidence that: "(1) it had, or would have obtained, an independent, legal justification for conducting a search that would have led to the discovery of the evidence; and (2) … it would have conducted a lawful search absent the challenged conduct." *United States v. Howard*, 729 F.3d 655, 663 (7th Cir. 2013).

The inevitable discovery doctrine is "closely related to," but distinct from, the independent source doctrine, which asks whether the evidence was "discovered by means wholly independent of any constitutional violation." *Nix v. Williams*, 467 U.S. 431, 443 (1984). While inevitable discovery looks

prospectively—would the officers have found the firearms—independent source looks retroactively—did the officers find the firearms through an untainted source. *See, e.g., United States v. Markling*, 7 F.3d 1309, 1318 n.1 (7th Cir. 1993) (comparing doctrines). Jones' brief relies heavily on *Murray v. United States*, 487 U.S. 533 (1988), and argues the facts of Jones' case fail to meet *Murray*'s test. (Def. Br. 34-43). But *Murray* analyzes the independent source, not inevitable discovery, doctrine. 487 U.S. at 539-40 (noting "distinct requirements" of two doctrines).

As the district court properly found, and as Jones' trial counsel conceded, there "is no question that the officers had probable cause for a search warrant even prior to their initial entry." (A11, A20). The officers knew that Jones had been accused of molesting his daughter, was a felon, and had numerous firearms in the house. They knew Kelley was scared that the violent Jones would use those firearms. (A11, A20-21). These facts provided ample probable cause to search the residence without relying on any evidence found inside. *United States v. Are*, 590 F.3d 499, 507 (7th Cir. 2009) (holding discovery inevitable where officer knew defendant was felon and had firearm in house). Jones does not cite this finding or argue it was erroneous.

Next, the court properly found it "unthinkable that the officers would not have sought a search warrant" absent the entry. (A20-21; *see also* A11). Jones suggests that the officers were only at the house to evict him and that they

"exploited" their presence in the area to conduct a search. (Def. Br. 13-14, 34-46). Yet his argument all but ignores the "separate investigation," (Def. Br. 3, nn. 3, 8), that actually brought the officers to the residence: MK's admission that Jones molested her. Once MK reported the molestation, Kelley said she did not want Jones in her house anymore because, among other things, she was scared for both her own safety and her daughter's safety since Jones was a convicted felon who had firearms in the house and "had violent and aggressive tendencies." (A20).

Given that background, the officers arrived at Kelley's house to remove Jones and ensure their safety as well as that of MK and Kelley. They then sought and obtained a search warrant based "not only upon guns but also evidence of a possible sex offense." (JA58; *see also* R. 66-2 at 3-4 (transcript of warrant proceedings seeking oral warrant to investigate "molest[ation] or rape" reported by MK, as well as the fact that Jones was a convicted felon)). Thus, a magistrate judge "intended to permit the search and seizure that occurred" and this Court "know[s] that no lawful interest of [Jones'] was harmed by the constitutional error." *United States v. Stefonek*, 179 F.3d 1030, 1035 (7th Cir. 1999). It is "unreasonable to think that" on this evidence, the officers "would have failed to follow up and obtain a search warrant." *Pelletier*, 700 F.3d at 1116-18. The inevitable discovery doctrine applies.

Jones argues counterfactually that the firearms' discovery would not have been inevitable because Kelley "had been considering demanding that Jones move out" and so he might have left before officers could have arrived armed with a warrant. (Def. Br. 43-44). Jones points to no evidence in the record that Kelley had been considering kicking him out. To the contrary, the only reasonable inference from the record is that Kelley reacted to MK's allegations and Jones did not know Kelley was kicking him out until after the fact. Based on the facts of this case, the officers would have inevitably searched the house and found the firearms.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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RULE 32 CERTIFICATION

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,355 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word word processing program, with thirteen point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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