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

REPLY BRIEF OF DEFENDANT-APPELLANT VINCENT JONES

Matthew S. Hellman
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001

David A. Strauss
Sarah M. Konsky
Counsel of Record
Joshua B. Pickar (Ill. Sup. Ct. R. 711
License Number 2017LS00234)
JENNER & BLOCK SUPREME
COURT AND APPELLATE CLINIC
AT THE UNIVERSITY OF CHICAGO
LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
773-834-3190

Counsel for Defendant-Appellant

Dated: May 5, 2017

ORAL ARGUMENT SCHEDULED FOR MAY 16, 2017

TABLE OF CONTENTS

REPLY ARGUMENT 1

I. The Plain View Doctrine Does Not Apply Because the District Court Clearly Erred in Crediting the Officer's Prior Inconsistent Testimony that One of the Safes Was Open 1

II. The Officers' Unconstitutional Search Violated *Randolph* and *Fernandez*.. 4

A. Jones properly objected to the officers' search under *Randolph* 5

B. The officers unconstitutionally removed Jones from his residence for the purpose of preventing him from objecting 9

i. The officers removed Jones 9

ii. Jones was not absent due to a lawful arrest or detention 11

III. The Inevitable Discovery Doctrine is Inapplicable 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. City of Bessemer City, North Carolina,
470 U.S. 564 (1985) 3

Blake v. United States,
814 F.3d 851 (7th Cir. 2016) 2, 4

Chicago, Rock Island & Pacific Railway Co. v. Howell,
401 F.2d 752 (10th Cir. 1968) 7

Fernandez v. California,
134 S. Ct. 1126 (2014) 4, 9, 11, 12, 13

Georgia v. Randolph,
547 U.S. 103 (2006) 4, 5, 9

Michigan v. Long,
463 U.S. 1032 (1983) 13

Murray v. United States,
487 U.S. 533 (1988) 15

Selle v. Gibb,
741 F.2d 896 (7th Cir. 1984) 6

Terry v. Ohio,
392 U.S. 1 (1968) 13

United States v. Brown,
328 F.3d 352 (7th Cir. 2003) 17

United States v. Brown,
64 F.3d 1083 (7th Cir. 1995) 15-16

United States v. Contreras,
820 F.3d 255 (7th Cir. 2016) 2

United States v. Henderson,
536 F.3d 776 (7th Cir. 2008) 6, 8

United States v. Johnson,
380 F.3d 1013 (7th Cir. 2004) 15, 16

United States v. Liss,
103 F.3d 617 (7th Cir. 1997) 18

United States v. Madrid,
152 F.3d 1034 (8th Cir. 1998) 15

United States v. Markling,
7 F.3d 1309 (7th Cir. 1993) 17, 18

United States v. Marrocco,
578 F.3d 627 (7th Cir. 2009) 14, 15, 16, 17

United States v. Pelletier,
700 F.3d 1109 (7th Cir. 2012) 15

United States v. Tatman,
397 F. App'x 152 (6th Cir. 2010)... 8

United States v. Tejada,
524 F.3d 809 (7th Cir. 2008) 18

United States v. Thomas,
955 F.2d 207 (4th Cir. 1992) 16

United States v. Witzlib,
796 F.3d 799 (7th Cir. 2015) 10, 11

United States v. Wysinger,
683 F.3d 784 (7th Cir. 2012) 8

REPLY ARGUMENT

I. The Plain View Doctrine Does Not Apply Because the District Court Clearly Erred in Crediting the Officer's Prior Inconsistent Testimony that One of the Safes Was Open.

As Jones established in his Opening Brief, the officers' warrantless search of Jones's safe violated the Fourth Amendment. The government does not dispute that Kelley lacked actual or apparent authority over Jones's safes and therefore could not consent to their search. *See* Gov't Br. 17–18. Rather, the government contends that the warrantless search of Jones's safe was permissible because: (a) Kelley gave valid consent to search the residence, and (b) the search of the safe falls within the "plain view" exception to the warrant requirement. Gov't Br. 17. As discussed further in Section II, Kelley's consent to search the residence was not sufficient in light of Jones's objection and the officers' subsequent removal of Jones from the property. But regardless, the search of the safe was also unconstitutional for the independent reason that the "plain view" exception is inapplicable here.

The government's plain view argument is based on an officer's testimony that, when the officers arrived, one of the safes was open and the firearms inside it were visible. But this same officer later admitted, under oath, that this testimony was not true.[1] In his original police report, filed "right after" the actual 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

[1] The government does not dispute that, if the safes in fact were closed when the officers arrived, the officers' warrantless search of the safes would not have been permissible under the plain view exception. Gov't Br. 15.

immediately observed several handguns and much ammunition." JA157–59; JA107–08. Thus, the police report states that he opened the safe, and *then* observed the handguns and ammunition inside. More than three years later during the proceedings in this case, Sgt. Piergalski testified in conflict with his police report that one of the safes was actually open when he arrived. *See* JA79–80; JA86–88, 108–9. However, when confronted with his police report during his final trial testimony, Sgt. Piergalski admitted that the police report was accurate and that "[he] opened the door for officer safety and immediately observed several handguns." JA159.

The district court committed clear error in crediting Sgt. Piergalski's prior inconsistent testimony, instead of his subsequent admission at trial that his prior assertions were untrue. While credibility findings are reviewed for clear error, that review is not a mere "rubber stamp," *United States v. Contreras*, 820 F.3d 255, 263 (7th Cir. 2016), and reversal is warranted where, as here "credited testimony is internally inconsistent, implausible, or contradicted by extrinsic evidence." *Blake v. United States*, 814 F.3d 851, 854–55 (7th Cir. 2016).

It was clear error for the district court to credit Sgt. Piergalski's testimony that one of the safes was open, when Sgt. Piergalski admitted both in his contemporaneous police report and his final testimony at trial that the safes were closed and he only saw Jones's guns once he opened one of the safes. The district court decided to credit Sgt. Piergalski's prior inconsistent testimony for two reasons: (1) "Sergeant Piergalski's testimony on cross-

examination was somewhat vague as to the order of events," and (2) "even to the extent Sergeant Piergalski's testimony on cross-examination is inconsistent with his prior testimony and his testimony on direct examination, the Court finds the previous testimony more credible." JA168–69. Neither passes muster, even under the clear error standard of review.

This is not a situation where there are two reasonable interpretations of testimony at trial and the district court chooses the more credible one. *Cf. Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–74 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Instead, the district court was choosing between an officer's admission "right after" searching Jones's residence, and his musings to the contrary three years later during the proceedings in the case. Even more critically, the district court also ignored Sgt. Piergalski's ultimate admission that the safes were closed, an admission made under oath, after he was confronted with his own statements in the contemporaneous police report.[2] *See* JA167–69. And the district court's conclusion also

---

[2] The government also points to Captain Jackson's testimony to support its claim. *See* Gov't Br. 17. However, the district court did not rely on this testimony in reaching its finding, and this Court thus should not rely on it either. Jackson's testimony is vague at best, as well. His full testimony was: "Once we walked in there, Sergeant Piergalski looked around, and it was obvious to see there was a safe that had the door open and there was holsters sitting there. Apparently he opened the door up on the safe, and he could observe what appeared to be either ammunition and/or weapons." JA94. This testimony does not establish that Sgt. Piergalski saw weapons in an open safe before opening the door to the safe and, in any event, is not sufficient to overcome Sgt. Piergalski's sworn testimony that he did not.

completely disregarded Jones's truthful testimony that his safes were closed and locked. *See id.*

Not only is the district court's decision based on testimony that was "internally inconsistent [and] implausible" in light of Sgt. Piergalski's subsequent admission, but it was also "contradicted by extrinsic evidence" in the form of the police report.[3] *Blake*, 814 F.3d at 854–55. Because it was clearly erroneous for the district court to credit Sgt. Piergalski's testimony regarding whether the safes were closed when it contradicted the original police report and his own admission on cross-examination that the safes were closed, the Court should reverse.

II. The Officers' Unconstitutional Search Violated *Randolph* and *Fernandez.*

The officers' warrantless search of Jones's residence also violated the Fourth Amendment. The government seeks to justify the warrantless search on the grounds that the officers received consent from Jones's co-tenant, Kelley. But as Jones established, Op. Br. 15-21, Kelley's consent to search the residence was not sufficient under the Supreme Court's decisions in *Georgia v. Randolph*, 547 U.S. 103 (2006), and *Fernandez v. California*, 134 S. Ct. 1126 (2014), for several independent reasons. The government's arguments in defense of the district court's ruling are meritless.

---

[3] In ruling on Jones's second motion to reconsider the denial of his motion to suppress, the district court refused to credit the police report, instead "find[ing] the testimony at the [suppression] hearing more probative and persuasive." A10. This was prior to Sgt. Piergalski's admission at trial that the police report in fact was correct, however. In light of that testimony, it was clearly erroneous for the trial court not to credit the police report.

A. Jones properly objected to the officers' search under *Randolph.*

Jones was present and objected to the officers' search of his residence, and his objection therefore overrode Kelley's consent under *Georgia*, 547 U.S. at 109. Jones testified that, while still in the trailer and before the officers removed him to the picnic table, he said to the officers that he did not "need any help finding my keys or wallet, and I didn't invite you in," and he questioned "[d]on't you need a warrant" to search his residence. JA123. As a result, there was not valid consent for the warrantless search, and the entire search of the residence violated the Fourth Amendment.

Jones established in his opening brief that the district court clearly erred in failing to credit Jones's uncontroverted testimony that he made these two statements, especially in light of the significant inconsistencies in the officers' own testimony. *See* Op. Br. 23–30. In response, the government argues that Jones's testimony was not uncontroverted, because the officers "testified at the first hearing that Jones never objected." Gov't Br. 18–19. However, the government's characterization of the five officers' testimony is erroneous. Officer Piergalski's and Captain Jackson's testimony in no way bears on the question of whether Jones objected to the police's search, as they had not yet entered the residence and would not have been present to hear Jones's objections. *See* JA123–24. And the government's representation of the others' testimony is similarly problematic. For example, Marshal Gunning testified that he never had "any conversations with Mr. Jones *when he was outside*." JA59 (emphasis added); *see also* JA39–40 (Yagelski testifying that "[t]here was no conservation

from Mr. Jones at all" once he "was brought out to . . . [the] picnic table"). Finally, Deputy Chavez's testimony that Jones did not "at any time object" is not inconsistent with Jones's testimony, as Chavez very well could have heard Jones's statements, but truthfully answered the question in the negative because he did not consider them to be "objecting." *See, e.g.*, *United States v. Henderson*, 536 F.3d 776, 777–78 (7th Cir. 2008).

But the officers' testimony is even further confused. When directly asked about the threshold colloquy, four of the five officers could not recall what conversation took place. JA48 (Deputy Yagelski testifying that he did not recall whether, at the door, Jones "t[old] them not to come in"); JA75-6 (Sergeant Piergalski testifying that he did not recall what Jones said when he opened the door); JA92 (Captain Jackson testifying that he did not recall the conversation at the door); JA103 (Deputy Chavez testifying that he could not recall who knocked on the door or if Jones answered the door). The fifth and final officer—Marshal Gunning—testified only that he "had no interaction with Mr. Jones." JA59. The government is simply incorrect that "[e]ach officer had already provided testimony that directly controverted Jones' claims." Gov't Br. 19.

Indeed, the officers' lack of contradictory testimony is striking, because Jones's statements are exactly the type of testimony that could easily be controverted, as all of the officers were present at the residence and could have testified as to what was said prior to Jones exiting the residence. *See Selle v. Gibb*, 741 F.2d 896, 903 (7th Cir. 1984) (upholding district court judge's

conclusion that the factfinder cannot reject testimony without impeachment, contradiction, or inconsistency); *accord Chicago, Rock Island & Pac. Ry. Co. v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968) ("[T]estimony concerning a simply fact capable of contradiction, not incredible, and standing uncontradicted, unimpeached, or in no way discredited by cross examination, must be taken as true.") (citing *Chesapeake & O. Ry. Co.*, 283 U.S. 209, 209). While the government points to the fact that Jones testified after the officers did as the reason for why there was no directly opposing testimony, Gov't Br. 19, the government could have called the officers back to the stand after Jones testified to refute his testimony.[4] Indeed, the government called Detective Jennifer Rhine-Walker and Agent Michael Solan for examination after Jones, so it is not as though the trial court prevented the government from calling witnesses at this late moment in the proceedings. *See* JA133, JA135. Accordingly, Jones's testimony was uncontroverted. Given his uncontroverted testimony and the significant inconsistencies in the officers' own testimony, *see* Op. Br. 23–30, it was clear error for the district court not to credit Jones's testimony.

Further, the government has no persuasive argument that Jones's uncontroverted statements did not rise to the level of an objection under *Randolph*. Indeed, Jones's statements are analogous to other statements that this Court has deemed sufficient. *See* Op. Br. 28–31. Counsel for Jones is

---

[4] Additionally, the trial court's refusal to credit Jones's testimony because he had lied about unrelated matters while not under oath was erroneous, as there is no evidence that Jones ever lied under oath.

unaware of any case in which this Court held that a question cannot constitute an objection, as the government suggests, nor does the government cite any authority for this proposition. *Cf.* Gov't Br. 21. Jones's first statement questioning "don't you need a warrant" amounts to a refusal to consent. And his second statement that he "didn't invite [the police] in" independently amounts to a refusal to consent under this Court's precedent, as well. *See, e.g.*, *Henderson*, 536 F.3d at 777–78; *see also United States v. Tatman*, 397 F. App'x 152, 157–58 (6th Cir. 2010) (construing defendant's statement that the police "had no right to be there" as a refusal to consent).[5]

The government's reliance on *United States v. Wysinger*, 683 F.3d 784, 794–95 (7th Cir. 2012) is also unfounded. Gov't Br. 21. *Wysinger* addresses whether a defendant invoked his right to counsel, and does not even cite *Randolph* nor discuss what constitutes an objection under *Randolph* for Fourth Amendment purposes. Ultimately, Jones's statements constituted objections to the police's search. Jones's objections therefore overrode Kelley's consent to enter their residence. Consequently, the police were not legally allowed to enter the residence, and all of the fruits of their search (including the fruits of the search purportedly obtained under the plain view doctrine) should have been suppressed.

[5] The government essentially advocates for an interpretation of *Randolph* where nothing short of "I object" can amount to an objection. *See* Gov't Br. 21. But this is clearly incorrect based on this and other Courts' precedent, and the government failed to distinguish the controlling case of *Henderson*, 536 F.3d at 777-78. *See also Tatman*, 397 F. App'x at 157–58.

B. The officers unconstitutionally removed Jones from his residence for the purpose of preventing him from objecting.

Even assuming for sake of argument that Jones did not make a valid objection to the search for purposes of *Randolph*, Kelley's consent still was not sufficient for a wholly independent reason: the officers subsequently removed Jones for the purpose of preventing him from objecting. When there is "evidence that the police have removed the potentially objecting tenant from the entrance specifically to avoid a possible objection," the consent of a co-resident is insufficient. *Randolph*, 547 U.S. at 105. In *Fernandez*, the Supreme Court explained that a removal is for the purpose of avoiding a possible objection when it is "not objectively reasonable." 134 S. Ct. at 1134. The police's decision to remove Jones was not objectively reasonable and, therefore, this Court should reverse.

i. The officers removed Jones.

The record is clear that the officers ordered Jones to collect some personal belongings, handcuffed him, and took him to a picnic table on an adjacent property, after which other officers entered his house to search it. JA39, JA50, JA52, JA65-6, JA76-7, JA122-24. Jones thus left the residence—and in fact, his property—because he was complying with the police's order to leave. Despite this, the government argues that Jones was not "removed" and, consequently, that *Fernandez* does not apply. Gov't Br. 22. This argument fails.

First, the government's argument that an individual who complies with police instructions to leave his property cannot be deemed to have been "removed" strains credulity. The government tellingly does not cite any

precedent for its assertion. *See* Gov't Br. 22. The Supreme Court has never defined what it means to be "removed," and counsel for Mr. Jones is not aware of any Seventh Circuit case law explaining what "removal" means in this particular context. But in this case, there is no question that Jones was no longer present because of police action and instructions.[6] *See* A5. Jones complied with the police's request to leave the residence, and they escorted him to the picnic table, where he sat handcuffed and guarded by multiple officers. JA122–23. But for the officer's instructions to Jones, Jones still would have been inside the residence.

The government also notes that Jones did not continue to object once he was at the picnic table. Gov't Br. 22. But, the government cites no case for the proposition that a defendant must make repeated objections under *Randolph*. And it is hard to imagine that a defendant must continually and repeatedly resist or be removed kicking and screaming for the circumstances to rise to the level of "removal." Additionally, under precedent in this Circuit, any objections Jones made from the table would not count as part of the "threshold colloquy." *See United States v. Witzlib*, 796 F.3d 799, 802 (7th Cir. 2015) (limiting the threshold colloquy to the interaction at the doorway, and disregarding

---

[6] The district court erroneously concluded that Jones's leaving the residence was voluntary. *See* A24 ("From outside the home, [the officers] asked [Jones] to leave, and he agreed to do so. After retrieving his keys from inside, [Jones] voluntarily exited the trailer."). That finding cannot be supported by the evidence. And in any event, even if Jones voluntarily stepped over the threshold of his residence, what happened next undoubtedly constituted a removal from his property by the officers.

defendant's objections when they were made from the driveway). Similarly, there is no merit to the government's argument that Jones was present, and thus was not "removed," because "he was only 20 feet away from the searching officers and could see and hear what they were doing." Gov't. Br. 22. This Court in fact has held that a defendant who objected from the driveway of his residence was not "present" for purposes of objecting under *Randolph*. *Witzlib*, 796 F.3d at 802. Here, Jones was taken from the threshold and escorted off his property. JA52. By taking Jones from the space from which he could be present and objecting, the officers removed Jones.

ii. Jones was not absent due to a lawful arrest or detention.

The government alternatively argues that Jones's removal was objectively reasonable, and thus does not negate Kelley's consent. While the government bases this argument in large part on *dicta* from the Supreme Court's decision in *Fernandez* that "an occupant who is absent due to a lawful detention . . . stands in the same shoes as an occupant who is absent for any other reason," that rule does not apply here. 134 S. Ct. at 1134. The government concedes that Jones was not under arrest. Gov't Br. 23. Nor was he "absent due to a lawful detention" for purposes of *Fernandez*.

As with removal, there is almost no case law elucidating the meaning of the phrase "absent due to a lawful detention" from the Supreme Court's decision in *Fernandez*. 134 S. Ct. at 1134. But the government's position cannot be correct, because it treats *Fernandez* as effectively overruling *Randolph*, rather than creating an exception to it. In *Fernandez*, the police had

lawfully arrested the defendant, taken him away to the police station, returned to the defendant's house an hour later to get his co-tenant's oral and written consent to search the house, and then searched it. 134 S. Ct. at 1130–31. The defendant in *Fernandez* was completely absent from the scene at the time of the search, because he had been lawfully arrested an hour earlier.

The facts in this case are a far cry from *Fernandez*. Here, Jones was not under arrest at the time of the search. Rather, the officers merely removed him from the scene of the search, and kept him in handcuffs and under guard on the adjacent property, to prevent him from objecting. The government does not explain in its brief under what legal theory it alleges it was "legally detaining" Jones during the search. Nevertheless, the government apparently would extend the holding of *Fernandez*, based on the *dicta* in the case, to cover any circumstance in which the defendant could be lawfully stopped by the police. Again, the government tellingly cites no authority for doing so. And importantly, the government's approach would completely gut the holding of *Randolph*. It in essence would mean that any time officers wanted to search the residence of a defendant who lived with someone else, the officers could prevent the defendant from having a meaningful opportunity to object by requiring the defendant to leave the house—and would be insulated from doing so, since they could assert that they had reasonable suspicion to stop and detain the defendant. Thus, officers could overcome the express and unequivocal objection of a defendant, merely based on the fact that his co-tenant gave consent to search and the police had reasonable suspicion to stop

the defendant. Indeed, if the Court reads "detention" as broadly as the government urges, then it would be difficult to even think of a hypothetical situation where the *Randolph* exception would come into play for a defendant who was unreasonably removed from the premises.

This phrase of dicta in *Fernandez* should not be read to create such a sweeping and boundless exception. Rather, the phrase should be examined in the context of the Supreme Court's decision—within the phrase "absent due to a lawful detention or arrest." 134 S. Ct. at 1134. In that context, the more natural meaning of "lawful detention" is the situation in which an individual is being held lawfully in jail or other similar police custody but not yet arrested—and not merely the situation, as in this case, where the defendant is removed for the sole purpose of preventing him from objecting to the search. As a result, the government's argument that Jones loses the protections of *Randolph* and *Fernandez* fails.

This case falls comfortably within *Randolph* and *Fernandez*, because the officers were not objectively reasonable in removing Jones to the adjoining property. The officers were unreasonable by taking Jones twenty feet away to a different property, handcuffing him, and guarding him with multiple officers when he was compliant with the police without hassle. *See* Op. Br. 22-24; *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *Michigan v. Long*, 463 U.S. 1032, 1033 (1983). And the fact that Jones did not continue to object once the police removed him is of no matter. To the contrary, this exception expressly covers the defendant who does *not* object because he or she has been removed—and

thus contains no requirement that the individual object after the removal. Accordingly, the district court erred in finding that Jones was present and failed to object to the search, and this Court should reverse the decision below.

III. The Inevitable Discovery Doctrine is Inapplicable.

The trial court relied on the inevitable discovery doctrine as an alternative ground for upholding the government's warrantless search. The applicability of the inevitable discovery doctrine is subject to *de novo* review, and requires the government to prove, 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. Marrocco*, 578 F.3d 627, 637–38 (7th Cir. 2009). The district court erred in applying this doctrine, because: (1) the decision to seek a warrant was prompted by the unconstitutional discovery of the firearms, and (2) the government did not seek a warrant prior to the illegal search, despite having probable cause to do so. A12; Dkt. 23 at 3; Op. Br. 38–39. Because the government fails to meet its burden, the inevitable discovery doctrine is inapplicable.

In arguing that the inevitable discovery doctrine applies in this case, the government asserts that Jones's reliance on *Murray* and other cases applying the independent source doctrine is misplaced. Gov't Br. 25. While the government is correct that the inevitable discovery doctrine and independent source are two distinct doctrines, it is not uncommon for courts to analyze the

two in tandem as many, if not all, of the arguments for independent source apply to inevitable discovery. *See, e.g.*, *United States v. Johnson*, 380 F.3d 1013, 1014 (7th Cir. 2004); *United States v. Madrid*, 152 F.3d 1034, 1039–41 (8th Cir. 1998) (relying on *Murray* for inevitable discovery analysis).[7] The "pair of Siamese twin[s]"—inevitable discovery and independent source—are "so similar" that, as Judge Posner stated, it can be difficult to determine "which one rules this case." *Johnson*, 380 F.3d at 1014, 1017. The arguments for why neither the inevitable discovery nor the independent source doctrines apply thus overlap to a significant extent.

The government has failed to meet its burden of showing, by a preponderance of the evidence, "not only that it *could* have obtained a warrant, but also that it *would* have obtained a warrant." *United States v. Pelletier*, 700 F.3d 1109, 1116 (7th Cir. 2012) (citations omitted); *see also Marrocco*, 578 F.3d at 637–38 (requiring government to show by a preponderance of the evidence that the police would "have conducted a lawful search absent the challenged conduct"). As explained by this Court, "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 . . . independent of the search." *United States v.*

---

[7] The district court in this case held in its Opinion and Order denying Jones's motion to suppress that the independent discovery doctrine applied, and then noted in a footnote that the "closely related independent source doctrine would thus apply equally under these circumstances." *See* A12 n.4. Echoing a similar sentiment, the Supreme Court explained in *Murray v. United States*, 487 U.S. 533, 539 (1988), that "[t]he inevitable discovery doctrine . . . is in reality an extrapolation from the independent source doctrine."

Brown, 64 F.3d 1083, 1085 (7th Cir. 1995); *accord United States v. Johnson*, 380 F.3d 1013 (7th Cir. 2004) (refusing to employ *either* the inevitable discovery or the independent source doctrine when the police's original unconstitutional search was the only basis for rendering their later search legal); *United States v. Thomas*, 955 F.2d 207, 210–11 (4th Cir. 1992) (holding that inevitable discovery doctrine did not apply because the police first unlawfully searched the defendant's hotel room then set up surveillance to monitor that room). The government is simply unable to prove that they *would have* gotten a warrant absent their search, as they merely rely on the assertion that—based on Kelley's statements—of course they would have. This is insufficient.

The government admitted in a filing in this case that the decision to seek a warrant was "based upon . . . the finding of the firearms." *See* Dkt. 23 at 3. This is exactly the hypothetical unconstitutional case discussed in *Marrocco*, 578 F.3d at 638, where the inevitable discovery doctrine was inapplicable because "the investigating officers learned new information during an illegal search and, based on that information, took investigatory steps that they would not have otherwise taken." On this basis alone, the Court should refuse to apply the inevitable discovery doctrine. *See Johnson*, 380 F.3d at 1016–17.

Additionally, the very fact that the police did *not* seek a warrant prior to the illegal search when they had probable cause to do so, and were not faced with exigent circumstances preventing them from doing so, is further evidence that the government would *not* "have conducted a lawful search absent the

challenged conduct." *Marrocco*, 578 F.3d at 638; *see also United States v. Brown*, 328 F.3d 352, 357–58 (7th Cir. 2003) (emphasizing that agents cannot rely on the fruits of an invalid search when seeking a warrant upon which they base an inevitable discovery claim). Instead, the police went to the residence, unconstitutionally searched the residence, and relied upon the evidence that they found in the unlawful search to present a warrant application to the magistrate judge. *See* Dkt. 23 at 3. Therefore, the Court should reverse the decision below as the invocation of the inevitable discovery doctrine was improper.

The very premise of the inevitable discovery doctrine underscores its inapplicability in this case. When applying the inevitable discovery doctrine, the court considers a counterfactual situation in which the evidence was discovered solely in an illegal search, and asks—counterfactually—whether it was inevitable that the evidence also would have been discovered eventually by lawful means. *See United States v. Markling*, 7 F.3d 1309, 1318 n.1 (7th Cir. 1993). Here, though, the government argues that it *in fact did* subsequently discover the evidence through lawful means, because it applied for and received a warrant to conduct the same search. Counsel for Jones has not located any case in which this Court has applied the inevitable discovery doctrine when the government subsequently obtained a search warrant. This is yet another reason why the inevitable discovery doctrine is not applicable here.

Rather, this fact pattern is more akin to cases that courts have analyzed under the independent source doctrine, in which the court questions whether, when evidence was obtained both in an illegal search and in a legal search, the two were sufficiently independent for the legal search to be deemed constitutional. *See, e.g., Markling*, 7 F.3d at 1315. Thus, courts applying the independent source doctrine look to whether the warrant actually provides an *independent source* of the evidence at issue. *Compare, e.g.*, *United States v. Tejada*, 524 F.3d 809, 813 (7th Cir. 2008) (employing inevitable discovery doctrine where no warrant was obtained and the government "wants to use the doctrine of inevitable discovery to excuse its failure to have obtained a search warrant"), *with Markling*, 7 F.3d at 1315 ("[A]s in *Murray* [under the independent source doctrine], the question we face is whether the search of [the defendant's] motel room pursuant to the search warrant 'was in fact a genuinely independent source of' the evidence found there.") (citation omitted).

For the reasons explained in Jones's opening brief, (at 36–38), the government also fails to carry its "onerous burden" under the independent source doctrine. Fatal to the government's argument are the facts that: (1) the police included information uncovered in the unconstitutional search in their warrant application, and (2) the magistrate was informed of the unconstitutional search. *See United States v. Liss*, 103 F.3d 617, 622 (7th Cir. 1997) ("[T]he Supreme Court has required that the government show that the illegally obtained evidence did not prompt the police officer to seek the warrant or affect the magistrate's decision to issue the warrant."). These reasons

undermine both an independent source and an inevitable discovery analysis. Therefore, because neither of these doctrines apply, the Court should reverse the decision below.

CONCLUSION

For these reasons and for those stated in Jones's opening brief, this Court should reverse the decision below.

Dated: May 5, 2017

Respectfully submitted,

VINCENT JONES

By: s/ Sarah M. Konsky
One of his Attorneys

Matthew S. Hellman
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001

David A. Strauss
Sarah M. Konsky
Counsel of Record
Joshua B. Pickar (Ill. Sup. Ct. R. 711 license no. 2017LS00234)
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC
AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
773-834-3190

Counsel for Defendant-Appellant

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

1. This reply 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 5,060 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

2. This reply 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: May 5, 2017

s/Sarah M. Konsky
Sarah M Konsky

CERTIFICATE OF SERVICE

I, Sarah M. Konsky, an attorney, hereby certify that on May 5, 2017, I caused the foregoing **Reply Brief Of Defendant-Appellant Vincent Jones** 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 this Court's order of April 4, 2017 (Dkt. 17), I certify that I will cause 15 copies of the **Reply Brief Of Defendant-Appellant Vincent Jones** to be transmitted to the Court via hand delivery on May 5, 2017.

Frank E. Schaffer
Office of the United States Attorney
204 S. Main Street
M01 Robert A. Grant Federal Building
South Bend, IN 46601-2191

s/Sarah M. Konsky
Sarah M. Konsky