14-4679

To Be Argued By:
TRACY LEE DAYTON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-4679

UNITED STATES OF AMERICA,
Appellant,

-vs-

RONELL HANKS aka BIZ, aka ACE, JERMAINE BUCHANAN, aka Hot Main, RASHAD HEARD, OMAR BAHAMONDE, aka

(For continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants,

JONATHAN BOHANNON

Defendant-Appellee.

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Janet C. Hall., C.J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On December 15, 2014, the district court entered an order granting, in part, the defendant's motion to suppress evidence. Joint Appendix ("JA__") 9. On December 19, 2014, pursuant to Fed. R. App. P. 4(b), the government filed a timely notice of appeal from this decision, JA9, JA94, and on December 23, 2014, the government filed a certification under 18 U.S.C. § 3731 that this appeal is not taken for purposes of delay and that the evidence is a substantial proof of a material fact, JA10, JA96. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3731.

The Solicitor General has authorized this interlocutory government appeal.

Statement of Issue Presented for Review

Whether law enforcement agents had a reasonable basis to conclude that the defendant was present in a third party's apartment when they had seen him at the apartment and heard him tell others to meet him there on occasion, associated him with a car found at the apartment on the morning of the 6:00 a.m. arrest, and knew that his cell phone had last operated at 2:38 a.m. in an area that included that apartment (but not his home) before it was turned off.

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-vs-

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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Preliminary Statement

In the early morning hours of December 5, 2013, law enforcement officers—armed with an arrest warrant for Jonathan Bohannon—entered an apartment in Bridgeport belonging to Shonsai Dickson to execute the arrest warrant. They entered Dickson's apartment because all of the information they had suggested that Bohannon was in her apartment and not in his own home several miles away that morning. This in-

formation included cell phone records, recent surveillance reports, and recorded phone conversations where Bohannon told others to meet him on Dickson's street. Once law enforcement agents entered the apartment, they quickly found and arrested Bohannon. During a protective sweep and a search incident to the arrest, the police found several bags of crack cocaine and a large bundle of cash.

Bohannon moved to suppress this evidence found during the execution of the arrest warrant, and the district court granted that motion in relevant part. According to the court, the seized evidence was the fruit of an unlawful arrest because the police lacked a reasonable basis to believe that Bohannon was in Dickson's apartment on the morning of his arrest.

As shown below, however, the police had more than sufficient evidence to support a reasonable belief that Bohannon was in Dickson's apartment in the early morning hours of December 5, 2013. Accordingly, the district court's judgment suppressing the evidence seized during a protective sweep and incident to Bohannon's arrest should be reversed.

Statement of the Case

On December 4, 2013, Magistrate Judge Holly B. Fitzsimmons signed an arrest warrant for Jonathan Bohannon, based on a criminal complaint alleging that Bohannon had engaged in

various drug crimes. JA65-66. Bohannon was arrested early the next morning pursuant to that warrant. JA66-69.

On December 18, 2013, a grand jury indicted Bohannon and 13 others on a variety of narcotics and firearms trafficking offenses. JA2. On June 6, 2014, Bohannon moved to suppress the cocaine base, firearms, ammunition and other items seized at the time of his arrest. JA4. The district court held a hearing on the suppression motion, JA8, JA11, and on December 15, 2014, the court (Janet C. Hall, C.J.) issued a ruling granting, in part, Bohannon's motion to suppress the evidence seized from Dickson's apartment, JA65-93 (Ruling on Motion to Suppress Evidence, reported at *United States v. Bohannon*, __ F. Supp. 3d. __, No. 13-cr-229 (JCH), 2014 WL 7156654 (Dec. 15, 2014)). The government filed a notice of interlocutory appeal on December 19, 2014. JA9, JA94.

A. The arrest of Bohannon[1]

On December 4, 2013, a magistrate judge signed an arrest warrant for the defendant, Jonathan Bohannon, based upon a criminal complaint alleging that he committed various drug crimes. *See* JA65-66. This warrant was one of several signed that day in conjunction with the

[1] The facts are drawn from the district court's ruling, and, where appropriate and necessary, from the transcript of the suppression hearing.

planned arrest, after a three-and-a-half-month wiretap investigation, of 14 people associated with the Trumbull Gardens narcotics trafficking organization ("TGO") in Bridgeport, Connecticut. JA12 (Tr. 5-6), JA14 (Tr. 14-15).

At approximately 4:30 a.m. on December 5, 2013, FBI agents, FBI task force officers and Bridgeport Police Department officers and detectives met at Central High School in Bridgeport, Connecticut, for a pre-arrest briefing. JA14 (Tr. 15), JA33 (Tr. 92), JA66. Just prior to the briefing, FBI Special Agent Michael Zuk, who was the lead agent on the investigation, sent officers to surveil several residences throughout the city to confirm that the suspects they planned to arrest were, in fact, where they were expected to be. JA14 (Tr. 15), JA16 (Tr. 22-24). Agent Zuk explained that he did this to ensure that the officers could safely and successfully perform their arrests. JA14 (Tr. 14-15).

With respect to Bohannon, as of December 4, 2013, the plan was to arrest him at his home at 103 Crestview Drive in Bridgeport. JA12 (Tr. 8), JA14 (Tr. 15), JA66. However, on December 5, 2013, just prior to the 4:30 a.m. briefing, an officer told Agent Zuk that it did not appear that anyone was home at 103 Crestview Drive and that there were no cars associated with Bohannon parked in the area. JA14 (Tr. 15). That same officer told Agent Zuk that he had driven by 34 Morgan Avenue, which, as described in greater

detail below, was an alternate location associated with Bohannon. JA14 (Tr. 15). There, the officer saw a Toyota Camry that was registered to Shonsai Dickson parked in front of 34 Morgan Avenue. JA14 (Tr. 15), JA15 (Tr. 20), JA20 (Tr. 40), JA24 (Tr. 56). Officers had seen that same car parked in front of Bohannon's home on November 26, 2013, just nine days earlier. JA14 (Tr. 13), JA20 (Tr. 40).

Agent Zuk then reviewed cell site information that the task force was obtaining from a pen register/trap and trace device ("PRTT") on Bohannon's cellular telephone. Agent Zuk knew from the investigation that that cell phone was used exclusively by Bohannon, and that Bohannon used his cell phone incessantly throughout the day. JA17 (Tr. 25), JA19 (Tr. 36), JA78. From a review of the cell site information, Agent Zuk learned that Bohannon had last used his cell phone approximately two hours earlier, at 2:38 a.m., in a cell site sector that did not include his home on Crestview Drive, but did include the Morgan Avenue address. JA13 (Tr. 10), JA14 (Tr. 15-16), JA66-67. The cell site information also established that Bohannon did not use his cell phone again after 2:38 a.m. JA77. Agent Zuk explained that based upon the investigation and the fact that "the phone was busy all day and went silent from 2:30 in the early morning hours and [was] still silent at 4, 5 in the morning," he believed that Bohannon turned his phone off and

went to sleep in the location that he had last used his cell phone. JA17 (Tr. 27).

The fact that Bohannon's cell phone was in the vicinity of Morgan Avenue at 2:38 a.m. was significant because Agent Zuk associated Morgan Avenue and, in particular, 34 Morgan Avenue, 2nd floor, with Bohannon. Specifically, Zuk knew through credit checks and a background check on the property that Shonsai Dickson lived at 34 Morgan Avenue, 2nd Floor. JA13-14 (Tr. 12-13). Dickson was a well-known associate of the TGO, with which Bohannon was also associated. JA14 (Tr. 14). In fact, officers learned during the investigation that prior to October 2013, Dickson had rented an apartment in the Trumbull Gardens Housing Complex from which she allowed members of the TGO to sell narcotics. JA14 (Tr. 14).

In addition, from September to November 2013, information obtained from a GPS on Bohannon's previous cell phone and from November 2013 through December 5, 2013, information obtained from the PRTT on Bohannon's current cell phone repeatedly showed Bohannon to be in the vicinity of 34 Morgan Avenue. JA13 (Tr. 11), JA77. In fact, there was precise location information obtained from the GPS on Bohannon's first cell phone that placed Bohannon, at times, within 10 meters of 34 Morgan Avenue. JA17 (Tr. 28), JA20 (Tr. 37). While Agent Zuk acknowledged that he was not an expert in cell

phone technology, he explained that he had successfully used cell site information in many investigations to locate people. JA18 (Tr. 30).

Moreover, consistent with the cell site location data, the wiretap had recorded several conversations during which Bohannon said that he was on Morgan Avenue. JA13 (Tr. 12). For example, on September 18, 2013, Bohannon sent a text message to co-conspirator Ronell Hanks, who was the subject of the wiretap, stating "Bout to be on Morgan;" on September 27, 2013, Bohannon sent a text message to Hanks asking, "You could just come to Morgan?" and on December 1, 2013, four days before his arrest, Bohannon sent a text message to Hanks advising that he was "off Madison by Central." JA21-22 (Tr. 42-45, describing GX20-22). Agent Zuk explained that "Madison by Central" was "essentially where 34 Morgan is" because Morgan Avenue abuts Central High School and 34 Morgan Avenue is "three or four houses off the corner of Madison Avenue." JA22 (Tr. 45), JA66-67.

In October 2013, based upon the contemporaneous GPS information that they were receiving and Bohannon's references on the wiretap to Morgan Avenue, the FBI Task Force began conducting physical surveillance on Morgan Avenue. JA13 (Tr. 12). On October 16, 2013, Agent Zuk personally saw Bohannon walking from the area of 34 Morgan Avenue to a rental car. JA12 (Tr. 8), JA13 (Tr. 12), JA77. Later that day, an

officer conducted a traffic stop on a car that Bohannon was driving.[2] JA13 (Tr. 12). Bohannon told the officer that he had come from his sister's house on Morgan Avenue. JA13 (Tr. 12). After the traffic stop, surveillance officers saw Bohannon drive back to Morgan Avenue and park the car in the vicinity of 34 Morgan Avenue. JA13 (Tr. 12). Task Force officers then saw Bohannon walk to the door of 34 Morgan Avenue. JA13 (Tr. 12). After that point, Agent Zuk clearly associated 34 Morgan Avenue with Bohannon. JA13 (Tr. 12), JA15 (Tr. 18). Notably, other than Dickson's apartment, officers had never seen Bohannon at, and therefore did not associate him with, any other residence or location on Morgan Avenue. JA20 (Tr. 38), JA77-78.

Agent Zuk explained that after having monitored GPS and cell site information "for months with Mr. Bohannon and others, we had become pretty comfortable in determining where they were based on where the cell site and the precision location was showing his phone." JA14 (Tr.

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[2] The traffic stop was important insofar as it confirmed that the GPS location information that they were receiving on Bohannon's cell phone was accurate. Specifically, the police stopped Bohannon on Madison Avenue in the area of Morgan Avenue. JA20 (Tr. 38). During the stop, the GPS showed Bohannon's location to be at the precise cross streets where the police stopped him, namely, Madison Avenue and Jackson Avenue. JA20 (Tr. 38-40).

15). Therefore, the cell site information combined with: (1) seeing the same Camry parked in front of 34 Morgan Avenue that they had seen parked in front of Bohannon's Crestview home just nine days earlier, (2) the fact that the Camry was registered to Dickson, who was a well-known associate of the TGO, (3) the fact that Dickson was, in effect, Bohannon's girlfriend, (4) Bohannon's multiple references on the wiretap to being on Morgan Avenue, including one on December 1, 2013, just four days before his arrest, (5) GPS information that placed Bohannon within 10 meters of 34 Morgan Avenue on multiple occasions, (6) Bohannon telling a police officer that he was coming from Morgan Avenue, and (7) physical surveillance that placed Bohannon both in the vicinity of and at the door of 34 Morgan Avenue, led Agent Zuk to conclude that Bohannon was, in fact, at 34 Morgan Avenue that morning.[3] JA14 (Tr. 16), JA15 (Tr. 18-20), JA16 (Tr. 22-23), JA20 (Tr. 40), JA25 (Tr. 57).

Accordingly, at approximately 5:15 a.m., Agent Zuk was "very, very comfortable" that Bohannon was at 34 Morgan Avenue, 2nd Floor and therefore redirected the arrest team to that

[3] Agent Zuk testified that there may have been additional factors that led him to conclude that Bohannon was at 34 Morgan Avenue on December 5, 2013, but that he could not specifically recall what those factors may have been. JA16 (Tr. 22-23).

location. JA14-15 (Tr. 16-17), JA16 (Tr. 22, 24), JA67. Agent Zuk also advised the arrest team, some of whom personally knew Bohannon, that Bohannon had several prior arrests and convictions, including arrests for assault and weapons offenses, and that he had been tried and acquitted of murder. JA15 (Tr. 17), JA34 (Tr. 93), JA41 (Tr. 123), JA46 (Tr. 141).

Shortly after 6:00 a.m., the arrest team went to 34 Morgan Avenue to arrest Bohannon. JA37 (Tr. 107), JA67. When they arrived, FBI Special Agent Ryan James, who was the arrest team leader, and several other officers went to the front door of the building. JA34 (Tr. 93-94), JA37 (Tr. 107-108), JA67. Agent James knocked on the front door and announced their presence for approximately eight minutes without response. JA37 (Tr. 108), JA67. Bridgeport Detectives Paul Ortiz and Thomas Scholl went around to the back of the building and up a fire staircase to the rear door of the 2nd floor apartment. JA26 (Tr. 63), JA34 (Tr. 94), JA37 (Tr. 108). The door had a large window through which the officers could see a woman, who was later identified as Dickson, standing in the kitchen. JA34 (Tr. 95). Detective Ortiz tried the door and, finding it to be unlocked, opened it and entered the apartment. JA34 (Tr. 95), JA67. Detective Ortiz showed Dickson his badge, identified himself and advised her that they were there because they had a warrant for "Jonathan." JA27 (Tr. 66), JA34

(Tr. 95), JA46 (Tr. 142). Detective Ortiz did not have his gun drawn when he entered the apartment. JA36 (Tr. 102). Dickson turned and walked out of the kitchen and into her bedroom followed by the two detectives. JA34 (Tr. 95), JA67. There, the officers saw Bohannon lying in bed. JA34 (Tr. 96). Detective Ortiz said to the defendant, "Jonathan, we have a warrant for you" and told him to get up. JA27 (Tr. 66), JA34 (Tr. 96). Bohannon got out of bed and stood up on the right side of the bed, which was next to an open closet. JA26 (Tr. 64), JA27 (Tr. 66), JA34 (Tr. 96), JA37 (Tr. 108), JA68.

After Bohannon got out of bed, Detective Scholl remained in the room with Bohannon and Dickson, neither of whom were handcuffed, while Detective Ortiz went downstairs to open the front door and let the remaining members of the arrest team into the apartment. JA34 (Tr. 96), JA47 (Tr. 146), JA68. Agent James stated that neither he nor any other member of the arrest team had their weapons drawn when they entered the apartment as he presumed that Detectives Ortiz and Scholl had already ensured that the apartment was safe. JA37-38 (Tr. 108-109), JA41 (Tr. 123-24). Furthermore, none of the members of the arrest team drew their weapons at any time after entering the apartment. JA30 (Tr. 77, 79), JA37-38 (Tr. 108-109), JA41 (Tr. 123), JA47 (Tr. 147).

After they entered, Agent James and Task Force Officer Jason Guerrera followed Detective Ortiz upstairs and into Dickson's bedroom. JA37 (Tr. 108), JA41 (Tr. 124), JA68. Dickson was standing near the entrance of the bedroom and Bohannon was still standing on the right side of the bed closest to the closet. JA30 (Tr. 79), JA41 (Tr. 124). Seeing that Bohannon was not restrained in any manner, Agent James stepped in front of Bohannon and Officer Guerrera stepped behind Bohannon in order to place him into handcuffs. JA37 (Tr. 108), JA41 (Tr. 125-27).

As Officer Guerrera placed Bohannon in handcuffs, Agent James and Detective Scholl conducted a brief "safety sweep" that consisted of looking under the bed and into the closet and visually scanning the room to determine if there was anything within "reaching distance" that could harm them. JA27 (Tr. 67), JA38 (Tr. 109), JA41 (Tr. 122), JA42 (Tr. 128), JA45 (Tr. 139). While Agent James peered into the open closet, Detective Scholl glanced under the bed, which was approximately 12 to 18 inches off the floor. JA40 (Tr. 117), JA43 (Tr. 129-30), JA48 (Tr. 149). The view between the bottom of the bed and the floor was not obstructed in any manner such as by a bed skirt. JA43 (Tr. 130); GX 8. Detective Scholl then motioned to Agent James to look under the bed. JA42-43 (Tr. 128-29), JA68. When he did, Agent James saw several plastic bags filled with large quantities of what he rec-

ognized to be crack cocaine. JA38 (Tr. 110), JA68. Neither Agent James nor Detective Scholl seized the narcotics at that time or said anything to Bohannon about what they had seen under the bed. JA45 (Tr. 137).

Once Bohannon was handcuffed and the safety sweep conducted, one of the officers suggested that Dickson put on some pants and Detective Ortiz asked Dickson to get Bohannon, who was clad only in a t-shirt and underwear, a pair of pants as well. JA30 (Tr. 80), JA35 (Tr. 98), JA38 (Tr. 109), JA47 (Tr. 147), JA69. Dickson picked up a pair of Bohannon's pants off the floor and handed them to Detective Ortiz. JA35 (Tr. 98), JA47 (147). Detective Ortiz searched the pockets of the pants to ensure that there was not a weapon in either of the pockets. JA35 (Tr. 98), JA47 (Tr. 147). While Detective Ortiz did not find a weapon, he did find a large quantity of cash. JA35 (Tr. 98), JA69. The officers then helped Bohannon put on his pants. JA38 (Tr. 109, 111).

As Bohannon was getting dressed, Dickson, who was not handcuffed, was escorted out of the bedroom and eventually into either the dining or living room area of the apartment. JA27 (Tr. 67), JA31 (Tr. 81), JA38 (Tr. 111-12), JA45 (Tr. 138), JA69. After Dickson left the bedroom, Detective Ortiz and Agent James walked Bohannon out of the bedroom and into the kitchen. JA35 (Tr. 99), JA69. Agent James told Bohannon what he had

been arrested for and that they would be advising him of his *Miranda* rights. JA38 (Tr. 112), JA43-44 (Tr. 132-33). Officer Guerrera then read Bohannon his *Miranda* rights from a form. JA35-36 (Tr. 100-101), JA38 (Tr. 112). Bohannon stated that he understood his rights and signed the form at approximately 6:21 a.m. to indicate that he was willing to speak with law enforcement. JA38 (Tr. 112), JA44 (Tr. 133).

Within the first minute of the conversation, Bohannon told Agent James that the apartment was Dickson's apartment. JA39 (Tr. 113), JA44 (Tr. 134). Agent James therefore paused his conversation with Bohannon and went into the living room to speak with Dickson. JA39 (Tr. 113). There, Agent James explained to Dickson that they had an arrest warrant for Bohannon, and asked for her consent to search the apartment. JA27 (Tr. 68), JA30 (Tr. 80), JA39 (Tr. 113-14), JA44 (Tr. 134). Dickson gave verbal consent to search the apartment, and then also signed a consent-to-search form.[4] JA39 (Tr. 114-15).

Once Officer Rosado confirmed that Dickson had signed the consent-to-search form, law enforcement began a search of the apartment. JA39 (Tr. 114-15). During the search, law enforcement recovered crack cocaine, three fire-

[4] The district court found that Dickson's consent was not voluntary, *see* JA82-91, but that finding is not at issue in this appeal.

arms, a large quantity of ammunition, a scale, and a large quantity of cash in the dresser. JA39 (Tr. 115-16), JA40 (Tr. 118-20).

As the items of evidentiary value were recovered, they were brought out of the bedroom and into another room of the apartment in order to be packaged and marked. JA40 (Tr. 119). As some of the evidence was carried out, Dickson saw it and began to cry. JA29 (Tr. 74), JA40 (Tr. 119). Bohannon then yelled from the kitchen, "It is all mine, don't worry about it. It is all mine." JA29 (Tr. 74), JA40 (Tr. 119), JA69.[5]

After law enforcement completed the search of the house, Agent James went back to Dickson and asked her for consent to search her Camry and her rental car, both of which were parked in front of her apartment. JA29 (Tr. 75), JA70. Dickson first verbally consented to the search of her cars. Thereafter, a description of each of the cars was added to the initial consent form. Dickson then signed the form a second time. JA29 (Tr. 75-76), GX 4. During a search of the Camry, which Bohannon was the last to drive before his arrest, law enforcement found a fourth loaded

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[5] The district court's ruling states that Bohannon took responsibility for the contraband in the apartment *before* Dickson gave consent, *see* JA69, but the testimony at the hearing suggests that Bohannon's statements were made later.

firearm. JA25 (Tr. 60), JA29 (Tr. 76), JA32 (Tr. 85).

B. The indictment and motion to suppress

On December 18, 2013, a grand jury sitting in Bridgeport, Connecticut, returned an 18-count indictment charging Bohannon and 13 other individuals with a variety of narcotics and firearms trafficking offenses. With respect to Bohannon, Count One charged conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine and at least 280 grams of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(B) and 846. Count Five charged Bohannon with possession with intent to distribute over 280 grams of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Count Fifteen charged Bohannon with possession of firearms and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g). Count Sixteen charged Bohannon with possession of firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i). JA2.

On June 6, 2014, Bohannon filed a motion to suppress the cocaine base, firearms, ammunition and other evidentiary items seized at the time of his arrest. JA4. Relying upon *Steagald v. United States*, 451 U.S. 204 (1981), Bohannon claimed that the evidence was seized in violation of the

Fourth Amendment because law enforcement entered a third-party's residence without a search warrant. Bohannon subsequently supplemented his motion to suppress with the argument, based on *Payton v. New York*, 445 U.S. 573 (1980), that law enforcement did not have a reasonable basis to believe that he was at the Morgan Avenue address and thus they were not permitted to make entry without a search warrant.

On November 13, 2014, the Honorable Janet C. Hall, United States District Court Judge, held a suppression hearing.[6] JA8. After the hearing, Bohannon supplemented his motion again, arguing first, that Agent Zuk was improperly permitted to testify as an "expert" on cell phone technology, and second, that the cell phone data that Agent Zuk considered was so imprecise that it could not provide law enforcement with a reasonable basis to believe that Bohannon was at 34 Morgan Avenue on December 5, 2013.

On December 15, 2014, the district court issued a ruling granting Bohannon's motion to suppress the evidence seized from Dickson's

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[6] During this hearing, Bohannon orally moved to suppress spontaneous statements that he made—after he waived his *Miranda* rights—claiming that the statements were the product of coercion. JA62 (Tr. 205). The district court ultimately denied this motion in a separate ruling. JA9 (Doc. 433).

apartment and denying his motion to suppress the evidence seized from the Camry.[7]

At the outset of its ruling, the court considered two preliminary issues: First, the court found that Bohannon, as an overnight guest in Dickson's apartment, had a legitimate expectation of privacy and therefore had standing to challenge the search of her apartment. JA72 (citing *Minnesota v. Olson*, 495 U.S. 91, 99 (1990)). Second, the court concluded that law enforcement did not need a search warrant to enter Dickson's apartment to arrest Bohannon. JA74-75 (relying on cases from Third, Sixth, Eighth, and Ninth Circuits).

With these issues resolved, the court turned, as relevant here, to the legality of law enforcement's entry into Dickson's apartment. According to the court, although the officers did not need a search warrant to arrest Bohannon in Dickson's apartment, they needed to have a reasonable basis to believe that he was there, and they did not have that reasonable basis. JA75-81. As a result, the court concluded that any evidence obtained during a search incident to arrest—including the money found in Bohannon's

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[7] The court found that Bohannon lacked standing to challenge the search of the car and therefore denied his motion to suppress the firearm recovered from the car. JA73.

pocket and the drugs found under the bed—must be suppressed. JA81-82.

Summary of Argument

Law enforcement officers entered Dickson's apartment to arrest Bohannon based on a reasonable belief that Bohannon was in that apartment on the morning of December 5, 2013. This reasonable belief was based on specific and articulable facts, including the following: Bohannon's cell phone was last used in that area, in the middle of the night and just three hours earlier, a car associated with Bohannon was parked outside Dickson's apartment, historical—but recent—cell site and GPS information placed Bohannon near Dickson's apartment on multiple occasions, Dickson was seen near the apartment on multiple occasions (including one occasion when he was seen walking to the door of the apartment), and Bohannon had repeatedly referenced being on Morgan Avenue in recorded telephone conversations. These facts, together with all of the other facts known to the agents, gave them a reasonable basis to believe that Bohannon was in Dickson's apartment on the morning of the arrest.

Because the officers had a reasonable basis to believe that Bohannon was in Dickson's apartment, his arrest was lawful, and the officers accordingly conducted a lawful search incident to arrest and a protective sweep. Because these

limited searches were proper, the evidence found those searches should not be suppressed.

Argument

I. Because law enforcement had a reasonable basis to believe that Bohannon was in Dickson's apartment, any evidence they saw during a protective sweep or a search incident to the arrest was admissible.

A. Governing law and standard of review

When evaluating the grant of a motion to suppress evidence, the appellate court reviews "'the district court's factual findings for clear error and its conclusions of law *de novo*.'" *United States v. Murphy*, 703 F.3d 182, 188 (2d Cir. 2012) (quoting *United States v. Awadallah*, 349 F.3d 42, 71 (2d Cir. 2003)). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Iodice*, 525 F.3d 179, 185 (2d Cir. 2008) (citations, quotation marks, and alteration omitted). When credibility determinations are at issue, the reviewing court will give particularly strong deference to the district court's findings. *Id.* Where a defendant's motion to suppress is granted, the evidence is reviewed in the light

most favorable to the defendant. *See Awadallah*, 349 F.3d at 71.

The districts court's determination as to whether the facts are sufficient to form a reasonable belief is reviewed *de novo*. *See United States v. Arvizu*, 534 U.S. 266, 275 (2002). Such a standard of review is necessary because "[a] policy of sweeping deference would permit, 'in the absence of any significant difference in the facts,' 'the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.'" *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)) (alterations omitted). Further, *de novo* review enables reviewing courts "to unify precedent" and "to provide law enforcement officers with the tools to reach correct determinations beforehand." *Arvizu*, 534 U.S. at 275.

In *Payton v. New York*, the Supreme Court held that police armed with an arrest warrant for a suspect founded on probable cause may enter the dwelling of that suspect when "there is reason to believe [he] is within." 445 U.S. at 603. In the Second Circuit, a reasonable belief has been interpreted to be a less stringent standard than the test for probable cause. *See United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995) (citing with approval *United States v. Manley*, 632 F.2d 978, 983 (2d Cir. 1980) for the proposi-

tion that "the 'reasonable belief' standard . . . may require less justification then the more familiar probable cause test"); *accord United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005); *Valdez v. McPheters*, 172 F.3d 1220, 1225-26 (10th Cir. 1999); *United States v. Route*, 104 F.3d 59, 62 (5th Cir. 1997); *United States v. Risse*, 83 F.3d 212, 216 (8th Cir. 1996); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995); *but see United States v. Gorman*, 314 F.3d 1105, 1112 (9th Cir. 2002) ("[T]he 'reason to believe' standard of *Payton* . . . embodies the same standard of reasonableness inherent in probable cause.").

"Reasonable belief is established by looking at common sense factors and evaluating the totality of the circumstances." *United States v. Pruitt*, 458 F.3d 477, 482 (6th Cir. 2006). Further, the officer's belief need not be correct, only reasonable. *United States v. Lovelock*, 170 F.3d 339, 343 (2d Cir. 1999). "[T]he constitutional requirement is that they have a basis for a reasonable belief as to the operative facts, not that they acquire all available information or that those facts exist." *Id.* at 344 (citations omitted).

It is impossible to provide a precise definition of, or a list of factors necessary to establish, the "reason to believe" or "reasonable suspicion"

standard[8] because the terms are "commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Ornelas*, 517 U.S. at 695-96 (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). Moreover, the concept of "reasonableness" is "'not readily, or even usefully, reduced to a neat set of legal rules.'" *Id.* (quoting *Gates*, 462 U.S. at 232, 235); *see also Ker v. California*, 374

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[8] It is instructive to look at the body of case law regarding the "reasonable suspicion" standard as the two standards are synonymous. *Cf. Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (showing required to establish reasonable suspicion to believe that a "no-knock" entry is warranted "is not high," and citing with approval the "reasonable belief" standard in *Maryland v. Buie*, 494 U.S. 325, 337 (1990)); *Buie*, 494 U.S. at 337 (allowing protective sweep of a house during an arrest where officers have "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger" to the officers); *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979) ("The narrow scope of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked . . . .") (internal quotation marks omitted); *see also United States v. Quemener*, 789 F.2d 145, 155 (2d Cir. 1986) ("We need not address appellants' unsupported contention that the "reasonable belief" language embodies a greater standard than the "reasonable suspicion" standard we concluded was satisfied in this case[.]").

U.S. 23, 33 (1963) (noting the "long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application" and explaining that "[e]ach case is to be decided on its own facts and circumstances") (internal quotation marks and citations omitted)).

"Although a mere 'hunch' does not create reasonable suspicion, [*Terry v. Ohio*, 392 U.S. 1, 27 (1968)], the level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause, *United States v. Sokolow*, 490 U.S. 1, 7 (1989)." *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014). In fact, reasonable suspicion requires only "some minimal level of objective justification." *Sokolow*, 490 U.S. at 7 (citations omitted). When determining if an officer has met this burden, a court must take into account "the totality of the circumstances—the whole picture." *United States v. Cortez*, 449 U.S. 411, 417 (1981). As the *Cortez* Court explained, "[t]he process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers." *Id.* at 418.

In *Steagald v. United States*, the Supreme Court considered "whether, under the Fourth Amendment, a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant." 451 U.S. 204, 205 (1981). While the Court ruled that a search warrant was necessary to protect the privacy interests of the third party, it specified that its ruling applied only to challenges raised by the third-party resident. *Id.* at 212. The Court left open the question "whether the subject of an arrest warrant can object to the absence of a search warrant when he is apprehended in another person's home." *Id.* at 219.

While the Second Circuit has not yet decided this issue left open by *Steagald*, *see United States v. Snype*, 441 F.3d 119, 133 (2d Cir. 2006), every Circuit that has decided the question permits entry into a third party's residence to effectuate an arrest warrant for a non-resident suspect reasoning that "(a) Fourth Amendment rights are personal and cannot be asserted vicariously, and (b) requiring police who already hold an arrest warrant for a suspect to obtain a search warrant before they can pursue that suspect in a third party's home would grant the suspect broader rights in the third party's home than he would have in his own home under *Payton*." *Id.*

Those Circuits have also refused to allow a person who is arrested pursuant to a valid arrest warrant in a third party's residence to use the Fourth Amendment to seek suppression of items seized from that residence. *See United States v. Agnew*, 407 F.3d 193, 197 (3d Cir. 2005) ("[E]ven if Agnew was a non-resident with a privacy interest, the Fourth Amendment would not protect him from arrest by police armed with an arrest warrant."); *United States v. Kaylor*, 877 F.2d 658, 663 n.5 (8th Cir. 1989) ("*Steagald* addressed only the right of a third party not named in the arrest warrant to the privacy of his or home. This right is personal to the homeowner and cannot be asserted vicariously by the person named in the arrest warrant."); *United States v. Underwood*, 717 F.2d 482, 484 (9th Cir. 1983) (en banc) ("The right of a third party *not* named in the arrest warrant to the privacy of his home may not be invaded without a search warrant. But this right is personal to the home owner and cannot be asserted vicariously by the person named in the arrest warrant.") (internal citations omitted); *United States v. Buckner*, 717 F.2d 297, 299-300 (6th Cir. 1983) ("We find nothing in this record to indicate that the defendant had a legitimate expectation of privacy in his mother's apartment. The defendant did not live there and there are no facts other than his relationship to the occupant of the apartment which would show that he had standing to challenge the search of his mother's apartment."); *see also*

United States v. Pabon, 603 F. Supp. 2d 406, 414-15 (N.D.N.Y. 2009) (noting that in *Snype*, the Second Circuit referred to majority circuits' reasoning and therefore refused to allow the defendant to contest search of third party's home in which the defendant was arrested); *but see United States v. Weems*, 322 F.3d 18, 23 n.3 (1st Cir. 2003) (assuming, without deciding, that arrestee has Fourth Amendment ground to object to search of third party's home).

B. Discussion

1. Law enforcement had a reasonable basis to believe that Bohannon was in Dickson's apartment the morning of his arrest.

The evidence established numerous factors that, in combination, led Agent Zuk to reasonably believe that Bohannon was in Dickson's apartment on the morning of his arrest:

- When law enforcement drove by Bohannon's house on Crestview Avenue in the middle of the night, there was nothing to indicate that he was home. JA14 (Tr. 15).
- By contrast, a car associated with Bohannon was seen outside the apartment on Morgan Avenue. JA14 (Tr. 15), JA15 (Tr. 20), JA20 (Tr. 40), JA24 (Tr. 56). That car, which was registered to Dickson, had been parked outside Bohannon's home just nine

days earlier. JA14 (Tr. 13, 14), JA20 (Tr. 40).

- Cell site information for Bohannon's cell phone showed that, at 2:38 a.m., that cell phone was in a cell site sector that did not include his house on Crestview Drive, but did include Dickson's apartment on Morgan Avenue. JA13 (Tr. 10), JA14 (Tr. 15-16), JA66-67.
- Bohannon used his cell phone incessantly and exclusively. JA17 (Tr. 25), JA19 (Tr. 36), JA78.
- Cell site information also established that Bohannon's cell phone was not used at any time between 2:38 a.m. and 5:00 a.m. JA77.
- Dickson's apartment was the only residence, other than his own, with which Bohannon appeared to be associated during the course of the wiretap investigation. JA20 (Tr. 38), JA77-78. *See Risse*, 83 F.3d at 217 (noting that for purposes of a "reasonable basis" analysis, a suspect can also be found at a place other than his primary residence).
- Credit checks and a background check on the property at 34 Morgan Avenue showed that the apartment was leased to Dickson, a well-known associate of the TGO, with which Bohannon was also associated. JA13

(Tr. 12), JA14 (Tr. 14). Indeed, Dickson had rented an apartment in the Trumbull Gardens Housing Complex from which she allowed members of the TGO to sell narcotics. JA14 (Tr. 14).

- In the three months preceding the arrest, PRTT and GPS information placed Bohannon within 10 meters of 34 Morgan Avenue on multiple occasions. JA17 (Tr. 28), JA20 (Tr. 37).
- In the two months before his arrest, Bohannon was seen near 34 Morgan Avenue on multiple occasions, and on one occasion, was seen walking to the door of 34 Morgan Avenue. JA12 (Tr. 8), JA13 (Tr. 12), JA15 (Tr. 18), JA20 (Tr. 38), JA78.
- In the three months before his arrest, Bohannon repeatedly referenced being on "Morgan Avenue" in recorded phone conversations, including one conversation just four days before his arrest. JA13 (Tr. 12), JA21-22 (Tr. 42-45, describing GX20-22), JA78.
- During a traffic stop on October 16, 2013, Bohannon told an officer that he had just come from his sister's house on "Morgan Avenue." JA13 (Tr. 12). After that stop, he was seen driving back to Morgan Avenue and parking his car in the vicinity of 34 Morgan Avenue. JA13 (Tr. 12).

Taken together, all of these pieces of information gave Agent Zuk a reasonable basis for his belief that in the early morning hours of December 5th, Bohannon was in Dickson's apartment at 34 Morgan Avenue. Indeed, Agent Zuk came to the reasonable conclusion that Bohannon had turned off his phone after his 2:38 a.m. phone call and went to sleep where he had last used his phone—in Dickson's apartment at 34 Morgan Avenue. The fact that it was the middle of the night when Bohannon's phone went silent lent further credence to Agent Zuk's belief that Bohannon was no longer moving about the city. In sum, because Bohannon had been associated with Dickson and her apartment in the recent past, and because cell phone records appeared to place him there within the past few hours, Agent Zuk reasonably believed that Bohannon was at Dickson's apartment. *See United States v. Price*, 599 F.2d 494, 501 (2d Cir. 1979) ("Some patterns of behavior which may seem innocuous enough to the untrained eye may not appear so innocent to the trained police officer who has witnessed similar scenarios numerous times before. As long as the elements of the pattern are specific and articulable, the powers of observation of an officer with superior training and experience should not be disregarded.") (internal citation, quotations marks and alterations omitted).

The district court and the defendant came to a contrary conclusion by ignoring the totality of

the evidence and attacking inferences to be drawn from different pieces of the whole. These strategies fail because the arguments raised by the defendant (and those credited by the court) do not undermine the significance of the evidence, especially when the evidence is considered as a whole:

> [T]he Supreme Court has instructed us not to consider individual facts in isolation but to examine the totality of the circumstances. [*Maryland v. Pringle*, 540 U.S. 366, 371 (2003)]. In *United States v. Arvizu*, 534 U.S. 266, a border patrol agent who stopped defendant's vehicle testified about a number of small details that might have each been explained away but that collectively aroused his suspicions. The Court held that, in declining to give weight to any observation "that was by itself readily susceptible to an innocent explanation," the lower court engaged in erroneous "divide-and-conquer analysis." *Id.* at 274; *see also United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985) ("The fact that an innocent explanation may be consistent with the facts alleged . . . does not negate probable cause."). For the same reason, we cannot discount facts one by one simply because [the defendant] has suggested hypothetical explanations for them that are consistent with his innocence.

United States v. Delossantos, 536 F.3d 155, 161 (2d Cir. 2008) (footnote omitted).

For example, the defense and the court theorized that Bohannon's cell phone could have been in someone else's possession at the time of the 2:38 a.m. call or that Bohannon could have left his phone at Dickson's apartment after that call. While it was, of course, possible to come up with scenarios that placed the phone in the hands of someone other than Bohannon, all of the evidence available to Agent Zuk at the time of Bohannon's arrest established that over the three-month period of the wiretap, Bohannon was the only person who ever used his cell phones. *See United States v. Klump*, 536 F.3d 113, 120 (2d Cir. 2008) ("'The fact that an innocent explanation may be consistent with the facts alleged ... does not negate probable cause.'") (quoting *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985)). Similarly, while it was theoretically possible that Bohannon left his phone at Dickson's apartment, the evidence known to Agent Zuk at the time suggested otherwise. Therefore, it was reasonable for Agent Zuk to conclude that Bohannon was, in fact, in possession of his cell phone at 2:38 in the morning.

Similarly, the court, like the defense, attacked the GPS/cell site information. They argued, for example, that the cell site and/or GPS information did not provide an individual's location with pinpoint precision. JA80. In particular,

the court focused on Agent Zuk's statement that, at times, the GPS provided information that Bohannon was within 1,500 meters of a particular location. JA80. *See* JA20 (Tr. 40).

But in highlighting this evidence, the court ignored the other evidence in the record that on multiple occasions between September and November 2013, GPS information placed Bohannon within ten meters of 34 Morgan Avenue. JA20 (Tr. 37). The court also ignored the evidence that led Agent Zuk to reasonably believe that the GPS information was very reliable—even though it was not perfect. For example, on the day officers conducted a traffic stop of Bohannon, the GPS showed Bohannon to be at the exact location where he was stopped. JA20 (Tr. 38, 40). Additionally, one of the reasons that Agent Zuk and his team began conducting surveillance on Morgan Avenue, in the first instance, was because the GPS information showed Bohannon to be in the vicinity of Morgan Avenue on several occasions. JA15 (Tr. 18). When they did conduct physical surveillance in that area, they confirmed that Bohannon was, in fact, on Morgan Avenue and, more specifically, at the front door of 34 Morgan Avenue. Moreover, Agent Zuk had relied upon cell site information in many prior investigations as an aid to locate suspects. JA18 (Tr. 30).

The defendant also hypothesized about heavy cell phone traffic or environmental factors that

could have caused his cell phone to fail to access the closest cell site tower. The defendant argued that Agent Zuk should have considered the possibility that Bohannon could have been at home, over two miles away, and his cell phone—perhaps by coincidence—could have nonetheless accessed the cell site tower closest to 34 Morgan Avenue. JA53 (Tr. 169-70). Along the same lines, the court noted that the area indicated by the cell site data upon which Agent Zuk relied was relatively large, *see* JA79, and that one of Bohannon's exhibits suggested that 34 Morgan Street was actually located outside the relevant cell tower's coverage area, JA67 n.3. And while the court acknowledged that Agent Zuk did not associate Bohannon with any other location within that cell sector, the court nonetheless found, "that fact does not mean that Bohannon could not have been elsewhere in the area" or rule out the possibility that he "could have been driving through any street in the area on his way to his residence at 103 Crestview." JA79. The court continued that while it was reasonable for Agent Zuk to believe that the monitored cell phone was in Bohannon's possession, the lack of specificity from the cell site information and the fact that it could not place Bohannon's phone exactly "in 34 Morgan, never mind in the second floor apartment of that address" made reliance upon it unreasonable. JA79. Finally, citing to a law review article that was written after Bohannon's arrest, the court found that Agent Zuk's

assumption that the phone interacted with the tower closest to the cell phone was "not necessarily correct because a phone will interact with the tower that has the strongest signal, which is not always the nearest tower to the cell phone." JA66 n.2.

As a preliminary matter, the court should not have relied on the defendant's map purporting to show that 34 Morgan Street was outside the coverage area for the relevant cell site tower. *See* JA67 n.3. That map was not admitted for the purpose of establishing the breadth of the cell site sector. Rather, it was admitted solely to establish where the Morgan Street address was located in relation to where the cell tower in that sector was located. JA22-23 (Tr. 47-49, discussing DX 101). In fact, the government objected to the admission of the exhibit precisely because Agent Zuk testified that the information contained on the exhibit, namely, a colored drawing of a "cone" that purported to show the size of the cell sector, was not accurate and was not information upon which he had relied. JA23 (Tr. 49). In light of this objection, the court admitted the map solely for the limited purpose for which it was offered, JA23 (Tr. 50), even though the court then referred to the purported "coverage areas" shown on that map as a basis for its decision. JA67 n.2.

More significantly, though, the fact that cell site information may not be perfect or exact does

not diminish its usefulness for determining an individual's general location. Indeed, the "use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous federal courts." *United States v. Jones*, 918 F. Supp. 2d 1, 5 (D.D.C. 2013); *United States v. Eady*, No. 2:12-cv-415-DCN-3, 2013 WL 4680527 at *4 (D.S.C. Aug. 30, 2013) (agreeing that there is an "overwhelming consensus of judicial authority" that cell phone location records can be used "to determine the general location of a cell phone"). In short, the fact that cell site technology may not be perfect does not mean that all information gleaned therefrom is unreliable or that reliance upon cell site information, in combination with many other factors, is unreasonable.

Moreover, the fact that there might have been some theoretical way to get more reliable information does not mean that Agent Zuk's reliance on the information that he had was unreasonable. Here, for example, it would have been theoretically possible for Agent Zuk to bring in an expert in cellular telephone technology in the middle of the night to determine if the cell tower in the sector encompassing Morgan Avenue was emitting the strongest signal such that a cell phone used in that area would necessarily access the closest tower. But such an action would have been neither reasonable nor required. *See Lovelock*, 170 F.3d at 344 ("[T]he constitutional re-

quirement is that they have a basis for a reasonable belief as to the operative facts, not that they acquire all available information or that those facts exist[.]"). The Supreme Court has treated the reality that decisions must be made "in the midst and haste of a criminal investigation" as a reason not to require high levels of refinement in officers' factual and legal conclusions. *Gates*, 462 U.S. at 235 (citation omitted) (declining to adopt complex standard for probable cause because legal rule must be applied in fast-developing circumstances); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (declining to require consideration of state penalty schemes in arrest decisions because "the Fourth Amendment has to be applied on the spur (and in the heat) of the moment"). Further, "'[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.'" *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (quoting *Brinegar*, 338 U.S. at 176). So while the cell phone data that Agent Zuk received on the morning of Bohannon's arrest theoretically could have been incorrect, that fact does not demean its value or render Agent Zuk's reliance upon it unreasonable. *See id.* at 183-86 (warrantless entry is valid when based upon consent of third party that officer reasonably, but incorrectly, be-

lieves possesses common authority over the premises).

Finally, the court dismissed the significance of the surveillance, GPS and wire-tap evidence that (1) had Bohannon frequenting Morgan Avenue, (2) placed Bohannon within 10 meters of 34 Morgan Avenue on multiple occasions, (3) had Bohannon repeatedly referencing being on Morgan Avenue, and (4) placed Bohannon at the entrance to 34 Morgan Avenue. According to the court, this evidence was insufficient because it did not specify whether Bohannon was going to the first or the second floor apartment. JA79.

Putting aside that the testimony established that the front door to Dickson's apartment was actually on the first floor, *see* JA34 (Tr. 96), there is no doubt that it was theoretically possible that Bohannon was visiting the first floor resident. That theoretical possibility, however, does not mean that Agent Zuk was unreasonable in his belief that Bohannon was actually with Dickson in the second floor apartment. *See Delossantos*, 536 F.3d at 161 ("[W]e cannot discount facts one by one simply because [the defendant] has suggested hypothetical explanations for them that are consistent with his innocence."). Agent Zuk had multiple sources of information that associated Bohannon with Dickson—who was believed to be Bohannon's girlfriend and who was a known associate of the TGO. JA14 (Tr. 14), JA20 (Tr. 40). At the same

time, he had no information that tied Bohannon to any other locations on Morgan Avenue. JA20 (Tr. 38), JA77-78. Additionally, law enforcement saw Dickson's Camry parked in front of Bohannon's apartment on November 26, 2013 and thus associated that car with Bohannon. JA14 (Tr. 13), JA20 (Tr. 40). The timing of the sighting—just nine days before Bohannon's arrest—combined with Bohannon's statement that he was on Morgan on December 1, 2013—just four days before his arrest—reasonably led Agent Zuk to believe that Bohannon was still frequenting Dickson's apartment.

Agent Zuk was not required to prove beyond a reasonable doubt that Bohannon was at Dickson's apartment on December 5, 2013. Rather, he needed only have a reasonable basis for his belief that Bohannon was there. As the testimony at the hearing clearly established, there were numerous factors that, when taken together, gave Agent Zuk an ample and reasonable belief that Bohannon was, in fact, where he was actually found, namely, the second floor apartment of 34 Morgan Avenue.

2. Law enforcement properly conducted a search incident to arrest and a protective sweep during a lawful arrest and therefore any evidence found during those limited searches was admissible.

"It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment." *United States v. Robinson*, 414 U.S. 218, 224 (1973). Inherent in this exception is that law enforcement may not only search the arrestee's person, but also the area within his immediate control. *Id.* Such a search is justified "by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon," *id.* at 227 (citing *Preston v. United States*, 376 U.S. 364, 367 (1964)), and by the "need to preserve evidence on his person for later use at trial," *id.* at 234. Because it is the fact of the custodial arrest that establishes the officer's authority to search, an officer need not have any subjective concern that the arrestee is actually armed. *Id.* at 236. Moreover, the lawful nature of a search incident to arrest "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.* at 235.

Additionally, when officers enter a home pursuant to an arrest warrant they may conduct a

protective sweep, defined as "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others," without acquiring a search warrant. *Buie*, 494 U.S. at 327; *see also Lauter*, 57 F.3d at 216 (holding that "[w]hen arresting a person in a residence, officers may perform a protective sweep incident to the arrest to protect themselves or others"); *United States v. Grubczak*, 793 F.2d 458, 461 (2d Cir. 1986) (upholding seizure of items in plain view when agents were in the defendant's apartment due to valid arrest warrant for the defendant). Such a search permits officers "as a precautionary matter and without probable cause or reasonable suspicion, [to] look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Buie*, 494 U.S. at 334. To justify such a search, an officer need only possess "a reasonable belief based on specific and articulable facts that the area to be swept" may harbor a person who could pose a threat to the officer. *Id.* at 337.

Here, law enforcement did no more than they were lawfully entitled to do. When the officers entered Dickson's apartment, they encountered three people: Bohannon, Dickson and Dickson's sister. *See* JA67 (noting that Dickson's sister was in apartment), JA69. Therefore, as Bohannon was taken into custody, Agent James and Detective Scholl took a very cursory look around

the room glancing under the bed and into the open closet next to which Bohannon was standing, JA40 (Tr. 117), JA43 (Tr. 130), JA48 (Tr. 149), both areas capable of harboring a person who could pose a threat to the officers. As they looked under the bed, Agent James and Detective Scholl saw, in plain view, a large quantity of crack cocaine. JA38 (Tr. 110). This search, then, was within the scope of a search incident to arrest and a protective sweep. *See Buie*, 494 U.S. at 334.

Furthermore, at the time of his arrest, Bohannon was clad only in a t-shirt and underwear. JA30 (Tr. 80), JA35 (Tr. 98), JA38 (Tr. 109), JA47 (Tr. 147). Prior to removing him from the house, Detective Ortiz asked Dickson to hand them Bohannon's pants. Before helping Bohannon put the pants on, Detective Ortiz did a brief search of the pant pockets to ensure that they did not contain a weapon. JA35 (Tr. 98), JA47 (Tr. 147). When Detective Ortiz reached into the pocket, he instead found a large quantity of cash, which was seized and retained as evidence. JA35 (Tr. 98). The search of Bohannon's pants was also within the bounds of the officer's authority as a search incident to arrest. That is, the officer could have searched Bohannon's pants if he had been wearing them. Therefore, there is no legitimate reason that he should be prohibited from searching the pants before Bohannon put them on in order to ensure that they

did not contain a weapon or evidence that Bohannon could destroy.

In short, although the district court declined to decide whether the search incident to arrest and the protective sweep were valid, as set forth above, those searches were fully consistent with governing law. *See* JA82 (noting good reasons to believe that searches would have been valid), JA86. Accordingly, the evidence found during those searches—the drugs under the bed and the cash in Bohannon's pants—should not be suppressed.

Conclusion

For the foregoing reasons, the district court's ruling suppressing the evidence seized during the protective sweep incident to Bohannon's arrest should be reversed.

Dated: April 1, 2015

Respectfully submitted,

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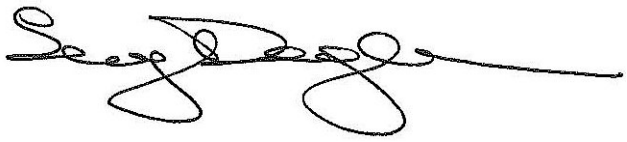

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,755 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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