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

REPLY BRIEF
FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
United States Attorney
District of Connecticut

TRACY LEE DAYTON
RAHUL KALE
SANDRA S. GLOVER *(of counsel)*
Assistant United States Attorneys

Dirk, TAVAR JOHNSON, MOYAN FORBES, EBONEY WOOD, aka Sis, TYSHEEM WRIGHT, SYBIL HOPKINS, STEVEN HUTCHINSON, aka L, CARLOS SOTO, aka Machon, YAZMINE MORALES, D'METRIUS WOODWARD, aka Flea,

Defendants,

JONATHAN BOHANNON

Defendant-Appellee.

Table of Contents

Table of Authorities iiii

Summary of Argument 1

Argument 3

I. Bohannon's arguments do not undermine the conclusion that Agent Zuk had a reasonable basis to believe that Bohannon was in Dickson's apartment 3

A. Bohannon's analysis, like the district court's, relies on a divide-and-conquer approach instead of considering the totality of the circumstances 4

B. Bohannon ignores many of the circumstances that informed Agent Zuk's belief about Bohannon's location on the morning of his arrest 5

C. Bohannon and the district court fail to give consideration to Agent Zuk's training and experience 13

D. Bohannon incorrectly suggests that Agent Zuk should have done "more" to attain a reasonable belief as to Bohannon's whereabouts on the morning of his arrest 17

II. The district court correctly found that law enforcement did not need a search warrant to enter Dickson's apartment to effectuate Bohannon's arrest 21

Conclusion 27

Certification per Fed. R. App. P. 32(a)(7)(C)

Table of Authorities

Pursuant to "Blue Book" rule 10.7, the Government's citation of cases does not include "certiorari denied" dispositions that are more than two years old.

Cases

Charland v. Nitti,
No. 1:11-cv-1191, 2014 WL 1312095
(N.D.N.Y. March 31, 2014)..... 26

Florida v. Harris,
133 S. Ct. 1050 (2013) 20

Payton v. New York,
445 U.S. 573 (1980) 21, 24

Plumhoff v. Rickard,
134 S. Ct. 2012 (2014) 23

Steagald v. United States,
451 U.S. 204 (1981) 21, 23, 24, 27

United States v. Agnew,
407 F.3d 193 (3rd Cir. 2005) 22, 23

United States v. Arvizu,
534 U.S. 266 (2002) 4, 6, 14, 16, 18

United States v. Bailey,
743 F.3d 322 (2d Cir.), *cert. denied*,
135 S. Ct. 705 (2014) 14

United States v. Bervaldi,
226 F.3d 1256 (11th Cir. 2000) 11

United States v. Delossantos,
536 F.3d 155 (2d Cir. 2008)..... 5, 8, 14

United States v. Elmore,
482 F.3d 172 (2d Cir. 2007)..... 5

United States v. Graham,
553 F.3d 6 (1st Cir. 2009)..... 25

United States v. Hollis,
780 F.3d 1064 (11th Cir. 2015) 22

United States v. Jackson,
576 F.3d 465 (7th Cir. 2009) 22

United States v. Kaylor,
877 F.2d 658 (8th Cir. 1989) 22

United States v. Kern,
336 Fed. Appx. 296 (4th Cir. 2009)..... 22

United States v. King,
604 F.3d 125 (3rd Cir. 2010) 22

United States v. Lovelock,
170 F.3d 339 (2d Cir. 1999)..... 19, 20, 26

United States v. McCarson,
527 F.3d 170 (D.C. Cir. 2008) 22

United States v. Pruitt,
458 F.3d 477 (6th Cir. 2006) 22

United States v. Raddatz,
447 U.S. 667 (1980) 10

United States v. Snype,
441 F.3d 119 (2d Cir. 2006)..... 3, 21, 23, 24, 26

United States v. Underwood,
717 F.2d 482 (9th Cir. 1983)
(en banc) 22, 23, 26

United States v. Vistero,
391 Fed. Appx. 932 (2d Cir. 2010) 24

United States v. Weems,
322 F.3d 18 (1st Cir. 2003)..... 23, 26

Rules

Fed. R. Evid. 702..... 9

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-4679

UNITED STATES OF AMERICA,
Appellee,

-vs-

JONATHAN BOHANNON,
Defendant-Appellant.

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

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

Summary of Argument

The district court erred in suppressing the evidence found when law enforcement officers arrested Jonathan Bohannon—pursuant to an arrest warrant—in Shonsai Dickson's apartment in the early morning hours of December 5, 2013. As set forth in the government's opening brief, the officers entered Dickson's apartment based

on a reasonable belief that Bohannon was in that apartment, and that reasonable belief was based on specific and articulable facts, including Bohannon's past ties to the location, and cell phone location information.

Bohannon argues, in response, that the officers lacked a reasonable basis to believe he was in Dickson's apartment, largely by recapitulating portions of the district court's ruling. Like the district court, he selectively addresses the factors upon which law enforcement relied, entirely omitting some factors, mischaracterizing others, and failing to give proper consideration to the training and experience of the case agent. Bohannon then analyzes a select few of the factors individually, in isolation from their contextual whole, attempting to reduce each to a possible innocent explanation. And like the district court, Bohannon concludes from this "divide-and-conquer" analysis that law enforcement lacked a reasonable basis to believe that Bohannon was where he was actually found, namely, in Shonsai Dickson's apartment on the second floor of 34 Morgan Avenue.

But as set forth in the government's initial brief, the district court's analysis—and Bohannon's—misses the mark. Taking all of the factors into consideration, including the agent's training and experience, and considering them as a whole, the agent had more than a reasonable ba-

sis to believe that Bohannon was in Dickson's apartment.

Bohannon argues, alternatively, that this Court should affirm the district court's suppression of evidence because law enforcement did not obtain a search warrant prior to entering Dickson's apartment to place him under arrest. In short, Bohannon, urges this Court to reject the reasoning of the Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits, all of which have held that law enforcement may enter a third-party's residence to effectuate an arrest warrant for a non-resident. While this Court has not yet decided the issue, *see United States v. Snype*, 441 F.3d 119, 133 (2d Cir. 2006), the government respectfully submits that this Court should follow the reasoning of the circuit courts cited above.

Argument

I. Bohannon's arguments do not undermine the conclusion that Agent Zuk had a reasonable basis to believe that Bohannon was in Dickson's apartment.

As set forth in the government's initial brief, FBI Special Agent Michael Zuk had a reasonable basis to believe that Bohannon was in Dickson's apartment on Morgan Avenue in the early morning hours of December 5, 2013. Bohannon's arguments to the contrary are not persuasive because they fail to consider the totality of the cir-

cumstances, ignore crucial facts, fail to give weight to Agent Zuk's training and experience, and improperly suggest that Agent Zuk should have done more investigation.

A. Bohannon's analysis, like the district court's, relies on a divide-and-conquer approach instead of considering the totality of the circumstances.

In his brief, Bohannon avoids addressing the district court's erroneous use of a "divide-and-conquer" methodology that misapplied the totality of the circumstances test. *See United States v. Arvizu*, 534 U.S. 266, 274 (2002) (rejecting a "divide-and-conquer" approach in analyzing factors comprising the totality of the circumstances). In fact, Bohannon does not even attempt to argue that the district court considered collectively, and in relation to one another, all of the factors upon which Agent Zuk relied. Nor could he. Even a cursory review of the district court's opinion demonstrates that the court viewed each factor in isolation, a method of analysis specifically proscribed by *Arvizu*.

Because the district court's divide-and-conquer analysis—an analysis repeated in Bohannon's brief—"seriously undercut[s] the 'totality of the circumstances' principle which governs the existence *vel non* of 'reasonable suspicion,'" *see id.* at 275, the court's determination to suppress the evidence found in 34 Morgan Avenue

constituted reversible error. *See id.* at 274 ("The court's evaluation and rejection of seven of the [ten] listed factors in isolation from each other does not take into account the 'totality of the circumstances,' as our cases have understood that phrase."); *cf. United States v. Delossantos*, 536 F.3d 155, 161 (2d Cir. 2008) (reversing suppression ruling where court viewed facts establishing probable cause to arrest in isolation rather than examining the totality of the circumstances); *United States v. Elmore*, 482 F.3d 172, 181-83 (2d Cir. 2007) (reversing suppression ruling where court focused on a categorical determination regarding an informant's status as anonymous or not, rather than examining the totality of the circumstances in context).

B. Bohannon ignores many of the circumstances that informed Agent Zuk's belief about Bohannon's location on the morning of his arrest.

Putting aside that Bohannon fails to consider the totality of the circumstances, he does not even consider *all* of the relevant circumstances. In particular, Bohannon ignores many of the factors that Agent Zuk identified as pertinent to his determination that Bohannon was in Dickson's apartment on the morning of his arrest. And with respect to the factors that Bohannon *does* consider, his analysis is incomplete.

To begin, Bohannon addresses only three factors, namely: (1) his "alleged association with 34 Morgan," (2) his "alleged association with the Toyota Camry," and (3) "the cell tracking information [on the morning of December 5, 2013] which assumes that the call pinged off the tower closest to 34 Morgan." *See* Def. Br. at 21. Then, like the district court, Bohannon dismisses the significance of each factor by analyzing it in isolation. This methodology skews the meaning of each of the facts and contravenes the clear command of the Supreme Court about how to apply the totality of the circumstances test. *See Arvizu*, 534 U.S. at 273-74.

For example, Bohannon attempts to diminish the significance of the physical surveillance that placed Bohannon at 34 Morgan Avenue approximately six weeks before his arrest by claiming that "the Government was not able to cite one instance where surveillance, or any information whatsoever, established that Mr. Bohannon actually went to 34 Morgan on any occasion prior to his arrest." Def. Br. at 18. This "factual" assertion is just wrong. Agent Zuk testified that on October 16, 2013, he saw Bohannon walk from the area of 34 Morgan Avenue to a rental car. JA12 (Tr. 8), JA13 (Tr. 12), JA77. Later that day, surveillance officers followed Bohannon as he drove back to and parked in the vicinity of 34 Morgan Avenue, and then as he "walk[ed] to the door of 34 Morgan Avenue." JA13 (Tr. 12).

Next, Bohannon makes much of the fact that law enforcement did not see him at 34 Morgan Avenue until October 16, 2013, despite the length of the investigation. Def. Br. at 18. Yet, the reason for that is clear. The wiretap was initiated in August 2013. JA12 (Tr. 5-6). On September 18, 2013, approximately three weeks into the wire, law enforcement first intercepted Bohannon stating that he was on Morgan Avenue. JA21 (Tr. 43). And then, on September 28, 2013, Bohannon was again intercepted stating that he was on Morgan Avenue. JA21 (Tr. 43). During this same time period, the GPS on Bohannon's cell phone repeatedly showed him to be on Morgan Avenue and, in fact, within ten meters of 34 Morgan Avenue. JA17 (Tr. 28), JA20 (Tr. 37). Armed with this information, law enforcement decided to conduct targeted surveillance on Morgan Avenue, at which point they immediately saw Bohannon coming from the vicinity of 34 Morgan Avenue. JA13 (Tr. 12). Moreover, Dickson rented an apartment in Trumbull Gardens through September 2013. JA14 (Tr. 14). Thus, there would have been no reason for law enforcement to have been looking for Bohannon on Morgan Avenue in the time period preceding the August 2013 initiation of the wiretap.

Bohannon dismisses the significance of the physical surveillance on October 16, 2013 claiming that such surveillance, "alone or in conjunction with the following"—referring to the infor-

mation about the Toyota Camry delineated below—"does not lead to a 'reasonable belief.'" Def. Br. at 18. Bohannon misses the point. Whether or not any factor "alone," or in conjunction with any one other factor, leads to a reasonable belief is not the question. The question is whether all of the facts—when viewed in their entirety and in context—led Agent Zuk to a reasonable belief that Bohannon was in Dickson's apartment. *See Delossantos*, 536 F.3d at 161.

Bohannon also attempts to diminish the significance of the Toyota Camry that was parked in front of 34 Morgan Avenue on the morning of his arrest and how that factored into Agent Zuk's analysis. Specifically, Bohannon claims that it was unreasonable for Agent Zuk to believe that the car was associated with Bohannon because it was only observed in front of his home on one occasion. Def. Br. at 18. However, the car, which was registered to Dickson, was seen in front of Bohannon's home on November 26, 2013, *just nine days before his arrest*, a fact which Bohannon ignores. JA20 (Tr. 40). The timing of that sighting was relevant because it made clear that Bohannon was still associating with Dickson, who Agent Zuk believed to be Bohannon's girlfriend. JA20 (Tr. 20).

To be sure, Bohannon attacks Agent Zuk's belief on that issue as well, pointing to Dickson's testimony during the suppression hearing that she and Bohannon were merely "friends[]." Def.

Br. at 19. But Agent Zuk testified that he thought Dickson was Bohannon's girlfriend. JA20 (Tr. 40). (Although Agent Zuk did not explain the basis for his belief, it is instructive to note that Bohannon was found virtually naked in Dickson's bed at 6:00 a.m. on the morning of his arrest. JA27 (69), JA35 (Tr. 98), JA38 (Tr. 109), JA47 (Tr. 147).) More to the point, whatever word Dickson chose to use during a federal court proceeding to describe her relationship with Bohannon is irrelevant to the reasonableness of Agent Zuk's belief that Bohannon had a relationship with Dickson such that he could reasonably be expected to be found at her house in the early morning hours. Notably, Agent Zuk was correct.

Finally, Bohannon goes to great lengths[1] to belittle the significance of the cell site infor-

[1] In fact, Bohannon spends seven pages of his response discussing the various methods of cell phone tracking and cites to four district court opinions that relate to whether or not trial testimony about cell site information must be admitted through an expert. *See* Def. Br. at 11-17. The decisions and Bohannon's discussion of them have no relevance to the instant case. To the extent that Bohannon's argument can be read to suggest that the district court should not have admitted Agent Zuk's testimony regarding cell phone tracking because he is not an "expert" in this field subject to the rigors of Fed. R. Evid. 702, he fails because, as the district court recognized, the Rules of Evidence do not apply at a suppression

mation that placed Bohannon within the cell sector that included 34 Morgan Avenue just three-and-a-half hours before his arrest. Def. Br. at 19. First, Bohannon argues that the government proffered "zero evidence to establish that the phone in question was in Mr. Bohannon's possession on December 5, 2013." Def. Br. at 5. Again, Bohannon is just wrong. Agent Zuk testified that throughout the investigation, Bohannon used his cell phone incessantly and exclusively. JA17 (Tr. 25), JA19 (Tr. 36), JA78. Further, there was absolutely no evidence to suggest that anyone other than Bohannon ever used or possessed his phone. Indeed, the district court found as much: "[I]t was reasonable for the government to believe that the phone was on his person." JA79.

Next, Bohannon argues that the cell site information available on December 5, 2013 "could only indicate the 'general location'" of Bohannon's cell phone and notes—as if harmful to Agent Zuk's analysis—that this "phone . . . did

---

hearing. *See* JA79 (citing *United States v. Raddatz*, 447 U.S. 667, 679 (1980)). Moreover, it is clear that the district court credited Agent Zuk's interpretation of the cell site information he received from the telephone companies, *see* JA66-67, but, after analyzing it in isolation, nonetheless chose to disregard the significance of that information.

not begin to be followed until just before the search took place." Def. Br. at 20. On this latter point, Bohannon is correct, although he misstates the significance of this information. The first cell phone associated with Bohannon, which had GPS capabilities, repeatedly placed Bohannon within ten meters of 34 Morgan Avenue through November 2013. *See* Def. Br. at 20 n.8. Bohannon was no longer using that phone as of the date of his arrest. Yet, despite Bohannon's insinuation to the contrary, it is not as if the significance of the information garnered from the first cell phone dissipated or grew stale in a matter of weeks. *See United States v. Bervaldi*, 226 F.3d 1256, 1263-67 (11th Cir. 2000) (information associating subject of an arrest warrant with a particular residence not stale despite passage of six months and 21 days). Rather, that information—which put Bohannon near the apartment of Dickson, a known associate of Bohannon's narcotics organization—played a significant role among the many factors that Agent Zuk took into consideration.

The second cell phone, which lacked GPS (precision location) capabilities, but did provide contemporaneous cell site information, was the one in use on December 5, 2013, when Bohannon was arrested. The fact that the second cell phone could not provide Bohannon's location with pinpoint precision is of no moment. The "general location" information from that phone, when com-

bined with the other information available to the agent that associated Bohannon with the Morgan Avenue apartment—but with no other residence within that sector, JA20 (Tr. 38)—supported Agent Zuk's reasonable belief that Bohannon was in the Morgan Avenue apartment on the morning of his arrest.

Specifically, by 5:00 a.m. on December 5, 2013, law enforcement already knew that: (1) Bohannon did not appear to be at his Crestview Avenue home; (2) a car that had been parked in front of Bohannon's home just nine days earlier was now parked in front of 34 Morgan Avenue; (3) 34 Morgan Avenue was the only residence other than Crestview with which Bohannon was associated during the nearly three-month wiretap investigation; (4) Dickson, who was an associate of Bohannon's narcotics trafficking group and who Agent Zuk believed to be Bohannon's girlfriend, lived at 34 Morgan Avenue; (5) on October 16, 2013, Bohannon was seen walking from the vicinity of 34 Morgan Avenue to a rental car; (6) later that day, during a traffic stop, Bohannon stated that he had just come from his "sister's" house on Morgan Avenue; (7) after the traffic stop, Bohannon drove the car back to Morgan Avenue and parked in the vicinity of Dickson's apartment; (8) Bohannon then walked up to the front door of 34 Morgan Avenue; (9) GPS information between September and November 2013 repeatedly placed Bohannon's phone within ten

meters of 34 Morgan Avenue; (10) Bohannon had repeatedly referenced, in intercepted conversations, that he was on Morgan Avenue, including on December 1, 2013, just four days before his arrest.

With this information, on December 5, 2013, it was entirely reasonable for Agent Zuk to believe that cell site information received at 2:38 a.m. that placed Bohannon's cell phone within a sector that included 34 Morgan Avenue, but did not include Bohannon's home on Crestview Avenue, meant that Bohannon was at 34 Morgan Avenue. It was also reasonable for Agent Zuk to conclude from the fact that Bohannon's cell phone was not used again after 2:38 a.m. that Bohannon had remained at 34 Morgan Avenue and would be found there at 5:15 a.m. when Agent Zuk re-directed the arrest team to that location. JA14-15 (Tr. 16-17); JA16 (Tr. 22, 24); JA67.

C. Bohannon and the district court fail to give consideration to Agent Zuk's training and experience.

Bohannon attempts to cast aspersions on Agent Zuk, labeling his interpretation of cell phone data ignorant and delusional, *see* Def. Br. at 20 and 22, and claiming that the decision to re-direct the arrest team to 34 Morgan Avenue was based on "nothing short of fallacy," *see* Def. Br. at 19. What is plain, however, from Bohan-

non's selective and isolated analysis of only three of the myriad factors upon which Agent Zuk relied is that Bohannon completely ignores the Supreme Court's admonition that "due weight" must be given to the inferences of law enforcement officers based upon their training and experience, as applied to the cumulative totality of the information. *See, e.g., Arvizu*, 534 U.S. at 273 (requiring consideration of the totality of the circumstances "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person") (internal quotation marks and citation omitted); *cf. United States v. Bailey*, 743 F.3d 322, 332 (2d Cir.) (in reviewing the propriety of a *Terry* stop, "the court must view the totality of the circumstances through the eyes of a reasonable and cautious police officer on the scene") (internal quotation marks and citation omitted), *cert. denied,* 135 S. Ct. 705 (2014); *Delossantos*, 536 F.3d at 159 (in making a probable cause determination, the totality of the circumstances "must be considered from the perspective of a reasonable police officer in light of his training and experience").

Bohannon's failure to mention this principle mirrors the district court's analysis in this respect. That is, neither Bohannon nor the court took into consideration that at the time of Bohannon's arrest, Agent Zuk had been an FBI

agent for 16-and-a-half years who, for the entirety of his career, had been investigating gangs, violent crimes, and both domestic and international narcotics trafficking. JA11-12 (Tr. 4-6). In addition, over the course of his career, Agent Zuk had participated in excess of 100 wiretap investigations. JA12 (Tr. 6).

For the present case, Agent Zuk was the lead case agent on the investigation into the Trumbull Gardens narcotics trafficking organization, of which Bohannon was a member. JA12 (Tr. 5). The investigation spanned approximately two years; the wiretap portion of the investigation began in August 2013. JA12 (Tr. 5-6). During the course of the wiretap, Agent Zuk and other law enforcement officers regularly went out early in the morning to conduct physical surveillance and to photograph individuals who had been intercepted on the wiretap in an effort to identify them. JA12 (Tr. 6-8). Moreover, Agent Zuk and other law enforcement officers had been using GPS and cell site information for several months to track Bohannon and the other targets of the investigation. JA13 (Tr. 10-11); JA14 (Tr. 15-16). As a result, Agent Zuk explained that he "had become pretty comfortable in determining where [Bohannon and the others] were based on where the cell site and the precision location was showing on [their] phone[s]." JA14 (Tr. 15). In addition, the Trumbull Gardens investigation was not the first time that Agent Zuk had relied on

cell site and GPS information to locate individuals. JA18 (Tr. 30). Rather, Agent Zuk testified that he had used this technology in many instances and that, in his experience, "[w]hen we get information from the phone company, [it is] generally helpful to find us where a person is." JA18 (Tr. 30).

Yet, despite all of the testimony presented to the court regarding Agent Zuk's extensive experience as a law enforcement agent and, more particularly, his experience using cell phone technology as a tool to locate people, both Bohannon and the district court conspicuously ignored this factor. As such, they both failed to abide by this Court's and the Supreme Court's mandates to view the totality of the circumstances, giving due weight to the officer's experience and specialized training. Together, this experience and training enabled Agent Zuk "to make inferences from and deductions about the cumulative information available . . . that might well elude an untrained person." *Arvizu*, 534 U.S. at 273 (internal citations and quotations omitted).

D. Bohannon incorrectly suggests that Agent Zuk should have done "more" to attain a reasonable belief as to Bohannon's whereabouts on the morning of his arrest.

Bohannon argues that Agent Zuk, at 5:00 a.m. on the morning of Bohannon's arrest, should have done more to obtain additional information, or sought to perfect the information that he had at his disposal, before concluding that Bohannon was in Dickson's apartment. Def. Br. at 20-21. For example, he claims that Agent Zuk should have determined whether the call at 2:38 a.m., which showed Bohannon to be in the cell sector associated with 34 Morgan Avenue, was an incoming or outgoing call. Def. Br. at 20. Bohannon hypothesizes that "[i]f this were an incoming call, then [Bohannon could have left] the phone . . . at 34 Morgan and it would still, potentially, ping off the cell tower in question," *see* Def. Br. at 20, presumably referring to the cell tower closest to Dickson's apartment. This argument not only contravenes Bohannon's earlier hypothesis, namely, that the cell phone was not accessing the closest cell tower to 34 Morgan Avenue, *see* Def. Br. at 20, but also directly conflicts with the district court's finding that it was reasonable for Agent Zuk to assume that the cell phone was in Bohannon's possession, JA79, without qualification as to whether Bohannon was making or receiving calls.

Bohannon also seems to suggest that Agent Zuk should have considered information that Bohannon posits for the first time in his brief. That is, Bohannon now claims that "[i]f the Government drove by 103 Crestview in the early morning hours of any day, and not just December 5, 2013, it would have found the same thing: no cars associated with Mr. Bohannon and a dark, or potentially dark, home." Def. Br. at 19. Of course, there is no evidence in the record to support this claim. But even so, Bohannon's unsubstantiated claim amounts to nothing more than an attempt to attack a single inference—that it was significant that the same car that was parked in front of 34 Morgan Avenue on the morning of his arrest had been parked in front of Bohannon's house nine days earlier—which was but one piece of the contextual whole. Again, Bohannon's one-by-one, divide-and-conquer tactic perpetuates the erroneous methodology employed by the district court and contravenes the clear command of the Supreme Court to view the circumstances in their entirety rather than addressing each factor in isolation. *See Arvizu*, 534 U.S. at 274.

Finally, Bohannon suggests that Agent Zuk should have conducted additional physical surveillance to establish that Bohannon "went to, or came from 34 Morgan, second floor." Def. Br. at 21. To begin, as established at the hearing, the door through which one would walk to get to

Dickson's apartment was on the first floor of the building. *See* JA34 (Tr. 96). Thus, it was a fair and reasonable inference for Agent Zuk to draw that seeing Bohannon walk up to the front door of 34 Morgan Avenue was tantamount to seeing him go to Dickson's apartment. Furthermore, as Agent Zuk explained at the hearing:

> It would have been in my view impossible to conduct surveillance that would permit us to see inside the second floor of 34 Morgan. We didn't know [Bohannon] was there until 2:30 in the morning, the middle of the night. In all likelihood he was asleep. With an arrest operation pending in three and a half hours later, in my view, it would have been impossible to do a surveillance that would establish that he was at 34 Morgan any better than the cell phone location that Verizon was telling me.

JA19 (Tr. 35-36).

More fundamentally, Bohannon's demand for additional information is nothing more than an improper attempt to require a level of certainty that is simply not required to form a reasonable belief. *See United States v. Lovelock*, 170 F.3d 339, 343 (2d Cir. 1999) (reason-to-believe standard requires less certainty than a requirement of probable cause). In fact, even the probable cause standard asks only whether there is a "fair probability" that a given fact is true and does not ap-

proach the far higher standards of certainty associated with a "preponderance of the evidence" or "beyond a reasonable doubt." *See, e.g., Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). Therefore, all that was constitutionally required in this case was that Agent Zuk "have a basis for [his] reasonable belief as to the operative facts, not that [he] acquire all available information or that those facts exist." *Lovelock*, 170 F.3d at 344.

Here, Agent Zuk had numerous facts available to him regarding Bohannon's location. When Agent Zuk viewed those facts cumulatively, in context and in light of his training and 16 years of experience as a federal agent, he reasonably formed a belief that Bohannon was in Dickson's apartment on the morning of December 5, 2013. Based on that belief, Agent Zuk sent the arrest team to Dickson's apartment rather than to Bohannon's own home. It stands to reason that if there was any evidence that Bohannon was home, or at a location other than Dickson's apartment, Agent Zuk would have directed the arrest team accordingly because, as Agent Zuk explained, his primary goal that morning was to ensure the successful and safe arrests of Bohannon and all of his co-defendants. JA14 (Tr. 15).

II. The district court correctly found that law enforcement did not need a search warrant to enter Dickson's apartment to effectuate Bohannon's arrest.

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. 573, 603 (1980). Thereafter, 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 of "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.

This Circuit has not yet decided this issue left open by *Steagald*. *See United States v. Snype*, 441 F.3d 119, 133 (2d Cir. 2006). However, every circuit that has addressed the question permits entry into a third party's residence to effectuate an arrest warrant for a non-resident suspect, reasoning as follows:

> A person has no greater right of privacy in another's home than in his own. If an arrest warrant and reason to believe the person named in the warrant is present are sufficient to protect that person's Fourth Amendment privacy rights in his own home, they necessarily suffice to protect his privacy rights in the home of another.

United States v. Hollis, 780 F.3d 1064, 1068 (11th Cir. 2015) (quoting *United States v. Agnew*, 407 F.3d 193, 197 (3rd Cir. 2005)) (alterations omitted); *see also United States v. King*, 604 F.3d 125, 137 (3rd Cir. 2010) (officers do not need a search warrant to execute an arrest warrant in a third-party's home); *United States v. Jackson*, 576 F.3d 465, 468 (7th Cir. 2009) (same); *United States v. Kern*, 336 Fed. Appx. 296, 298 (4th Cir. 2009) (same); *United States v. McCarson*, 527 F.3d 170, 172-73 (D.C. Cir. 2008) (same); *United States v. Pruitt*, 458 F.3d 477, 481-82 (6th Cir. 2006) (same); *United States v. Kaylor*, 877 F.2d 658, 663 (8th Cir. 1989) (same); *United States v. Underwood*, 717 F.2d 482, 484 (9th Cir. 1983) (en banc) (same).

These circuits have acknowledged that effectuating an arrest warrant in a third party's home without first obtaining a search warrant may violate the Fourth Amendment rights of the third party. *Hollis*, 780 F.3d at 1068. However, they have refused to allow the non-resident sub-

ject of an arrest warrant to use the Fourth Amendment to "challenge the execution of that warrant and the later discovery of evidence in the third-party's home." *Id*. at 1068-69; *see also Agnew*, 407 F.3d at 196 ("*Steagald* protected the interests of the third-party owner of the residence, not the suspect himself."); *Underwood*, 717 F.2d at 484 ("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); *cf. Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) ("Our cases make it clear that Fourth Amendment rights are personal rights which ... may not be vicariously asserted.") (internal quotation marks and citations omitted); *but see United States v. Weems*, 322 F.3d 18, 23 n.3 (1st Cir. 2003) (assuming, without deciding, that arrestee may raise Fourth Amendment objection to search of third party's home).

In *Snype*, this Court declined to decide whether law enforcement can enter a third-party's residence to execute an arrest warrant because the factual record in that case was insufficient to establish whether law enforcement had a reasonable basis to conclude that the non-resident subject of the warrant was in the premises. 441 F.3d at 133-34. However, in the course of that holding, this Court favorably cited the

Third, Sixth, Eighth, and Ninth Circuits, which, at that time, were the only four circuits to have decided the issue, noting that those Courts had reasoned 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*.

See id. at 133. Since *Snype*, the Fourth, Seventh, Eleventh, and D.C. Circuits have adopted the same position regarding the execution of arrest warrants in third-party residences.

Moreover, in a summary order issued subsequent to *Snype*, this Court gave a strong indication that it agreed with its sister circuits. *See United States v. Vistero*, 391 Fed. Appx. 932, 934 (2d Cir. 2010) ("Nor need we decide the question left open in *Steagald v. United States*: '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.' *Doubtful as it is that any arrestee could raise such an objection*, *Samson* clearly precludes Vistero from doing so . . . .") (emphasis added; citations omitted). Indeed, the First Circuit, although it has never squarely reached the issue, appears to stand

alone in leaning toward an assumption that an arrestee has standing to challenge the search of a third party's apartment in which he is arrested. *See United States v. Graham*, 553 F.3d 6, 14 n.4 (1st Cir. 2009) ("Both the Supreme Court and this court have left this issue open, and we have no need to resolve it today.") (internal citation omitted).

Here, the district court held that law enforcement should be permitted to enter a third-party's residence to effectuate an arrest warrant for a non-resident who they reasonably believe to be on the premises. JA75. Bohannon questions that holding noting that "[i]f the Government believed that there were narcotics or firearms within 34 Morgan, then there is no question that it would need a search warrant to enter this address." Def. Br. at 28. Bohannon thus reasons that law enforcement needed a search warrant to enter Dickson's residence to search for Bohannon. Bohannon misses the mark. If the government sought to enter Dickson's apartment to search for firearms and narcotics it would need to obtain a search warrant because such a search would impact *Dickson's* Fourth Amendment rights, rather than Bohannon's. The question here, however, is whether entry into Dickson's apartment impacted *Bohannon*'s Fourth Amendment rights. Again, every circuit to have addressed that question has answered it in the negative.

Nonetheless, Bohannon urges this Court to reject the reasoning of its sister circuits and to extend greater privacy rights to the subject of an arrest warrant in a third-party's home than he would otherwise enjoy in his own home. In support of his position, Bohannon relies upon *Weems*, a case in which the First Circuit specifically declined to decide the issue; the dissent from the Ninth Circuit's en banc decision in *Underwood*; *Lovelock*, a case which preceded *Snype;* and a district court decision in a civil case, *Charland v. Nitti.*

Bohannon's reliance upon *Charland v. Nitti*, No. 1:11-cv-1191, 2014 WL 1312095 (N.D.N.Y. March 31, 2014) is particularly misplaced. Def. Br. at 24-25. In *Charland*, law enforcement entered the plaintiff's home without a search warrant looking for her estranged husband (Williams), who was the subject of an arrest warrant and who no longer lived in her home. Charland brought a *Bivens* action claiming that *her* Fourth Amendment rights had been violated; Williams was not a party to that action. The issue in *Charland*, therefore, was whether the third-party homeowner's rights were violated, not whether Williams's Fourth Amendment rights had been violated. Accordingly, *Charland* has absolutely no bearing upon the issue in the present case.

Bohannon acknowledges, as he must, that all of the circuits that have reached this issue have

found *Steagald* inapplicable to Bohannon's claim. The government respectfully submits that this Court should do the same.

Conclusion

For the foregoing reasons, and for the reasons set forth in the government's opening brief, the district court's ruling suppressing the evidence seized during the protective sweep incident to Bohannon's arrest should be reversed.

Dated: July 29, 2015

Respectfully submitted,

DEIRDRE M. DALY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

TRACY LEE DAYTON
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

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

This is to certify that the foregoing brief complies with the 7,000 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 5,739 words, exclusive of the Table of Contents, Table of Authorities, and this Certification.

TRACY LEE DAYTON
ASSISTANT U.S. ATTORNEY