No. _____

IN THE

Supreme Court of the United States

RASHAUD JONES,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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September 27, 2018

QUESTION PRESENTED

The question presented in this petition is as follows:

> Whether, In The Context Of An Automobile Search, Dwellers In Multi-Family Homes Have A Legitimate Expectation Of Privacy In The Areas Surrounding Their Home That Would Be Regarded As Curtilage Under *Virginia v. Collins,* 584 U.S. ___, 138 S.Ct. 1663 (2018) If Their Home Were A Single-Family Dwelling?

In *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663 (2018) this Court held that a dweller in a single-family home has a legitimate expectation of privacy in the curtilage of their home that trumps the automobile exception to the warrant requirement. "The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage," the Court ruled. *Collins* at 1672. The holding of the case was unambiguous: "[T]he automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein." *Collins* at 1675.

Left unaddressed by the Court in *Collins* is whether dwellers in multi-family homes have a similar expectation of privacy in the curtilage of their homes. Mr. Jones seeks certiorari to present this issue in a case almost tailor-made to present consideration of this question.

At the time *Collins* was decided, *United States v. Jones*, 893 F.3d. 66 (F.3d., 2nd Cir.), was *sub judice* before a panel of the United States Court of Appeals for the Second Circuit. The Circuit deliberately withheld its decision in *Jones* until this Court decided *Collins*, no doubt anticipating that *Collins* would shed necessary light on how *Jones* ought to be decided. On June 19, 2018, the Second Circuit rejected Mr. Jones's claim that he had a legitimate expectation of privacy in the curtilage of his multi-family apartment building, and upheld a trial court denial of Mr. Jones's motion to suppress the search of his automobile parked in the common parking area of his home. As of this writing, the Second Circuit is the only federal appellate court to apply *Collins* to a case involving the curtilage of a multi-family dwelling.

The Second Circuit ruling was simple, and fatal to any claim that a dweller in a multi-family home has a legitimate expectation of privacy in the curtilage of their home. Indeed, the ruling goes so far as to raise a substantial federal question about whether the concept of curtilage has any application at all to multi-family homes. The Second Circuit concluded that Mr. Jones's claim that the warrantless search of his car was unlawful "fails because the driveway in which Mr. Jones's vehicle was parked was the *shared* driveway of tenants in two multi-family buildings and was not within the curtilage of Jones's private home." *United States v. Jones*, 893 F.3d 66, 72 (2d Cir. 2018) "We hold that Jones had no legitimate expectation of privacy in the rear parking lot" of his home, the Circuit concluded. *Jones* at 72.

This ruling assumes without deciding an issue requiring this Court's attention: whether the common spaces we share of necessity with neighbors in common dwellings must also, as a matter of law, be shared with agents of the state? For the millions of Americans who reside, either by economic necessity or lifestyle choice, in multi-family structures, treating the state as a tenant in common of the private spaces surrounding their home should come as an offensive surprise. The Fourth Amendment was intended to serve as a real and potent limitation on government power, not an invitation to camp outside the door of our private dwellings.

PARTIES TO THE PROCEEDING

Petitioner Rashaud Jones was, at the time of the underlying trial, an adult resident of the State of Connecticut. He is now in the custody and control of the federal Bureau of Prisons and resides in a New York penal institution.

Respondent is the United States of America, acting through the Department of Justice.

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PETITION FOR A WRIT OF CERTIORARI

Rashaud Jones petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit reported at 893 F.3d. 66 (F.3d., 2nd Cir.) is reprinted in the Appendix (App.) at 1a. A related unpublished decision by the United States Court of Appeals for the Second Circuit deciding other claims arising from Mr. Jones's conviction is reprinted at App. 17a. The underlying District Court decision rejected Mr. Jones's motion to suppress is reprinted at App. 27a.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its decision on June 19, 2018. App. 1a. Jurisdiction of this Court is evoked pursuant to U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . ."

INTRODUCTION

In November 2011 and August 2012, police officers in Hartford, Connecticut, received an anonymous tip identifying Rashaud Jones as a drug dealer who may use weapons in furtherance of his activities. App. 5a. A lengthy investigation ensued. App. 5a-8a.

At about 8:15 a.m. on December 18, 2012, officers saw Mr. Jones drive a Dodge Magnum to 232 Westland Street in Hartford. Mr. Jones left a common roadway, and pulled into a driveway shared by two adjacent buildings, including 232 Westland Street. Mr. Jones parked the Dodge Magnum behind 232 Westland. App. 7a. A little more than an hour later, two other individuals arrived at 232 Westland Street in a green Infniti. They pulled into the same rear lot as did Mr. Jones. App. 6a. Less than an hour later, the two individuals left 232 Westland in the green Infiniti. App. 6a.

When officers stopped the occupants of the green Infiniti shortly after it left 232 Westland Street, the officers searched the car, finding crack cocaine. One of the occupants of the car told officers he received the cocaine from Mr. Jones in the third floor of 232 Westland that morning. Mr. Jones still had narcotics at that address, he told the officers. App. 6a.

At about 10:30 a.m., officers saw Mr. Jones leave 232 Westland Street as a passenger in a different car, a Chevy Tahoe. They stopped the car a short distance away, arresting Mr. Jones and recovering about $4,000 in cash. They then brought him back to 232 Westland Street. A

search of the Tahoe yielded an additional $4,400 in cash. App. 7a.

After Mr. Jones left 232 Westland, officers saw a tow operator attempting to leave the shared driveway with the Dodge Magnum. The tow operator told officers a man named "Buck" had called to ask that the car be towed to a mechanic. Officers instructed the tow operator to return the Magnum to the rear lot behind 232 Westland, and the operator did so. App. 7a.

After returning to 232 Westland with Mr. Jones, an officer knocked on the door on the second-floor of 232 Westland. He received no response and left to get a warrant for both the second and third floors of the 232 Westland. The building was a multi-family dwelling.

At some point, the officer passed by the Dodge Magnum parked in the rear lot behind 232 Westland. The car had tinted windows. He drew close to the car, and peered into the rear hatch window, and saw an open paper bag with what appeared to be a box of Lawman ammunition in it. He then conducted a warrantless search of the car, finding crack cocaine, powder cocaine, a digital scale, firearms and ammunition. App. 7a.

Mr. Jones moved to suppress the evidence seized from the car on the grounds that because the car was within the curtilage of his dwelling, the automobile exception to the warrant requirement did not apply. The trial court held a hearing and rejected his claim, and the case proceeded to trial.

His first trial ended in a mistrial when jurors could not reach a unanimous verdict. His second

trial resulted in a finding of guilty on all counts. He appealed the trial court's denial of his motion to suppress the fruits of the warrantless search of the Dodge Magnum. The Second Circuit rejected his appeal. He seeks review in this Court by writ of certiorari.

STATEMENT OF THE CASE

Millions of Americans live in multi-family homes. Although Mr. Jones's actual residence was a contested issue in the underlying proceedings, there was no question that he had standing to raise a Fourth Amendment claim as to the search of his Dodge Magnum. For purposes of this litigation, the Government did not challenge that Mr. Jones had standing, in part, arising from his occupancy of 232 Westland Street.

But for the 232 Westland Street being a multi-family dwelling, this case would be analogous to *Collins* – police officers searched a vehicle parked adjacent to a residential dwelling. What distinguishes *Collins* from the instant case is that *Collins* involved a single-family dwelling, whereas the instant case involved a multi-family dwelling. The petitioner seeks an extension of the ruling in *Collins* to cover the curtilage of multi-family dwellings.

In *Collins*, an officer searched a motorcycle parked within a "partially enclosed top portion of the driveway that abuts the house."[1] *Collins* at

[1] A more complete description of the area in which the motorcycle was found is as follows: "[T]he driveway runs alongside the front lawn and up a few yards past the

1671. The Court had no difficulty concluding that this was within the curtilage of the home as it was in "an area adjacent to the home and 'to which the activity of home life extends,'" *Collins* at 1671, *citing Oliver v. United States*, 466 U.S. 170, 182, n. 12 (1984); see also, *United States v. Dunn*, 480 U.S. 294, 315 (1987)(there is "a reasonable expectation of privacy in the area surrounding . . . the home.").

In the instant case, Mr. Jones's vehicle was parked in an area immediately behind 232 Westland, which was described in the lower-court opinion as a three-family home. App. 33a. Access to this parking area was by way of a common driveway shared by both the residents of 232 Westland and the residents of an adjacent building. App. 33a. While the record is devoid of a more particular description of the parking area, it is clear that it was a parking area adjacent to, and in close contiguity to, 232 Westland. App. 41a. It was not a public parking lot; nor was it a public thoroughfare.

Regardless of whether the officer in Mr. Jones's case had a warrant to search Mr. Jones's apartment in 232 Westland, the officer did *not* have a warrant to search the Dodge Magnum. As

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front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car ad on a third side by the house. A side door provides direct access between the partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the enclosures and instead proceed up a set of steps leading to the front porch." *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663 (2018).

the Court noted in *Collins*, "The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." *Collins* at 1672. *Collins* limits the scope of *Maryland v. Dyson*, 527 U.S. 465, 466 (1999), which held that "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Id.,* at 467.

The Second Circuit's application of *Collins* to Mr. Jones's case results in the conclusion that no apartment dweller has any expectation of privacy in areas adjacent to their home. "We hold that Jones had no legitimate expectation of privacy in the rear parking lot, where he initially parked his car and to which it was returned by the towing company. First, the lot was not within the curtilage of Jones's home. The lot was a common area accessible to other tenants of 232 Westland Street and to tenants of a multi-family building next door, and therefore Jones could not reasonably expect that it should be treated as part of his private home. . . . Second, the lot was a common area of which Jones had no exclusive control." App. 12a-13a. "Our precedents," the Circuit went on to say, "establish that because an individual has no power to exclude another from a common area, a defendant has no legitimate expectation of privacy in a 'common area [that is] accessible to other tenants in a multi-family apartment building.'" App. 13a, *citing*, *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997);

see also, *United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985).

The Second Circuit's decision in *Jones* is written as though *Collins* had never been decided.

It may be that this Court will conclude that the curtilage doctrine does not apply to multi-family dwellings, the conclusion toward which the Second Circuit decision inevitably points. Was Mr. Jones's vehicle in the common lot behind 232 Wayland? Yes. But because the lot was accessible to other tenants of 232 Wayland, and because a common driveway shared by residents of the adjoining building also provided access to the lot, Mr. Jones could not expect that the lot "should be treated as part of his private home," the Second Circuit reasoned. *Jones* App. 12a. On this reasoning, Mr. Jones car could just as well have been parked on a public street. Yet there is a significant difference in renting an apartment that comes with a parking space and renting an apartment without such spaces. In the former, tenants have an expectation of something approaching exclusive right to the property – limited only by the claims of other tenants. In the latter case, a tenant must fend for herself, finding parking wherever she can. This distinction matters. A tenant with parking as part of the lease has an expectation that the public will be excluded from use of the parking lot, but that the lot will be shared with other tenants. Sharing a lot with other tenants does not mean sharing it with the state; the Second Circuit glides over this distinction without even noting it.

The Second Circuit also notes that the lot was not an area over which Mr. Jones had exclusive control. It follows, the Circuit concluded, that he had no legitimate expectation of privacy over what is left in the lot. Again, the Circuit confuses a jointly held expectation of privacy among co-tenants in the curtilage of their home with an invitation to treat the state as a neighbor.

REASONS FOR GRANTING THE WRIT

I. In The Wake Of *Collins,* Courts Have Been Quick To Conclude That Automobiles In Driveways Are Not Within The Curtilage Of A Multi-Family Dwelling, An Outcome Seemingly At Variance With *Collins*

In the wake of this Court's ruling in *Collins v. Virginia*, 138 S.Ct. 1663 (2018), courts have been quick to conclude that people sharing common space in multi-family dwellings shed an expectation of privacy. The courts seem wiling, however, to afford such an expectation of privacy to individuals living in single-family homes. The distinction between single-family and multi-family dwellings has no support in this Court's Fourth Amendment jurisprudence. *United States v. Jones*, 893 F.3d. 66 (2nd Cir. 2018)(no reasonable expectation of privacy in a location accessible to others and over which a party has no exclusive control); *United States v. Shaffers*, 2018 U.S.Dist. LEXIS 106952, * 13-14 (June 26, 2018)(no expectation of privacy because vehicle in a lot shared by residents of multi-family dwelling, citing *Jones* and *Collins*); *Commonwealth v. Carroll*, 2018 Va. Cir. LEXIS 108, *12 (June

10, 2018)(suppressing fruits of unlawful arrest in driveway of single-family dwelling where warrantless arrest occurred in "area of the driveway where occupants store their vehicles and objects," citing *Collins*); *United States v. Phillips*, 2018 U.S.Dist. LEXIS 144015, *13, fn.2 (August 24, 2018) (ruling, in a footnote, that Collins is not applicable in a case where vehicle "was parked in the middle of an unenclosed driveway ramp that was used to access the home and entirely exposed to public view, to which 'a neighbor would venture' and home life cannot reasonably extend"); *United States v. Thompson*, 2018 U.S.Dist. LEXIS 142379, *5, (August 22, 2018)(parties stipulate the automobile in private driveway not within curtilage, therefore, court does not reach issue presented in Collins, *5, fn. 1 but notes blanket approval of Ninth Circuit cases upholding automobile exception in case of cars parked in private driveway, citing *United States v. Kim*, 105 F.3d 1579 (9th Cir. 1997), *United States v. Hatley*, 15 F.3d 856, 858-59 (9th Cir. 1994) and *United States v. Heffington*, 951 F.2d 363 (9th Cir. 1991),*8).

The Fourth Amendment's limitation on searches and seizures is not a general trespass doctrine applicable to any and all: It is a limit on state action. We can share a right of joint access to an area with other private parties while at the same time sharing with those private parties an expectation of privacy as to the state and its agents. The amendment limits the ability of government agents to search the papers, persons and affects of those protected by the amendment. There are no graded tiers of Fourth Amendment protection. An item can be accessible to co-

tenants without being available to the government. Using *Collins* to justify warrantless searches of cars parked in common areas of multi-family dwellings is offensive to the robust sense of equality before the law etched above the portal of the entrance to this Court — "Equal justice under law."

II. Merely Because An Automobile Is Accessible To The Public When Parked Within The Curtilage Of A Dwelling Does Not Defeat *Collins* Holding That A Warrant Is Required To Search The Automobile

The Second Circuit's suggestion that "because an individual has no power to exclude another from a common area, a defendant has no legitimate expectation of privacy in a 'common area [that is] accessible to other tenants in a multi-family apartment building,'" App. 13a, yields a reading of the expectation of privacy tethered exclusively to trespass doctrines. The decision fails to acknowledge what this Court has repeatedly recognized: an expectation of privacy with respect to state actors is rooted in concerns about limiting arbitrary exercises of state power, especially when the state's power extends as an incident to the changing conditions of modern life. In the same way that cell technology has created expectations of privacy more nuanced than can be captured by trespass doctrines, so, too, has increasing occupancy in multi-family dwellings.

The evolution of Fourth Amendment doctrine inevitably leads to the conclusion that dwellers in multi-family units share common spaces in

their dwellings while simultaneously sharing an expectation of privacy as regards the government and its agents. Suggesting that the mere sharing of common space with others eliminates any expectation of privacy as to the activities of the state on the part of residents of multi-family dwellings effectively cripples, if not eliminates altogether, the curtilage doctrine with respect to millions of homes. To date, this Court has yet to reach such a conclusion. Everything in this Court's Fourth Amendment jurisprudence suggests that the Court is unprepared to do so.

Boyd v. United States, 116 U.S. 616 (1886) laid a broad foundation on which this Court built contemporary understandings of what constitutes a search within the meaning of the Fourth Amendment. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right to personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence . . ." *Boyd* at 622 (holding that a court order requiring production of incriminating business invoices constituted a search).

In *Olmstead v. United States*, 277 U.S. 438 (1928), the Court laid a firmer foundation, ruling that a search required actual physical invasion of a person, place or home, or a trespass upon a protected area. Thus, wiretapping was not a search because it did not physically invade a person, place, paper or effect. *Id*. This test was supplemented, in *Katz v. United States,* 389 U.S. 347 (1967), with Justice Harlan's reasonable expectation of privacy test, a standard that

recognizes that the Fourth Amendment "protects people, not places." *Id.*, at 361. The *Katz* test requires satisfaction of two prongs: demonstrating a subjective expectation of privacy on the part of the person seeking Fourth Amendment protection, and an objective determination that the expectation of privacy is one that society finds reasonable. *Id*.

Katz did not replace the trespass standard of *Olmstead* and its progeny. In *United States v. Jones*, 132 S.Ct. 945 (2012), the Court held that the installation and monitoring of a GPS device on a car was a search for Fourth Amendment purposes because the device amounted to a physical intrusion. *Id.*, at 954. While not replacing the expectation of privacy test, *Jones* reaffirmed the historic role of the trespass standard. *Id.* at 952. The Court noted that because the installation of the GPS device amounted to a trespass, there was no need to examine whether the police violated the petitioner's expectations of privacy under *Katz*. *Id*., at 1417.

The customary-invitation standard of *Florida v. Jardines*, 133 S.Ct. 1409 (2013) relied upon the trespass standard, but did not replace Katz's expectation of privacy standard.[2]

Last term, the Court reemphasized the constitutional vitality of the reasonable expectation of privacy standard in *United States*

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[2] In *Jardines*, the Court held that a person has a limited license to enter certain areas of property accessible to the public. This license, "express or implied – is limited not only to a particular area but also to a specific purpose." *Jardines*, 133 S.Ct. at 1416.

v. Carpenter, 138 S.Ct. 2206 (2018). Significantly, the Court noted that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'" *Carpenter*, slip op., p. 12, citing *Katz*, 389 U.S., at 351–352. In limiting the reach of the third-party doctrine, the Court noted, in language equally applicable to joint curtilage: "The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of 'diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.'" *Id.*, at 2219 citing *Riley v. California*, 134 S.Ct. 2473, 573 U.S., at ___ (slip op., at 16). The Court noted that:

> Although no single rubric definitely resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings 'of what as deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.' *Carroll v. United States*, 267 U.S. 132, 149 (1925). On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure 'the privacies of life' against 'arbitrary power.' *Boyd v. United States*, 116 U.S. 616, 630 (1886) Second, and relatedly, that a central aim of the Framers was 'to place obstacles in the way of too

> permeating police surveillance.' *United States v. Di Re*, 332 U.S. 581, 595 (1948).

Carpenter, at pp. 2213–2214.

While the curtilage doctrine lacks exactitude, this Court has recognized it as "the area around the home to which the activity of home life extends." *Oliver*, 466 U.S. at 182. Individuals possess a "reasonable expectation of privacy in the area surrounding . . . the home." *Dunn*, 480 at 315. As this Court noted in *Collins*:

> Like the automobile exception, the Fourth Amendment's protection of curtilage has long been black letter law. '[W]hen it comes to the Fourth Amendment, the home is first among equals.' *Florida v. Jardines*, 569 U.S. 1, 6 (2013). 'At the Amendment's 'very core' stands ''the right of a man to retreat into his own home and there be free from unreasonable government intrusion.' *Ibid.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). To give full practical effect to that right, the Court considers curtilage – 'the area 'immediately surrounding and associated with the home' – to be 'part of the home itself for Fourth Amendment purposes.' *Jardines*, 569 U.S. at 6 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). 'The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations

> are most heightened.' *California v. Ciraolo*, 476 U.S. 207, 212-213 (1986).

A homeowner entering into a rental or purchase agreement to acquire a property interest in the dwelling in a multi-unit dwelling certainly has an expectation of privacy in the common area immediately outside his home. It makes little sense to suggest that a single-family home dweller can reasonably expect to exclude the state and its agents from hovering on his porch or in the driveway outside his home, while concluding that multi-family unit dwellers shed such an expectation. The castle doctrine regards our homes as surrounded, in effect, by moats – curtilage. A constructive condition of any sale or rental agreement recognizing the rights of tenants-in-common or joint owners to have access to common space is not an invitation to the world at large, and certainly not the state, to share that space.

III. Constructive Elimination Of The Curtilage Doctrine In The Case Of Multi-Family Homes Is Repugnant In A Society Increasingly Populated By Apartment Dwellers

Searches of common areas associated with multi-family dwellings will increasingly draw the attention of the courts as population density increases and more people dwell in units in multi-family dwellings. Whatever visions of a nation of small, independent free-holders may have inspired Thomas Jefferson and his contemporaries, we are increasingly a nation of apartment dwellers living in close proximity to one another. This case presents a discrete

opportunity to examine and decide the extent to which the curtilage doctrine survives in the context of a multi-family dwelling. This Court has already ruled that the automobile exception does not trump the warrant requirement when a car is located within the curtilage of a single-family dwelling; the petitioner here requests that this Court decide whether his expectation of privacy is of lesser constitutional import simply because his car was parked in an area closely associated with the intimate life of more than one household. It is a question that has long troubled scholars.

"[T]he geographical curtilage factors delineated in *United States v. Dunn*[, 480 U.S. 294 (1987)] arose in, and therefore apply primarily to, rural dwellings.[3] This path of development has left a large area of the population without significant protection of their privacy or property." Leonetti, Carrie, Open Fields In The Inner City: Application Of The Curtilage Doctrine To Urban And Suburban Areas, 15 Geo. Mason U. Civ. Rts. L. J. 297 (2005). The Census Bureau reported in 2014 that an increasing number of urban areas have more apartment dwellers than residents of single-family homes.[4] Indeed, "buildings with two

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[3] The Four *Dunn* factors are: (1) the proximity of the area in question to the physical home; (2) whether the area in question is located within an enclosure also surrounding the physical home; (3) the type of use to which the area in question was put; and, (4) the steps taken by the property owner to protect the area in question from observation by non-residents. *Dunn*, at 300-301.

[4] United States Census Bureau, Selected Housing Characteristics (2014) http://factfinder.census.gov/face

or more residential units constitute roughly 26.5% of the country's housing stock, and there are approximately 25 million residential units with 19 million Americans who reside in building with two-to four units, and 37 million Americans who reside in buildings with five or more residences." Justice, Jeremy J., Note: Do Residents of Multi-Unit Dwellings Have Fourth Amendment Protections In Their Locked Common Area After *Florida v. Jardines* established The Customary Invitation Standard?, 62 Wayne L. Rev. 305, 329 fn. 197 (2017).[5] "Fourth Amendment Protection varies depending on the extent to which one can afford accoutrements of wealth such as a freestanding home, fences, lawns, heavy curtains, and vision and sound-proof doors and walls." Slobogin, Christopher, The Poverty Exception To The Fourth Amendment, 55 Fla. L. Rev. 391, 401 (2003)(The author notes two other exceptions in addition to the "poverty exception" – the "Mexican exception" and the "illegal alien exception." It matters not whether these exceptions are intended; their existence poses a challenge to a republic and jurisprudence founded on the concept of equality).

In recent years, the Court has shown great solicitude to technological changes in American life that require new light to be shed on the Fourth Amendment. *Smith v. Maryland*, 442 U.S. 735, 741 (1979)(pen register searches and telecommunications): *Jones*, 132 S.Ct. 945 (2012)(GPS tracking devices); *Kyllo v. United*

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[5] *Florida v. Jardines*, 569 U.S. 1 (2013).

States, 533 U.S. 27 (2001)(thermal imaging); *Carpenter*, 138 S.Ct. 2206 (2018)(cell site location records). In the course of rendering these decisions, the Court has focused on expectations of privacy.

Collins applied settled law to yesteryear's housing arrangments. The petitioner seeks a ruling on the applicability of *Collins* to the expectations of privacy of persons in multi-family homes. He contends that the Fourth Amendment's scope and reach applies equally to rich and poor alike, and that the distinction between single-family and multi-family curtilage on our courts now rely must be eliminated.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

16-87-cr
United States v. Jones

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM, 2017

ARGUED: AUGUST 15, 2017

DECIDED: JUNE 19, 2018

NO. 16-87-cr

UNITED STATES OF AMERICA,

Appellee,

—v.—

RASHAUD JONES,

Defendant-Appellant,

CHARLES TYSON, MADELAINE RIVERA,

Defendants.[1]

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[1] The Clerk of Court is respectfully directed to amend the caption as above.

Appeal from the United States District Court
for the District of Connecticut.
No. 3:13-cr-2-1 - Michael P. Shea,
District Judge.

Before: WALKER, CABRANES, and RAGGI,
Circuit Judges.

Defendant-Appellant Rashaud Jones appeals, following a jury trial in the United States District Court for the District of Connecticut (Michael P. Shea, *J.*), from his conviction for conspiracy to possess with intent to distribute cocaine base, possession with intent to distribute various quantities of cocaine base and cocaine, possession of a firearm in furtherance of a narcotics trafficking crime, and unlawful possession of a firearm and ammunition by a convicted felon.

On appeal, Jones argues that we should vacate his conviction because the district court erred by: (1) denying a motion to suppress evidence seized from a warrantless search of a car used by him; (2) denying his motion to suppress evidence seized from his apartment; (3) permitting a witness to testify regarding her drug-trafficking activities with Jones prior to the period charged in the indictment; (4) instructing the jury about inferences that they could make if they found that Jones was the sole occupant of the car; and (5)

applying a two-level Sentencing Guidelines enhancement for obstruction of justice.

Rejecting each of Jones's arguments, we AFFIRM his conviction and sentence. In this opinion we discuss why the district court did not err in refusing to suppress evidence seized from a car parked in the common parking lot of a multi-family building where the vehicle search was warrantless but supported by probable cause. The remaining arguments are resolved by a summary order issued simultaneously with this opinion.

GEOFFREY M. STONE, Assistant United States Attorney (Marc H. Silverman, Assistant United States Attorney, *on the brief), for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, CT, *for Appellee.*

NORMAN A. PATTIS & BRITTANY B. PAZ, Pattis & Smith, LLC, New Haven, CT, *for Defendant-Appellant.*

JOHN M. WALKER, JR., *Circuit Judge*:

Defendant-Appellant Rashaud Jones appeals, following a jury trial in the United States District Court for the District of Connecticut (Michael P. Shea, *J.),* from his conviction for conspiracy to possess with intent to distribute cocaine base, possession with intent to distribute various

quantities of cocaine base and cocaine, possession of a firearm in furtherance of a narcotics trafficking crime, and unlawful possession of a firearm and ammunition by a convicted felon.

On appeal, Jones argues that we should vacate his conviction because the district court erred by: (1) denying a motion to suppress evidence seized from a warrantless search of a car used by him; (2) denying his motion to suppress evidence seized from his apartment; (3) permitting a witness to testify regarding her drug-trafficking activities with Jones prior to the period charged in the indictment; (4) instructing the jury about inferences that they could make if they found that Jones was the sole occupant of the car; and (5) applying a two-level Sentencing Guidelines enhancement for obstruction of justice.

Rejecting each of Jones's arguments, we AFFIRM his conviction and sentence. In this opinion we discuss why the district court did not err in refusing to suppress evidence seized from a car parked in the common parking lot of a multi-family building where the vehicle search was warrantless but supported by probable cause. The remaining arguments are resolved by a summary order issued simultaneously with this opinion.

BACKGROUND

Jones challenges the district court's denial of his motion to suppress evidence seized from a warrantless search of a car. The search occurred in December 2012, following months of investigation into Jones's drug-trafficking activities.

A U.S. Drug Enforcement Administration Task Force handles a variety of narcotics investigations in Hartford, Connecticut. For years, Officer James Campbell has been a member of that Task Force. Years prior to the events at issue in this case, Officer Campbell had arrested Jones for possession and sale of crack cocaine.

In November 2011 and August 2012, the Hartford Police Department received anonymous tips identifying Jones as a drug dealer and indicating that weapons may be involved in his activities. This information was conveyed to Officer Campbell, who, along with other investigators, began conducting daily surveillance of Jones from August through November 2012.

During their surveillance, officers observed Jones routinely meeting with individuals on Evergreen Avenue in Hartford, including Tyrone Upshaw, Charles Tyson, and Madelaine Rivera. On September 6, 2012, officers saw Upshaw violate motor vehicle laws as he drove away from Evergreen Avenue. Officers stopped the car and obtained Upshaw's consent to search, during which they recovered marijuana and several items connected to Jones. Specifically, officers uncovered a set of keys to a car that were labeled "Buck," a known alias of Jones; a money gram identifying "Rashad Jones"; and a dentist receipt that listed Jones's address as 232 Westland Street.

During the course of the investigation, the officers took several steps to confirm that Jones lived at 232 Westland Street. For example, Officer Campbell checked the Hartford Police Department computer system and Lexis Nexis for information

related to Jones, both of which indicated that his most recent address was 232 Westland Street, second floor. In addition, during a November 26, 2012 motor vehicle stop, several weeks before the events at issue in this case, Jones identified his address as 232 Westland Street.

On December 18, 2012, at approximately 8:15 a.m., officers observed Jones driving a Dodge Magnum to 232 Westland Street, where he pulled into a shared driveway and parked the vehicle behind the building. The driveway is accessible to various tenants of 232 Westland Street, a three-story, multi-family apartment building, and to the tenants of another multi-family building next door.

At approximately 9:20 a.m., Tyson and Rivera arrived in a green Infiniti and pulled into the same rear lot of 232 Westland Street. Less than an hour later, Tyson and Rivera left in the Infiniti. Officers stopped them and, with their consent, searched the car and recovered crack cocaine. Tyson told the officers that he had obtained the crack from Jones on the third floor of 232 Westland Street, that he did so several times a week, and that Jones still had narcotics at that address. During this conversation, Rivera received two incoming calls from Jones, but did not answer them. The officers arrested Tyson and Rivera.

At approximately 10:30 a.m., the officers observed Jones leave 232 Westland Street as a passenger in a Chevy Tahoe. The officers stopped the Tahoe, arrested Jones, recovered approximately $4,000 from his person, and brought him back to 232 Westland Street. With consent from the

registered owner of the Tahoe, officers searched the vehicle and recovered an additional $4,400.

Meanwhile, at 232 Westland Street, officers observed a tow truck at the very end of the shared driveway removing the Dodge Magnum. The officers called the towing company and learned that someone named "Buck" had requested that the vehicle be towed to his mechanic because the struts were bad. The officers instructed the tow-truck operator to return the car to the rear lot of 232 Westland Street, where it had previously been parked.

Officer Campbell then knocked on the door of the second-floor apartment of 232 Westland Street and, receiving no response, left and obtained a search warrant for both the second- and third-floor apartments. The subsequent search of the second-floor apartment yielded crack cocaine, marijuana, paraphernalia, and ammunition. Officer Campbell then went to the Dodge Magnum that had been returned to the back lot by the towing company. At the suppression hearing, he testified that, because the windows were tinted, he walked up to the vehicle, put his head on the rear hatch window, and looked inside. App. 160; Gov't App. 8-10, 13. He saw an open paper bag sitting inside a black Zales bag and, within the open paper bag, what looked like one box with a second box on top of it. App. 160; Gov't App. 9. He recognized the bottom box as Lawman ammunition, which has a distinct logo. The officers then conducted a warrantless search of the Dodge Magnum and recovered crack cocaine, powder cocaine, a digital scale, firearms, and ammunition.

Jones was charged with seven drug trafficking and firearms offenses, including conspiring to distribute and possess with intent to distribute cocaine from approximately December 2011 through December 2012. Prior to trial, Jones unsuccessfully moved to suppress the evidence recovered from the Dodge Magnum.

On March 2, 2015, a jury convicted Jones of all seven counts. Following a sentencing hearing on January 5, 2016, the district court sentenced Jones to 211 months' imprisonment followed by 5 years of supervised release. Jones timely appealed both his conviction and sentence.

DISCUSSION

On appeal, Jones argues that the district court erred by admitting evidence seized from the warrantless search of the Dodge Magnum because, in these circumstances, the automobile exception to the warrant requirement does not apply. Specifically, Jones argues that: (1) the officers lacked probable cause to search the vehicle; (2) he had an enhanced expectation of privacy in the Dodge Magnum because it was parked in a residential lot; and (3) there were no exigent circumstances justifying the search of the Dodge Magnum before obtaining a warrant. We discuss each argument in turn.

On appeal from a suppression ruling, we review factual findings for clear error, and questions of law *de nova. United States v. Faux,* 828 F.3d 130, 134 (2d Cir. 2016). The district court's ultimate determination of whether probable cause existed and whether the automobile exception applied are

both reviewed *de nova. United States v. Gagnon,* 373 F.3d 230, 235 (2d Cir. 2004).

I. The Automobile Exception to the Warrant Requirement

Although the Fourth Amendment generally requires police to obtain a warrant before conducting a search, there is a well-established exception for vehicle searches. *Maryland v. Dyson,* 527 U.S. 465, 466 (1999) (per curiam). "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Id.* at 467. "The Supreme Court has relied on two rationales to explain the reasonableness of a warrantless search" under this exception: (1) a vehicle's "inherent mobility" and (2) a citizen's reduced expectations of privacy in the contents of that vehicle. *United States v. Navas,* 597 F.3d 492, 497 (2d Cir. 2010).

Jones does not dispute that the Dodge Magnum was inherently mobile. His remaining arguments that the automobile exception does not apply are unpersuasive. We hold that the officers had probable cause to search the Dodge Magnum and that the automobile exception applies because Jones had no heightened expectation of privacy a multi-family parking lot. The district court therefore did not err in admitting evidence recovered from the vehicle search.

A. Probable Cause

The officers had probable cause to search the Dodge Magnum. Probable cause exists "where the facts and circumstances within . . . [the officers']

knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that evidence of a crime will be found in the place to be searched." *United States v. Gaskin,* 364 F.3d 438, 456 (2d Cir. 2004) (alterations in original) (internal quotation marks omitted) (quoting *Brinegar v. United States,* 338 U.S. 160, 175-76 (1949)).

At the suppression hearing, Officer Campbell was questioned about his search of the Dodge Magnum. He testified that he observed a box of ammunition in the car when he peered through the car's rear window. The district court credited this testimony. Assuming that the district court did not commit clear error in crediting this testimony, this evidence was sufficient to establish probable cause *to* search the car. Officer Campbell was aware that Jones was a convicted felon who could not legally possess ammunition. Therefore, Officer Campbell's observation of ammunition in the car provided probable cause that the Dodge Magnum contained evidence of the crime of possession of ammunition by a felon.

Yet we cannot definitively say that this conclusion was correct because we do not have before us the evidence that was introduced in the district court. The parties have included in the record on appeal Officer Campbell's testimony, but they have not included a photograph of the Dodge Magnum showing its tinted windows or a photograph of the ammunition box that Officer Campbell allegedly observed in the car.

We need not, however, rely on Officer Campbell's observation. Even excluding it, there was sufficient

evidence for the district court to conclude that the officers had probable cause. By the time Officer Campbell searched the car, the officers had observed Jones driving the Dodge Magnum alone to 232 Westland Street, had recovered crack cocaine from the car that Tyson and Rivera were driving after they left 232 Westland Street, had been told by Tyson that he obtained this crack from Jones at 232 Westland Street, and had arrested Jones, who had $4,000 in cash in his possession. Officers had also observed a tow truck attempting to remove the Dodge Magnum from 232 Westland Street at Jones's request. The officers seized the car and then searched 232 Westland Street where they recovered crack, marijuana, ammunition, and other evidence from Jones's second-floor apartment. It was only at that point, after collecting other evidence of Jones's involvement in drug trafficking, that the officers searched the Dodge Magnum.

Based on this record, we conclude that the district court did not err in finding that the officers had probable cause to believe that the Dodge Magnum contained evidence of a crime.

B. Expectation of Privacy

One rationale for the automobile exception is that a citizen possesses a reduced expectation of privacy in the contents of his car, particularly in light of "the pervasive regulation of vehicles capable of traveling on the public highways." *California v. Carney,* 471 U.S. 386, 392 (1985). This rationale applies "forcefully" when an officer observes the vehicle "being used for transportation."

Navas, 597 F.3d at 500-01. Jones argues that he had a heightened expectation of privacy in the Dodge Magnum because he parked the car in a lot within his home's curtilage.

After oral argument in this case, the Supreme Court granted a writ of certiorari in *Collins v. Virginia* to address the issue of whether the automobile exception applies to a vehicle parked in a private driveway and within the curtilage of a home. *See* 138 S. Ct. 53 (2017) (mem.); *United States v. Jones,* No. 16-87, Dkt. No. 107 (2d Cir. Oct. 2, 2017) (a letter from the government regarding the grant). The Supreme Court recently decided *Collins,* holding that the automobile exception does not permit "a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein." 138 S. Ct. 1663, 1668 (2018). That decision, however, has no effect on Jones's appeal, which fails because the driveway in which Jones's vehicle was parked was the *shared* driveway of tenants in two multi-family buildings and was not within the curtilage of Jones's private home.

We hold that Jones had no legitimate expectation of privacy in the rear parking lot, where he initially parked the car and to which it was returned by the towing company. First, the lot was not within the curtilage of Jones's home. The lot was a common area accessible to other tenants of 232 Westland Street and to tenants of a multi-family building next door, and therefore Jones could not reasonably expect that it should be treated as part of his private home. *See, e.g.,*

United States v. Dunn, 480 U.S. 294, 300 (1987); *United States v. Alexander,* 888 F.3d 628, 632 (2d Cir. 2018) ("[T]he central question . . . [is] whether the area in question harbors the intimate activity associated with the sanctity of a man's home and the privacies of life.") (internal quotation marks omitted); *cf Collins,* 138 S. Ct. at 1673 n.3 (explaining that the driveway was "private, not public, property, and the [vehicle] was parked in the portion of the driveway beyond where a neighbor would venture").

Second, the lot was a common area of which Jones had no exclusive control. Jones argues that tenants have a legitimate privacy interest in such common areas, and cites to several cases in which courts have held that there was an unlawful, warrantless search where a police dog sniffed an individual's apartment door while in a common hallway. Those cases, however, concern whether a resident has "a legitimate expectation that the contents of [the] closed apartment would remain private," *United States v. Thomas,* 757 F.2d 1359, 1367 (2d Cir. 1985). They do not address whether an individual has a legitimate expectation of privacy in the hallway itself.

Our precedents establish that because an individual has no power to exclude another from a common area, a defendant has no legitimate expectation of privacy in a "common area [that is] accessible to the other tenants in the multi-family apartment building." *United States v. Fields,* 113 F.3d 313, 321 (2d Cir. 1997). In *United States v. Holland,* 755 F.2d 253, 255 (2d Cir. 1985), we held that because they are not "subject to his exclusive

control . . . it is the established law of this Circuit that the common halls and lobbies of multi-tenant buildings are not within an individual tenant's zone of privacy even though they are guarded by locked doors." *See also United States v. Hoover,* 152 F. App'x 75, 77 (2d Cir. 2005) (summary order) (holding that "[d]efendant ha[d] no reasonable expectation of privacy from others viewing his van when parked in a multi-user parking lot"). Here, because the parking lot was not subject to Jones's exclusive control and was not within the curtilage of his home, he did not have a legitimate expectation of privacy when he parked there.[2]

C. Exigency

Jones finally argues that there were no exigent circumstances requiring a warrantless search of the Dodge Magnum, because all of the relevant suspects were in custody and investigators had secured the area. But "the automobile exception does not have a separate exigency requirement." *Dyson,* 527 U.S. at 466-67 (explaining that the

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[2] The government also argues that Jones did not have a legitimate expectation of privacy because (1) he had entrusted his vehicle to a third party when he enlisted a towing company to tow it to his mechanic; and (2) the Dodge Magnum has a rear window and the trunk's contents, including the box of ammunition, were exposed. While these arguments may have force, we need not address them in light of our probable cause determination and our holding that the automobile exception applies to the search of a vehicle parked in a shared parking area. Further, we do not address the second argument because we do not have photographs of the car or its contents, and the government concedes that the windows were tinted.

automobile exception simply requires that a car be readily mobile and that probable cause exists to believe it contains contraband). Jones's arguments to the contrary are misplaced.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of Jones's motion to suppress evidence recovered from the search of the Dodge Magnum. For the reasons stated in this opinion and in the summary order issued simultaneously with this opinion, we AFFIRM the judgment of the district court in all respects.

Appendix B

16-87-cr
United States v. Jones

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of June, two thousand eighteen.

PRESENT: JOHN M. WALKER, JR.,
JOSE A. CABRANES,
REENA RAGGI,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

—v.—

RASHAUD JONES,

Defendant-Appellant,

CHARLES TYSON, MADELAINE RIVERA,

Defendants.[1]

FOR APPELLEE:

GEOFFREY M. STONE, Assistant United States Attorney (Marc H. Silverman, Assistant United States Attorney, *on the brief), for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, CT.

FOR DEFENDANT-APPELLANT:

NORMAN A. PATTIS & BRITTANY B. PAZ, Pattis & Smith, LLC, New Haven, CT.

Appeal from an order of the United States District Court for the District of Connecticut (Michael P. Shea, *Judge*).

[1] The Clerk of Court is respectfully directed to amend the caption as above.

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the district court's judgment of conviction and sentence is **AFFIRMED.**

Defendant-Appellant Rashaud Jones appeals from a judgment of conviction entered on January 8, 2016, after a jury found him guilty on all seven counts of a seven-count indictment, charging him with, among other things, conspiracy to distribute and to possess with intent to distribute 280 grams or more of cocaine base, possession with intent to distribute various quantities of cocaine base and cocaine, and possession of a firearm in furtherance of a narcotics trafficking crime. The district court sentenced Jones principally to 211 months' imprisonment.

On appeal, Jones argues that we should vacate his conviction because the district court erred by: (1) denying his motion to suppress evidence seized from a warrantless search of a car used by him; (2) denying his motion to suppress evidence seized from his apartment; (3) permitting witness Madelaine Rivera to testify regarding he drug-trafficking activities with Jones prior to the period charged in the indictment; instructing the jury about inferences that they could make *if* they found that Jones was the sole occupant of the car; and (5) applying a two-level Sentencing Guidelines enhancement for obstruction of justice. The first issue, concerning the warrantless vehicle search, is resolved by an opinion issued simultaneously with this summary order. We assume the parties' familiarity with the underlying facts and the procedural history of the case.

1. The District Court Did Not Err in Denying Jones's Motion to Suppress the Evidence Seized from the Search of 232 Westland Street.

Jones argues that the district court erred in denying his motion to suppress evidence seized from a search of his apartment at 232 Westland Street. More specifically, he contends that law enforcement officers entered the second floor of 232 Westland Street unlawfully, used information gained during that unlawful entry – *i.e.,* the presence of a money counter – to acquire a search warrant for the second floor, and could not have acquired the second-floor search warrant without this "tainted" information. We disagree. Assuming *arguendo* that law enforcement officers entered the second floor of 232 Westland Street unlawfully, performed an unauthorized protective sweep, and that information relating to the money counter must thus be excised from the subsequent search warrant affidavit, there remained sufficient probable cause to support the issuance of the search warrant for the second floor.

When an application for a search warrant includes both tainted and untainted evidence, "the warrant may be upheld if the untainted evidence, standing alone, establishes probable cause." *Laaman v. United States,* 973 F.2d 107, 115 (2d Cir. 1992). We review *de nova* the district court's ruling on whether any untainted portions of an affidavit suffice to establish probable cause. *United States v. Canfield,* 212 F.3d 713, 717 (2d Cir. 2000). It is well settled that "[p]robable cause is 'a practical, commonsense decision whether,

given all the circumstances set forth in the affidavit . . . , including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."' *Id.* at 718 (quoting *Illinois v. Gates,* 462 U.S. 213, 238 (1983)). Here, taken together, several facts set forth in the search warrant affidavit show that it was reasonable for law enforcement officers to believe that they would find evidence of drug trafficking on the second floor of 232 Westland Street, notwithstanding the excision of the money-counter evidence from the affidavit. For example, (1) Tyson told law enforcement officers that he bought crack cocaine from Jones on the third floor of 232 Westland Street; (2) Jones told law enforcement that he lived on the second floor of 232 Westland Street and had nothing on the third floor; and (3) Drug Enforcement Administration Task Force Officer James Campbell, based on his training and experience, knew that narcotics traffickers frequently maintain evidence concerning their narcotics activities in their residences, *see* Gov't App. 24-25 at ¶ 18 ("Search Warrant Affidavit").

2. The District Court Did Not Err in Permitting Madelaine Rivera to Testify Regarding Prior Drug Trafficking Activities She Engaged in With Jones.

Jones asserts that the district court violated Federal Rule of Evidence 403 by permitting Madelaine Rivera, an indicted co-conspirator and close friend of Jones, to testify about drug trafficking activities she engaged in with him in

the years preceding the conspiracy charged in the indictment. Again, we disagree.

We review evidentiary rulings "for abuse of discretion, reversing only if we find manifest error." *United States v. Al Kassar,* 660 F.3d 108, 123 (2d Cir. 2011). In addition, "we accord great deference to the district court's assessment of the relevancy and unfair prejudice of proffered evidence, mindful that it sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence." *United States v. Quinones,* 511 F.3d 289, 310 (2d Cir. 2007) (internal quotation marks omitted).

We have observed "that it is within the [district] court's discretion to admit evidence of prior acts to inform the jury of the background of the conspiracy charged, in order to help explain how the illegal relationship between participants in the crime developed, or to explain the mutual trust that existed between coconspirators." *United States v. Rosa,* 11 F.3d 315, 334 (2d Cir. 1993). The district court permitted Rivera to testify about her prior narcotics dealing relationship with Jones because it was probative of their relationship of trust, specifically of how the *illegal* nature of that relationship developed over time.

Nevertheless, Jones argues that Rivera's testimony on this topic was more prejudicial than probative, and thus violated Rule 403, because there was ample other evidence demonstrating the close personal relationship between the two and because the testimony she gave regarding the prior narcotics dealings was more detailed than

her testimony regarding the charged conspiracy. Based on our review of the record, and mindful of the discretion afforded trial judges on evidentiary rulings, *see Quinones,* 511 F.3d at 310, we cannot conclude that the district court abused its discretion in admitting Rivera' s testimony on her past criminal relationship with Jones.

First, the other "ample" evidence to which Jones refers did not establish the illegal dimension of the relationship between him and Rivera. Second, nothing in Rivera's testimony about prior narcotics dealings was "more inflammatory than the charges alleged in the indictment." *United States v. Abu-Jihaad,* 630 F.3d 102, 133 (2d Cir. 2010). Third, the district court twice instructed the jury that it could only consider Rivera's testimony "for the limited purpose of determining whether or not it shows the development of a relationship of trust between Ms. Rivera and Mr. Jones." App. 514. Any resulting unfair prejudice did not substantially outweigh the testimony's probative value, *see* Fed. R. Evid. 403, and the district court did not abuse its discretion in admitting this testimony, *see Al Kassar,* 660 F.3d at 123.

3. The District Court Properly Instructed the Jury Regarding the Inferences it Could Draw From the Sole Occupancy of a Vehicle.

We review *de novo* a challenge to a district court's jury instructions. *United States v. Lange,* 834 F.3d 58, 75 (2d Cir. 2016). "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury of the law." *Id.* Where "the charge,

viewed as a whole, demonstrates prejudicial error," we will reverse a conviction. *Id.*

There is no dispute that the district court's jury instruction regarding the inferences the jury could draw from the sole occupancy of a vehicle was legally correct. Instead, Jones argues that, because a central component of the government's case was the argument that contraband belonged to Jones because he was the last person inside the vehicle containing the contraband, the district court's use of the sole occupancy of a vehicle as an example in its jury instructions was unfair.

Despite Jones's contention, the district court's jury instruction was fair to both parties. While the district court did instruct the jury that "if the defendant was the sole occupant of a residence or a vehicle, that is significant evidence that the defendant knew about items in the residence or vehicle," App. 555-56, it also instructed the jury, in the subsequent sentence, "that the defendant's sole ownership or control of a residence or vehicle *does not* necessarily mean that the defendant had control and possession of the items found in it," App. 556 (emphasis added). Moreover, the district court's instruction did not undermine the "defense theory [that] it was Ms. Rivera, and not Mr. Jones, who placed items in the car." Br. of Defendant-Appellant at 58. To the contrary, the district court's instructions explicitly invited the jury to credit that theory if it was supported by the evidence presented at trial. We thus find no error in the district court's sole-occupancy instruction.

4. The District Court Properly Applied a Sentencing Enhancement for Obstruction of Justice.

At sentencing, and over Jones's objection, the district court applied an obstruction of justice enhancement to the applicable sentencing guidelines under U.S.S.G. § 2D1.l(b)(15)(D) for Jones's testimony at the suppression hearing. When, as here, a district court applies a sentencing enhancement based on perjured testimony, the court must find by a preponderance of the evidence that the defendant intentionally gave false testimony as to a material matter. *United States v. Thompson,* 808 F.3d 190, 194-95 (2d Cir. 2015) (per curiam). Such testimony includes a "statement . . . that, if believed, would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1 cmt. n.6. We review a district court's application of an enhancement under the Guidelines *de novo* and factual determinations underlying a district court's Guidelines calculation for dear error. *United States v. Rowland,* 826 F.3d 100, 116 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1330 (2017) (mem.).

At the suppression hearing, defense counsel stated that Jones would testify about "the facts surrounding his initial seizure and communications in the area of 232 Westland." App. 87-88. During the government's cross-examination, defense counsel objected that the government's line of questioning exceeded its permissible scope for the hearing. The district court overruled defense counsel's objection. Jones went on to

testify *inter alia* that (1) he did not provide crack to Tyson or Rivera, including at 232 Westland Street; (2) he did not see Rivera or Tyson on December 18, 2012, the date on which he was arrested; (3) he did not inform Officer Campbell that he lived at 232 Westland Street; and (4) he was not aware of any narcotics trafficking that occurred out of 232 Westland Street.

Jones first argues that the enhancement should not apply because his objection to the government's questions should have been sustained. But even assuming *arguendo* that the district court erred in allowing the government's questions, Jones was not permitted to commit perjury. Jones further contends that the enhancement does not apply because his testimony was not material to the district court's determination. He is wrong. At issue at the suppression hearing was whether the evidence seized from 232 Westland Street and the Dodge Magnum should be admitted. Officer Campbell, who was the government's sole witness, testified about the officers' investigation in this case. Jones's testimony was inconsistent with Officer Campbell's testimony in important respects, including that Jones had met with Rivera and Tyson on December 18, 2012 and had provided them with drugs, and that Jones had stated that he resided at 232 Westland Street. As the district court noted in applying this enhancement, Jones also stated that he was unaware of any narcotics trafficking out of 232 Westland Street. To the extent that such testimony contradicted Officer Campbell's, in addition to being material to whether the government had evidence constituting probable cause, Jones's testimony

also tended to undermine Officer Campbell's credibility. It was, therefore, a statement that, if believed, would tend to affect the issue under determination. *See* U.S.S.G. § 3C1.l. cmt. n.4(F), cmt. n.6.

Finally, the district court did not err in finding that Jones's statements were false. His testimony was inconsistent with the jury's verdict and implausible based on the evidence introduced at trial. For example, although Jones testified that he was not aware of any narcotics trafficking out of 232 Westland Street, the government introduced evidence that it found narcotics and paraphernalia in his apartment at this location, and Rivera testified that she saw Jones there with drugs on multiple occasions.

CONCLUSION

For the foregoing reasons, and in conjunction with the opinion issued simultaneously, we **AFFIRM** the district court's judgment of conviction and sentence.

FOR THE COURT:

/s/_____
Catherine O'Hagan Wolfe, Clerk
[SEAL]

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:13-cr-2 (MPS)

UNITED STATES OF AMERICA,

—v.—

RASHAD JONES

RULING ON MOTION TO SUPPRESS

On January 3, 2013, a grand jury returned an Indictment [doc. # 15] charging Defendant Rashad Jones ("Jones") with narcotics and firearms offenses in connection with an alleged conspiracy to distribute crack cocaine in the City of Hartford.[1] Jones has moved to suppress evidence seized by investigators (1) following the stop of a Chevy Tahoe in which Jones was riding as a passenger; (2) from

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[1] The Indictment also charged two other co-defendants, Charles Tyson and Madelaine Rivera, in connection with the alleged drug conspiracy. Both Tyson and Rivera have entered guilty pleas. [See doc. ## 55, 86.]

the second floor apartment at 232 Westland Street, a three-family apartment building, in Hartford; and (3) from a Dodge Magnum parked behind 232-234 Westland Street. The Court held a two-day evidentiary hearing on the motion to suppress [doc. #103] on December 12, 2013, and February 20, 2014, and now denies the motion in its entirety. As explained more fully below, (1) the investigators had probable cause to arrest Jones when they stopped the Chevy Tahoe, the search of his person was a valid search incident to arrest, and the owner of the Tahoe consented to the search of the vehicle; (2) even if the pre-warrant entry at 232 Westland Street is considered illegal – an issue the Court does not decide – the search warrant affidavit contains sufficient information – without the information obtained from the initial entry – to support a finding of probable cause to issue the warrant; and (3) investigators had reasonable suspicion to prevent the tow truck driver from removing the Dodge Magnum from the scene, subsequent investigation gave them probable cause to search the vehicle, and a warrant was not required under the automobile exception to the warrant requirement.

I. Factual Findings

At the evidentiary hearing, the Court heard testimony from two Government witnesses, DEA Task Force Officer ("TFO") James Campbell and Sergeant Michael Coates of the Hartford Police Department, and two defense witnesses, Jones and Curtis Stevenson, who was present at the second floor of 232 Westland Street during the search. Based on that testimony and the exhibits admitted

into evidence, the Court makes the following findings of fact. Additional facts are set forth as needed in the legal analysis section.

TFO Campbell is a Hartford police officer and a member of the DEA Task Force for the Hartford Resident Offices. The DEA Task Force handles a range of narcotics investigations from street level enforcement to large scale narcotics trafficking involving money laundering and gang activity, as well as investigations involving crimes of violence and firearms offenses. (12/12/13 Hr'g Tr. Vol. I at 6-7.) TFO Campbell testified that approximately five years ago he received information from a confidential informant identifying Jones as a narcotics dealer. (Id. at 8-9.) Shortly thereafter, while TFO Campbell was conducting surveillance in the south end of Hartford, he observed what appeared to him to be a narcotics transaction between Jones and a female. TFO Campbell then arrested Jones for possession and sale of crack cocaine and seized crack cocaine from his person. (Id. at 9.)

On November 25, 2011, the Hartford Police Department received an anonymous call on its "crime stoppers" line and an anonymous web tip identifying Jones as being involved in narcotics activity and stating that "weapons may be involved." On August 9, 2012, the police received a second anonymous call on its "crime stoppers" line and a second anonymous web tip stating that Jones was manufacturing and selling crack cocaine in the Evergreen Avenue area of Hartford. (Id. at 10-16; Gov't Exs. 1-4.) The information contained in these tips was forwarded to TFO Campbell. Based on this information, TFO Campbell conducted an

investigation of Jones beginning in the summer of 2012. (12/12/13 Hr'g Tr. Vol. I at 16.)

From August to November 2012, investigators conducted daily surveillance at 17 Evergreen Avenue. (Id. at 36.) Investigators observed Jones routinely meeting with individuals on Evergreen Avenue, including Tyrone Upshaw, Charles Tyson, Madelaine Rivera, and Curtis Stevenson. Investigators also observed Jones and his associates driving a variety of vehicles, including a green Infiniti, a green Chevy Tahoe, a blue Honda with Florida plates, and several rental vehicles. (Id. at 36-50; Gov't Exs. 5, 5A-5N.)

TFO Campbell testified that Jones has dealt narcotics out of vehicles on numerous occasions. (2/20/14 Hr'g Tr. Vol. I at 54.) According to TFO Campbell, each of Jones's prior convictions for narcotics-related offenses, of which there were five between 2005 and 2011, involved Jones's operating a motor vehicle to conduct his narcotics activities. Further, with respect to each of these matters, TFO Campbell testified that crack cocaine was seized from either within the vehicle that Jones was operating or from his person.[2] (Id. at 70-71; Vol. II at 22.)

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[2] It is unclear from the testimony whether any of these convictions were for the distribution or sale of narcotics, as opposed to mere possession. (See 2/20/14 Hr'g Tr. Vol. II at 22-27.) Jones testified that all of his convictions were for possession of crack cocaine, but he did admit to having been arrested on at least one occasion in 2011 for possession with intent to sell. (Id. at 23, 27.) Further, as detailed above, TFO Campbell testified to having observed conduct involving Jones and a female that was consistent with the sale of narcotics and arresting him for possession and sale of crack cocaine. (12/12/13 Hr'g Tr. Vol. I at 9.)

On September 6, 2012, investigators observed Upshaw leave 17 Evergreen Avenue with a black plastic bag and drive away in the green Infiniti. Investigators subsequently conducted a motor vehicle stop of Upshaw for motor vehicle violations. (12/12/13 Hr'g Tr. Vol. I at 50.) Upshaw provided his consent to search the vehicle and investigators found 15 bags of packaged marijuana within the black plastic bag and $2,000 in cash. Investigators also found several personal items, including a set of keys to a Chevy Tahoe with a tag labeled "Buck," a known alias used by Jones, a money gram from Walmart labeled "Rashad Jones," a Connecticut Light & Power bill for Jenisha Nealy listing her address as 71 Giddings Avenue in Windsor, and a receipt from a dentist office listing Jones's address as 232 Westland Street. (12/12/13 Hr'g Tr. Vol. I at 50-52; Gov't Ex. 6A-D.) After waiving his Miranda rights, Upshaw stated that Jones had been a friend of his for approximately five years, that Upshaw had been selling marijuana as a source of income, and that he was living at 17 Evergreen Avenue with Buck's uncle Curtis. (12/12/13 Hr'g Tr. Vol. I at 56-57.) When asked whether he knew if Jones had any involvement with narcotics, Upshaw told TFO Campbell that "Jones does what he does and I do what I do and he doesn't know anything about that." (Id. at 56-57.)

After the stop of Upshaw, investigators began conducting surveillance at 71 Giddings Avenue. Based on their observations, it appeared to investigators that Jones and Nealy were living there, as the investigators observed the two leaving in the early morning hours and returning later in the evening. Investigators also observed

the Chevy Tahoe and several other rental vehicles they had seen Jones driving on previous occasions parked in the driveway at 71 Giddings Avenue. (Id. at 58-59.)

In October 2012, other members of the Hartford police department executed a search warrant at a location just south of 17 Evergreen Avenue. A large quantity of crack cocaine and firearms were seized from that location and numerous individuals were arrested. Shortly thereafter, investigators stopped seeing Jones, Rivera, and Tyson at 17 Evergreen Avenue. TFO Campbell testified that he suspected they decided to move their narcotics operation elsewhere because of the heightened law enforcement activity in the area. (Id. 60-61.)

During the course of the investigation, TFO Campbell ran a check for Jones in the Hartford Police Department in-house computer system, which is a database that documents all police activity within the City involving a particular person. The most recent address associated with Jones was 232 Westland Street, second floor. (Id. at 68-69.) Investigators also conducted a Lexis Nexis search for Jones and his address was listed in that database as 232 Westland Street, second floor. (Id. at 30.)

On November 26, 2012, investigators observed Nealy and Jones leave 71 Giddings Avenue in the Chevy Tahoe and drive to Hartford. Investigators subsequently conducted a motor vehicle stop of the vehicle. At the stop, Nealy identified her address as 71 Giddings Avenue and Jones identified his address as 232 Westland Street. (Id. at 62-64.)

232 Westland Street is a three-family apartment building with three floors.[3] (See Gov't Exs. 7, 12.) Jones testified that his mother lives on the first floor, he resides periodically on the second floor with his "roommate" Upshaw, and other persons whom he has heard, but not seen, live on the third floor. Jones further testified that he does not own the building and that he and Upshaw pay rent to the landlord. (2/20/14 Hr'g Tr. Vol. II at 14-15, 39-41, 46-47.) TFO Campbell testified that during the search of the second floor apartment at 232 Westland Street, he observed little evidence to suggest that it was a full-time residence. It contained only a couch, TV, DVD stand and speaker, table, chairs, and some clothes in the bedroom. (12/12/13 Hr'g Tr. Vol. II at 27-28.) The Government introduced into evidence a photograph of the front of the property located at 232 Westland Street. (Gov't Ex. 7.) From the photograph, it appears that 232 Westland Street has one common driveway accessible to the tenants of all three floors and also apparently accessible to the tenants of what appears to be a multi-family building next door.

On December 18, 2012, at approximately 8:00 a.m., investigators observed Jones exit 71 Giddings Avenue and enter a black Dodge Magnum that was parked in the driveway. (12/12/13 Hr'g Tr. Vol. I at 70.) Investigators had observed the Dodge

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[3] Although the actual street address of this building is 232-234 Westland Street, throughout the testimony, witnesses referred to it generically as "232 Westland Street." For that reason, the Court will refer to the property located at 232-234 Westland Street as 232 Westland Street.

Magnum on one prior occasion during the course of their surveillance. (2/20/14 Hr'g Tr. Vol. I at 5, 51.) Jones drove the vehicle to 232 Westland Street, pulled into the shared driveway, and parked the vehicle behind the building. (12/12/13 Hr'g Tr. Vol. I at 70-71.) Shortly after Jones arrived, investigators observed Upshaw arrive in a silver rental car, park behind 232 Westland Street, and leave a few minutes later. (Id. at 71.) At approximately 9:20 a.m., investigators witnessed Tyson and Rivera arrive in the green Infiniti and pull into the rear of 232 Westland Street. (Id. at 72, 83-84.)

At approximately 10:15 a.m., investigators observed Tyson and Rivera pull out of the driveway and take off at a high rate of speed in the Infiniti. Investigators conducted a stop of the Infiniti for motor vehicle violations. (Id. at 85.) As TFO Campbell approached the vehicle, he smelled a strong odor of marijuana. When questioned, Tyson and Rivera admitted to having just finished smoking marijuana and Tyson stated that he had some in his pocket. (Id. at 86.)

Tyson and Rivera waived their Miranda rights and consented to a search of the vehicle. In the back seat, TFO Campbell found a narrow cardboard box with a knotted plastic bag containing 56 grams of crack cocaine. (Id. at 87.) When TFO Campbell asked Rivera whose cocaine it was, she initially responded that the cocaine belonged to Upshaw. Rivera claimed that she had just dropped Upshaw off at 232 Westland Street and that he had a whole "cocaine factory" up there. (Id. at 90.) Rivera also said that she had gone up to the third floor at 232 Westland Street to purchase the crack cocaine. (2/20/14 Hr'g Tr. Vol. I at 14, 16.)

Tyson told investigators that he and Rivera had gone to 232 Westland Street, that they had met a party named Buck there, and that they had purchased the crack cocaine from Buck on the third floor. (12/12/13 Hr'g Tr. Vol. I at 91.) Further, Tyson said that he had known Jones for approximately one year, that he would obtain 63 grams of crack cocaine from Jones several times a week, and that there was a much larger quantity of narcotics still at 232 Westland Street with Jones. (12/12/13 Hr'g Tr. Vol. I at 92.)

While Rivera was speaking with investigators, she asked several times if she could call her babysitter because her son was with her babysitter at 232 Westland Street. TFO Campbell asked Rivera who her babysitter was and she said it was Rashad. Rivera's phone then rang a couple times. Rivera showed the phone to TFO Campbell and the name on the caller id was "King's godfather." Rivera stated that "King's godfather" was Rashad and that Rashad was the babysitter. (Id. at 93.) In his testimony, Jones stated that he was Rivera's son's godfather and that he brought her son to school "pretty much every day." (2/20/14 Hr'g Tr. Vol. II at 29.) Investigators later confirmed that there was no child at 232 Westland Street on December 18, 2012. (12/12/13 Hr'g Tr. Vol. I at 93.)

Investigators arrested Tyson and Rivera, who were later charged in the same Indictment as Jones, took them into custody, and placed them into marked Hartford police cruisers. TFO Campbell testified that based on the statements made by Tyson and Rivera at the stop, the crack cocaine seized from the Infiniti, and the other evidence developed during the investigation, investigators

made the decision at that time also to arrest Jones as part of a conspiracy involving Jones, Tyson, and Rivera. (12/12/13 Hr'g Tr. Vol. I at 102-03.)

At approximately 10:30 a.m., Nealy arrived at 232 Westland Street in the Chevy Tahoe and picked up Jones. Shortly after the Tahoe pulled out of 232 Westland Street, investigators stopped the vehicle on Edgewood Street. (Id. at 106.) Jones testified that investigators approached the vehicle with their weapons out. Jones stated that investigators took him out of the vehicle, placed him in handcuffs with his arms behind his back, walked him back to the unmarked police car, and then searched his pockets. (2/20/14 Hr'g Tr. Vol. II at 11-13.) Investigators seized approximately $4000 from his person. (12/12/13 Hr'g Tr. Vol. I at 120-21.) Investigators then transported Jones back to 232 Westland Street in a Hartford police cruiser. (Id. at 125; 2/20/14 Hr'g Tr. Vol. I1 at 17.) Jones testified that investigators held him in the police cruiser for four and a half hours. (2/20/14 Hr'g Tr. Vol. II at 18.) Jones further testified that investigators kept reiterating that he was not under arrest during this time and that he was only being detained because they were conducting an investigation. (Id. at 16.)

Kenneth Combs, Nealy's father and the registered owner of the Chevy Tahoe, arrived at the scene of the stop and provided verbal and written consent to search the vehicle. Nealy also provided her verbal consent to the search. (12/12/13 Hr'g Tr. Vol. I at 115-18; Gov't Ex. 9.) Investigators searched the Chevy Tahoe and found an additional $4400 in U.S. currency within a child's backpack in the back seat of the vehicle. (12/12/13 Hr'g Tr. Vol. I at 118-

20; Gov. Ex. 10.) Nealy also provided her verbal and written consent to search 71 Giddings Avenue. (12/12/13 Hr'g Tr. Vol. I at 122; Gov't Ex. 11.) Investigators subsequently searched the residence at 71 Giddings Avenue and recovered a money counter box from the bedroom. 12/12/13 Hr'g Tr. Vol. I at 124.)

While investigators were attending to the stop of the Chevy Tahoe, Upshaw was stopped in a rental vehicle by Hartford police. (12/12/13 Hr'g Tr. Vol. II at 7.) TFO Campbell went to the stop and Upshaw told him that there were pit bulls on the third floor of 232 Westland Street and they were not in cages. When asked whether there was anyone else at 232 Westland Street, Upshaw responded that he believed that Rashad's uncle was there. (Id. at 7-8.)

Thereafter, TFO Campbell testified that he drove to 232 Westland Street and approached the police cruiser holding Jones. TFO Campbell stated that he read Jones his Miranda rights and Jones said that he understood those rights. TFO Campbell testified that he had a brief discussion with Jones, including asking him what floor be lived on. TFO Campbell testified that Jones told him he lived on the second floor. (12/12/13 Hr'g Tr. Vol. I at 126.) In his testimony, Jones stated that although TFO Campbell read him his Miranda rights, he did not waive them and further disputes that he said anything to TFO Campbell, including that he lives on the second floor. (2/20/14 Hr'g Tr. Vol. II at 20.) The Court credits the testimony of TFO Campbell on this issue.

TFO Campbell further testified that when he arrived at 232 Westland Street he was notified by

Sergeant Coates that a tow truck operator had driven to the rear of 232 Westland Street, put the Dodge Magnum up on its lift, and started to pull out of the driveway. Sergeant Coates told TFO Campbell that he had stopped the tow truck operator and told him the Magnum needed to stay on the scene. (12/12/13 Hr'g Tr. Vol. II at 14.) Sergeant Miller of the Hartford police then notified TFO Campbell that he had contacted the tow truck company, Metro Auto, and spoke with a manager there who informed him that a party identifying himself as Buck wanted the vehicle towed because the struts were bad. (Id. at 11.) TFO Campbell testified that the phone number that Buck provided to the tow truck company was one that had previously been identified in the "crime stopper" tips. Investigators instructed the tow truck operator to place the Dodge Magnum back in the rear of 232 Westland where it had been parked. (Id. at 11-12.)

Sergeant Coates testified that he was the first investigator to enter 232 Westland Street. He stated that he entered through the front of the building, but could not recall whether there was a door there. He stated, however, that if there was a door there, it was unlocked. (2/20/14 Hr'g Tr. Vol. I at 93, 97-98.) Sergeant Coates then testified that he approached a second door that led to a stairwell to the second and third floor apartments. He stated that this door was locked and he kicked it in to gain access to the second and third floors. (Id. at 98.)

TFO Campbell testified that he and investigators went up to the second floor apartment and attempted to gain access by trying a set of keys that did not work and by knocking on the door for several minutes. (12/12/13 Hr'g Tr. Vol. II at 9-

10.) TFO Campbell testified that he could not recall whether he obtained the keys from another investigator at the stop of the Chevy Tahoe or from Jones when he spoke with him outside of 232 Westland Street. (Id. at 9.) TFO Campbell stated that when he could not gain access to the second floor, he drove to the federal courthouse to meet with a prosecutor and prepare an affidavit to support an application for a warrant to search the second and third floors at 232 Westland Street. (Id. at 14-15.) Before preparing the affidavit, TFO Campbell received a call from a DEA Special Agent about 232 Westland Street. The Agent stated that a confidential informant who had direct knowledge of Jones at 232 Westland Street told him that Jones resides on the second floor, but often conducts his narcotics transactions on the third floor. (Id. at 15-16.)

While TFO Campbell was at the federal courthouse, investigators gained access to the second floor apartment.[4] Sergeant Coates, who had remained at 232 Westland Street, testified that he

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[4] The parties dispute whether investigators obtained valid consent to enter the second floor apartment to conduct a protective sweep. Although Sergeant Coates testified that Stevenson opened the door and consented to the entry of the investigators, see 2/20/14 Hr'g Tr. Vol. I at 75-76, Stevenson testified that he did not answer the door and that investigators were already in the apartment when they woke him from his sleep. (2/20/14 Hr'g Tr. Vol. II at 72.) The Court need not decide this issue because, as discussed below, the Court's conclusions do not depend on whether investigators initially entered the premises lawfully. (See infra Part II.B.) For the same reason, the Court expresses no opinion about whether Sergeant Coates acted lawfully in kicking down the door to gain entry to the second and third floors.

and other investigators conducted a protective sweep of the apartment to make sure that the area was secure. (2/20/14 Hr'g Tr. Vol. I at 74.) During the protective sweep, investigators saw a money counter in plain view on the dining room table. (12/12/13 Hr'g Tr. Vol. II at 21-22.) Investigators also conducted a protective sweep of the third floor, but no evidence was found. (Id. at 18-19.) After the sweeps were completed, Sergeant Coates testified that he contacted TFO Campbell to inform him that both the second and third floors were secure and they would be waiting for him. (2/20/14 Hr'g Tr. Vol. I at 78.) Sergeant Coates also told TFO Campbell that investigators observed a money counter on the dining room table. (12/12/13 Hr'g Tr. Vol. II at 21-22.)

Thereafter, based on the affidavit of TFO Campbell, United States Magistrate Judge Thomas P. Smith authorized a search of the second and third floors of 232 Westland Street.[5] (Id. at 22; Gov't Exs. 12, 13.) After the warrant was signed, TFO Campbell telephoned investigators to instruct them to begin the search and returned to 232 Westland Street to join them. (12/12/13 Hr'g Tr. Vol. II at 25.) During the search of the second floor apartment, investigators found a quantity of crack cocaine, a quantity of marijuana, bags, a collection of pots that would typically be used to cook crack cocaine, various calibers of ammunition for firearms, a shotgun shell, and a Sprint phone bill for Jones. (12/12/13 Hr'g Tr. Vol. II at 27; Gov't

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[5] For a more detailed recitation of the statements set forth in the affidavit submitted in support of the search warrant, see infra Part II.B.

Ex. 15.) Investigators seized no evidence from the third floor. (12/12/13 Hr'g Tr. Vol. II at 28.)

After the searches of the second and third floor apartments were complete, TFO Campbell walked to the rear of the shared driveway at 232 Westland Street where the Dodge Magnum was parked. (Id. at 30.) He testified that because the windows were tinted, he walked right up to the vehicle, put his head on the rear hatch window, and looked inside. (Id. at 30, Gov't Ex. 14A.) TFO Campbell testified that he saw an open paper bag sitting inside a black Zales bag and, within the open paper bag, he saw what looked like one box with a second box on top of it. TFO Campbell recognized the bottom box to be a box of Lawman ammunition. (Id. at 31-35; Gov't Exs. 14B-C.) He testified that Lawman is a particular brand of ammunition that has a distinct logo that looks almost like a Nike "swoosh" symbol. (12/12/13 Hr'g Tr. Vol. II at 35.) The Court credits TFO Campbell's testimony regarding these observations. Further, TFO Campbell testified that he knew at this time that Jones was a convicted felon.[6] (Id. at 33.) Thereafter, investigators conducted a warrantless search of the Dodge Magnum and seized several cookies[7] of crack cocaine, 605.2

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[6] See 18 U.S.C. § 922(g) (felon in possession statute prohibits possession by a felon of "any firearm or ammunition.")

[7] TFO Campbell testified that a "cookie" consists of 128 grams of crack cocaine and "a half a cookie" consists of 63 grams. TFO Campbell testified "cookies" are larger amounts of crack that are then chopped up and resold at street level. He stated that although cost varies, a whole cookie would have likely sold for between $2,500 and $3,000 in the Hartford area in 2012. (12/12/13 Hr'g Tr. Vol. I at 88-89.)

grams of powder cocaine, a digital scale, three firearms, two of which were loaded, ammunition, and loaded magazines. Id. at 35-40; Gov't Ex. 14B-M, 15, 16.)

II. Legal Analysis

Jones moves to suppress evidence seized (1) following the stop of the Chevy Tahoe; (2) from the second floor apartment at 232 Westland Street; and (3) from the Dodge Magnum. The Court addresses each of these below.

A. Chevy Tahoe

Jones argues that investigators were not justified in stopping the Chevy Tahoe because they had neither reasonable suspicion nor probable cause to believe that a traffic violation or other offense had been committed. (Def.'s Mem. Supp. Mot. Suppress at 33-35.) The Government counters that the stop was justified because investigators had probable cause to arrest Jones for conspiracy to distribute crack cocaine based on evidence developed through their investigation, including evidence gathered from the stop of Tyson and Rivera earlier that morning. (12/12/13 Hr'g Tr. Vol. I at 110-11.)

Police may arrest a suspect in a public place without a warrant as long as they have probable cause to believe that a felony has been committed. See, e.g., United States v. Watson, 423 U.S. 411, 418 (1976) ("The usual rule is that a police officer may arrest without a warrant one believed by the officer upon reasonable cause to have been guilty of a felony.") (quoting Carroll v. United States,

267 U.S. 132, 156 (1925)). The Court finds that there was probable cause to stop the Chevy Tahoe on Edgewood Street and arrest Jones for conspiracy to distribute crack cocaine. On the morning of December 18, 2012, at approximately 8:00 a.m., just a few hours before the stop of the Chevy Tahoe, investigators observed Jones drive to 232 Westland Street. (12/12/13 Hr'g Tr. Vol. I at 70-71.) An hour or so later, Tyson and Rivera arrived at 232 Westland Street in the green Infiniti and, at approximately 10:15 a.m., pulled out of 232 Westland Street at a high rate of speed. Investigators conducted a motor vehicle stop of the Infiniti and seized a knotted plastic bag containing 56 grams of crack cocaine from a cardboard box found in the back seat of the vehicle. (Id. at 85-87.) Tyson told investigators that he and Rivera had gone to 232 Westland Street and purchased the crack cocaine from Jones. (Id. at 91.) Tyson stated that he had known Jones for approximately one year, that he would obtain 63 grams of crack cocaine from Jones several times a week, and that there was a much larger quantity of narcotics still at 232 Westland Street with Jones. (Id. at 91-92.) Further, although Rivera claimed that the drugs belonged to Upshaw, she stated that Upshaw had a whole "cocaine factory" up there and later stated that she had purchased the crack cocaine from the third floor at 232 Westland Street. (Id. at 90; 2/20/14 Hr'g Tr. Vol. I at 14, 16.) While Rivera was speaking with investigators, she asked several times if she could call her babysitter, Rashad, who was watching her son. Further, during the stop, Rivera's phone rang a couple of times, each time with the name "King's godfather" appearing on the caller id

screen. Rivera stated that "King's godfather" was Rashad, her son's babysitter. (12/12/13 Hr'g Tr. Vol. I at 93.)

These statements of Tyson and Rivera and the crack cocaine seized from the green Infinity, coupled with the other evidence obtained by investigators through their investigation, provided investigators with probable cause to arrest Jones for conspiracy to distribute crack cocaine.

Once under arrest, a suspect may be searched without a warrant. See, e.g., United States Robinson, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification."). Although Jones argues that investigators kept reiterating that he was not under arrest and that he was only being detained because they were conducting an investigation, the evidence at the hearing showed that, in spite of what they might have told Jones, the investigators had arrested him. An arrest, the "quintessential seizure of the person," is marked by "either physical force . . . or, where that is absent, submission [of the suspect] to the assertion of authority." California v. Hodari D., 499 U.S. 621, 624, 626 (1991). "An arrest need not be formal; it may occur even if the formal words of arrest have not been spoken provided that the subject is restrained and his freedom of movement is restricted." Posr v. Doherty, 944 F.2d 91, 98 (2d Cir. 1991) (citing United States v. Levy, 731 F.2d 997, 1000 (2d Cir. 1984) (an arrest occurred when suspect was ordered to "freeze" and was forced to stand spread-eagle against a wall); United States

v. Moreno, 897 F.2d 26, 31 (2d Cir. 1990) (defendant was arrested "when [the police officer] pushed [the defendant] against the wall and told him not to move.")); see also United States v. Newton, 369 F.3d 659, 676 (2d Cir. 2004) (reasoning that "[h]andcuffs are generally recognized as a hallmark of a formal arrest" and "telling a suspect that he is not under arrest does not carry the same weight in determining custody when he is in handcuffs as it does when he is unrestrained" to find that defendant, who was placed in handcuffs, was in custody for Miranda purposes where he "was specifically advised that he was not being placed under arrest and that the restraints were being employed simply to ensure his own safety and that of the officers."); United States v. Henley, 984 F.2d 1040, 1042 (9th Cir. 1993) (holding that handcuffed suspect placed in back seat of a squad car was in custody for purposes of Miranda even though agents told him he was not under arrest).

In the present case, Jones testified that investigators approached the vehicle with their weapons out, removed him from the Chevy Tahoe, placed him in handcuffs with his arms behind his back, and walked him to the unmarked police car where he was searched. (2/20/14 Hr'g Tr. Vol. II at 11-12.) These facts demonstrate that Jones was restrained and his freedom of movement was restricted. Thus, even if investigators told Jones that they were only detaining him, he was "arrested" for purposes of the Fourth Amendment and the ensuing search of his person was justified as a search incident to arrest.

Investigators were also entitled to search the Chevy Tahoe because they received consent to do

so from Combs, the registered owner of the vehicle, and Nealy, the driver of the vehicle. (12/12/13 Hr'g Tr. Vol. I at 115-18; Gov't Ex. 9.); see, e.g., United States v. Elliott, 50 F.3d 180, 185 (2d Cir. 1995) ("a warrantless entry and search are permissible if the authorities have obtained voluntary consent of a person authorized to grant such consent.") (citation omitted).

B. 232 Westland Street

Jones argues that investigators' initial warrantless entry into the second floor apartment at 232 Westland Street was unlawful and cannot be justified under the protective sweep or consent exceptions to the warrant requirement. He further argues that the evidence subsequently seized from that apartment pursuant to the warrant must be suppressed as fruit of the poisonous tree. (See Def.'s Mem. Supp. Mot. Suppress at 10-19; 2/20/14 Hr'g Tr. Vol. II at 106-07.) The Government contends that its initial entry into the apartment was lawful, but contends that even if it was not, once the reference to the money counter – the only evidence seen by investigators during their warrantless entry into the apartment – is removed from the warrant affidavit, the warrant still sets forth sufficient facts to justify a finding of probable cause and thus the issuance of a search warrant for the second and third floor apartments. (Gov't Mem. Opp. Mot. Suppress [doc. # 65] at 18-23.)

"When an application for a search warrant includes both tainted and untainted evidence, the warrant may be upheld if the untainted evidence, standing alone, establishes probable cause." Laaman v. Williams, 973 F.2d 107, 115 (2d Cir. 1992), cert.

denied, 507 U.S. 954 (1993). Where improper material is included in a warrant application, the court should disregard that information and "determine whether the remaining portions of the affidavit would support probable cause to issue the warrant." United States v. Canfield, 212 F.3d 713, 718 (2d Cir. 2000). "If the corrected affidavit supports probable cause, the inaccuracies were not material to the probable cause determination and suppression is inappropriate." Id. "The ultimate inquiry is whether, after putting aside erroneous information and material omissions, 'there remains a residue of independent and lawful information sufficient to support probable cause.'" Id. (quoting United States v. Ferguson, 758 F.2d 843, 849 (2d Cir. 1985)). "Probable cause is 'a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . , including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" Canfield, 212 F.3d at 718 (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

When the reference to the money counter – the only "tainted" piece of information in the warrant affidavit – is stricken from the affidavit, there is sufficient information to support a finding of probable cause that evidence of illegal narcotics activity would be found within the second floor apartment at 232 Westland Street. (Affidavit of TFO Campbell, dated December 18, 2012 (the "Affidavit"), ¶ 19, attached to Gov't Ex. 13.)

The Affidavit is seven pages long and consists of 20 paragraphs. In two sentences in paragraph 16,

the Affidavit references the money counter that was found in the second floor apartment. (Id. ¶ 16.) Specifically, paragraph 16 reads: "Investigators knocked on the door to the second floor apartment at 232 Westland Street (the Subject Premises) and received consent from the occupant (who is believed to be a relative of Jones) to conduct a security sweep of the apartment. During the security sweep, investigators saw in plain view on the kitchen table a money counter." Once these two sentences are removed from the Affidavit, the following information remains:

- Investigators received detailed information from a cooperating source that Jones was purchasing kilogram quantities of cocaine and cooking the cocaine into crack cocaine for resale to his customers. (Id. ¶ 5.)
- Investigators received a Crime Stopper tip line complaint that Jones was dealing crack cocaine in the area of 17 Evergreen Street in Hartford. The complaint listed several phone numbers used by Jones and three vehicles used by Jones, including a green Infiniti and a green Chevy Tahoe. (Id. ¶ 6.)
- Investigators conducted surveillance in the 17 Evergreen Street area and observed Jones at the location during the early morning hours and on an almost daily basis. Investigators also observed Upshaw, Rivera, and Tyson meet with Jones at the location and observed Jones using the Chevy Tahoe and various rental vehicles. (Id. ¶ 7.)
- On September 6, 2012, investigators observed Upshaw leave 17 Evergreen Street with a

black plastic bag and drive away in the green Infiniti. Investigators conducted a motor vehicle stop and seized the black bag, which contained a quantity of marijuana packed for street sale. Investigators also seized personal items of Jones from the Infiniti, including a dental receipt for Jones listing his address as 232 Westland Street. (Id. ¶ 8.)

- Investigators observed Jones at 71 Giddings Avenue in Windsor, Connecticut, on multiple occasions in the Fall of 2012 and also observed the green Chevy Tahoe parked there on a regular basis. It appeared to investigators based on their surveillance that Nealy and Jones were residing there. (Id. ¶ 9.)
- A check of the Hartford Police Department in-house computer system identified 232 Westland Street as Jones's last address. Investigators subsequently conducted a motor vehicle stop of Nealy, Jones, and another associate in the Chevy Tahoe. During the stop, Jones identified his address as 232 Westland Street. (Id. ¶ 10.)
- On December 18, 2012, at approximately 8:35 a.m., investigators observed Jones drive from 71 Giddings Avenue to 232 Westland Street. Approximately five minutes later, Upshaw arrived in a rental vehicle at 232 Westland Street. At approximately 9:21 a.m., Tyson and Rivera arrived at 232 Westland Street in the green Infiniti and parked behind the building. At approximately 9:25 a.m. Tyson and Rivera drove away from 232 Westland Street in the green Infiniti. (Id. ¶ 11.)

- Investigators subsequently conducted a motor vehicle stop of the Infiniti and seized marijuana from Tyson's pocket and a box containing 63 grams of crack cocaine from the rear seat of the vehicle. (Id. ¶ 12.)
- After waiving her Miranda rights, Rivera told investigators that the crack cocaine was not hers and that they had just dropped Upshaw off at 232 Westland Street. (Id. ¶ 12.)
- After waiving his Miranda rights, Tyson told investigators that the crack cocaine belonged to Jones; that he purchased the crack cocaine from Jones for $1600; that he and Rivera went to the third floor apartment to pick up the crack cocaine from Jones; that Tyson had been purchasing crack from Jones for approximately one year; and that Tyson had purchased crack from Jones on multiple occasions in the past from the third floor of 232 Westland Street. (Id.)
- Shortly thereafter, Nealy arrived in the green Chevy Tahoe at 232 Westland Street and picked up Jones. Investigators then conducted a motor vehicle stop of Nealy and Jones and seized approximately $4,000 from Jones and an undetermined amount of U.S. Currency from a duffel bag in the vehicle. (Id. ¶ 14.)
- After the stop, investigators transported Jones back to 232 Westland Street. After waiving his Miranda rights,[8] Jones said that he lives on the

[8] As detailed above, although Jones disputes that he waived his Miranda rights and spoke to investigators, the Court credits the testimony of TFO Campbell on this point.

second floor of 232 Westland Street, that he had not seen Rivera that day, and that he does not have anything on the third floor of 232 Westland Street. (Id. ¶ 15.)

- Investigators received consent from Nealy to search 71 Giddings Avenue and observed an empty money counter box. (Id. ¶ 16.)
- A Hartford Police Department registered informant advised investigators that Jones lives on the second floor of 232 Westland Street and maintains a stash location on the third floor of 232 Westland Street. (Id. ¶ 17.)
- Based on his training and experience, TFO Campbell knows that narcotics traffickers frequently maintain evidence concerning their narcotics activities in their residences, stash houses, businesses or within their vehicles, including records relating to the transportation, sale, and distribution of controlled substances, caches of drugs, scales, packaging materials, cutting agents and diluents, large amounts of currency, financial instruments, precious metals, jewelry and other proceeds of drug transactions, police scanners used to detect law enforcement activity, and firearms or other weapons. (Id. ¶ 18.)

Taken together, these statements are enough to support a finding of probable cause to search the second floor apartment at 232 Westland Street. Jones argues that while there may have been probable cause to search the third floor apartment, there was not with respect to the second floor because, without the reference to the money counter seen during the pre-warrant entry, the statements

in the Affidavit show only that Jones lived on the second floor and this is insufficient. (Def.'s Mem. Supp. Mot. Suppress at 20-23.) The Court disagrees. First, several of the statements in the affidavit identifying 232 Westland Street as Jones's residence refer to the address generally and do not reference any particular apartment number. (Affidavit ¶¶ 8, 10.) Indeed, although investigators witnessed several individuals allegedly involved in the narcotics conspiracy drive up to 232 Westland Street on December 18, 2012, they apparently could not tell from their vantage point which floor those individuals may have visited once inside the three-family apartment building. (Id. ¶¶ 11-14.) Also, the information available to investigators at the time was that Jones used two floors – the second as a residence and the third as a place to conduct narcotics transactions. (Id. ¶¶ 13, 15, 17.) Further, even assuming that Jones did reside in the second floor apartment, as TFO Campbell states in his affidavit, based on his training and experience, narcotics traffickers frequently maintain evidence concerning their narcotics businesses in multiple locations, including within their residences, stash houses , businesses, or automobiles. (Id. ¶ 18.) The proximity between the second and third floors and the fact that, according to the information the investigators had at the time, Jones had access to both also made it reasonable for investigators to believe that they might find evidence of narcotics activity in both places.

C. Dodge Magnum

Jones argues that investigators did not have reasonable suspicion to stop the tow truck operator from towing the Dodge Magnum from 232 Westland

Street. Further, Jones claims that investigators did not have probable cause to search the vehicle and, even if they did, they were required to obtain a warrant before conducting the search. (Def. Mem. Supp. Mot. Suppress at 25-31; see also Def.'s Supplemental Mem. [doc. #128].)The Court addresses each of these claims below.

1. Reasonable Suspicion to Stop the Tow Truck

The Fourth Amendment "permit[s] a brief detention of property on the basis of only 'reasonable, articulable suspicion' that it contains contraband or evidence of criminal activity." Smith v. Ohio, 494 U.S. 541, 542 (1990) (quoting United States v. Place, 462 U.S. 696, 702-03 (1983) (applying the principles of *Terry v. Ohio* to permit warrantless seizure of luggage where there is "reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband or evidence of a crime.")); see also United States v. Glover, 957 F.2d 1004, 1008 (2d Cir. 1992) (same); United States v. Van Leeuwen, 397 U.S. 249, 252-53 (1970) (permitting warrantless seizure of a suspicious mail package while police conducted further investigation).

Here, investigators were permitted to stop the tow truck operator from towing the Dodge Magnum because they had reasonable suspicion to believe that the vehicle contained evidence of a crime – like the luggage and mail package in the cases just cited. Investigators observed Jones drive the Dodge Magnum to 232 Westland Street that very morning and had also observed the vehicle on one prior occasion during the course of

their surveillance. (12/12/13 Hr'g Tr. Vol. I at 70-71; 2/20/14 Hr'g Tr. Vol. I at 5, 51.) Throughout their surveillance, investigators observed Jones and his associates driving multiple vehicles to conduct their narcotics business. (12/12/13 Hr'g Tr. Vol. I at 36-50.) Further, investigators knew that Jones had five prior convictions for narcotics-related offenses, with each one involving Jones operating a motor vehicle and the seizure of crack cocaine from either within the vehicle or from his person. (2/20/14 Hr'g Tr. Vol. I at 54, 70-71.)

Moreover, during the stop of Tyson and Rivera at approximately 10:15 a.m., investigators learned that Jones tried multiple times to reach Rivera on her cell phone. Investigators could have reasonably believed that Jones became concerned when Rivera did not answer her phone or return his calls. (12/12/13 Hr'g Tr. Vol. I at 93.) Fifteen minutes later, investigators observed Nealy pick up Jones at 232 Westland Street in what investigators might reasonably have suspected was an attempt to flee the scene. Investigators stopped the vehicle, took Jones into custody, and seized approximately $4,000 from his person and $4,400 from the vehicle – giving them further grounds to suspect that Jones had recently engaged in drug transactions. (Id. at 106, 120-21.) Shortly thereafter, investigators observed a tow truck arrive at 232 Westland Street unannounced, place the Dodge Magnum on its lift, and start to pull out of the driveway. (12/12/13 Hr'g Tr. Vol. II at 14.) Certainly, at this point, investigators had sufficient grounds reasonably to suspect that the Dodge Magnum, a vehicle that Jones had driven that very morning, might contain evidence of a

crime. They thus had a sufficient legal basis to order the tow truck driver to stop so that they could investigate further. After stopping the vehicle, investigators spoke with the tow truck manager, who stated that a person named "Buck," a known alias of Jones's, called to have the vehicle towed because it had bad struts. (Id. at 11.) Investigators had earlier observed, however, that Jones had driven the vehicle without incident from 71 Giddings Avenue in Windsor to 232 Westland Street in Hartford earlier that morning. (12/12/13 Hr'g Tr. Vol. I at 70-71.)With their earlier suspicions heightened by this new information, investigators then ordered the tow truck operator to remove the vehicle from the lift and return it to the back of the driveway. (12/12/13 Hr'g Tr. Vol. II at 12.)

Once investigators learned from the tow truck manager that Jones had ordered the tow based on a story that conflicted somewhat with their own observations of a few hours earlier,, they had additional grounds to suspect that Jones was trying to remove from the scene evidence of a crime, and lawfully detained the vehicle while they conducted the search of the second and third floor apartments.[9]

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[9] To the extent that Jones is challenging the stop of the tow truck driver, he lacks standing to do so. United States v. Padilla, 508 U.S. 77, 81 (1993) ("It has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that his fourth Amendment rights were violated by the challenged search or seizure.") (emphasis in original) (citations omitted).

2. Probable Cause to Search the Dodge Magnum

The information obtained by investigators before searching the Dodge Magnum supplied probable cause to believe that it contained evidence of a crime. After obtaining the warrant but before searching the Magnum, investigators searched the second and third floor apartments at 232 Westland Street and seized from the second floor substantial evidence that Jones was involved in narcotics trafficking. (Id. at 27.) After completing the search of the second floor apartment, TFO Campbell exited the building and approached the Dodge Magnum, which the tow truck driver had left in the driveway. After doing so, he observed a box of ammunition in plain view through the rear hatch window of the Dodge Magnum.[10] (Id. at 28-29; 30-35;

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[10] TFO Campbell was lawfully in a position to look in the window of the vehicle because he was on the property to execute a search warrant and, while the warrant itself was confined to the house, the driveway was next to the house. See, e.g., United States v. Titemore, 437 F.3d 251, 260 (2d Cir. 2006) ("[W]hen a police officer enters private property for a legitimate law enforcement purpose and embarks only upon places visitors would be expected to go, observations made from such vantage points are not covered by the Fourth Amendment.") (internal quotation marks and citations omitted); United States v. Reyes, 283 F.3d 446, 465 (2d Cir. 2002) ("no Fourth Amendment violation based on law enforcement presence on an individual's driveway when that officer was in pursuit of legitimate law enforcement business.") (citation omitted). In any event, for the reasons discussed below, Jones did not have a legitimate expectation of privacy in the driveway – a common area accessible to all tenants in the three family apartment building and, apparently, the adjacent building.

Gov't Ex. 14C.) As TFO Campbell knew that Jones was a convicted felon, this observation alone furnished probable cause to believe that the Dodge Magnum contained evidence of a crime. (See supra n.7.) In any event, when this was added to the other evidence known to TFO Campbell at this point, including the evidence seized from the apartment, there was ample probable cause to search the vehicle.

3. Applicability of Automobile Exception to Warrant Requirement

The last and most difficult issue is whether investigators were required to obtain a warrant before searching the Dodge Magnum, which was located in the driveway at 232 Westland Street. TFO Campbell had not sought, and Magistrate Judge Smith had not provided, authorization to search the Dodge Magnum. Pointing out there was nothing preventing Campbell from seeking that authorization – either with the initial application or after the search of the second or third floors – and relying on the Supreme Court's plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971) and the Second Circuit' s decision in United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992), Jones argues that a warrant was required to search the Dodge Magnum while it was located in the driveway at 232 Westland Street.Because the survival of the rule suggested in Coolidge is uncertain, because Lasanta has been narrowed to its facts, and because the facts of both cases are distinguishable, the Court disagrees.

In Coolidge, the Supreme Court invalidated a search of a vehicle that had been parked in the

driveway of the defendant' s residence before being towed to the police station. Police officers searched the vehicle pursuant to a warrant that the Court later found to be invalid. Coolidge, 403 U.S. at 453. The State argued that the search was nonetheless proper under the automobile exception to the warrant requirement, which the Court had first recognized in Carroll v. United States, 267 U.S. 132 (1925). Id. at 453. In Carroll, the Court had upheld the warrantless search of a vehicle where there was probable cause to believe it contained contraband. Carroll, 267 U.S. at 153. The Carroll Court had reasoned that it was "not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Id.; see also Chambers v. Maroney, 399 U.S. 42, 51 (1970) (holding that "exigent circumstances justify the warrantless search of an automobile stopped on the highway, where there is probable cause, because the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.").

In Coolidge, however, a plurality of justices found that the "exigent circumstances" cited in Carroll were absent. Instead, the defendant's vehicle was parked in the driveway of the house – not "stopped on the highway" –, there was no suggestion that on the night of the search it was used for any illegal purpose, the defendant had already had ample opportunity to destroy any incriminating evidence because the police had detained and released him weeks earlier, and the items seized during the search were " vacuum sweepings," not contraband. Coolidge, 403 U.S. at 448, 460. Further, the

defendant had been arrested and was in police custody at the time of the search, the defendant's wife, the only other adult occupant of the house, was driven by police to the house of a relative in another town, and the defendant's house was guarded throughout the night by two police officers. Id. at 460-61. Based on these facts, the plurality found that there was " no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized vehicle." Id. at 462. This was not a case, said the plurality, where "'it is not practicable to secure a warrant,' and the 'automobile exception,' despite its label, is simply irrelevant." Id. (quoting Carroll, 267 U.S. at 153.)

Similarly, in Lasanta, investigators seized defendant's vehicle without a warrant while it was parked in his driveway. The Government argued that no warrant was required because there was probable cause to believe that the vehicle was subject to forfeiture as property used to further a drug offense. The Second Circuit rejected this argument, noting that the language of the Fourth Amendment did not carve out "civil-forfeiture seizures in drug cases." Lasanta, 978 F.2d at 1305. The Second Circuit went on to find that no other exceptions to the warrant requirement applied. Addressing the automobile exception, the court stated that investigators "could have held no realistic concern that the car, parked not in a public thoroughfare, but in [defendant's] private driveway, might be removed and any evidence

within it destroyed in the time a warrant could be obtained". Id. The Second Circuit reasoned that defendant "was not operating the vehicle, nor was he in it or even next to it; when the agents knocked on his door to arrest him, he was inside his house, asleep." Id. Moreover, the Court held that it was not impractical for investigators to obtain a warrant to search the vehicle because their surveillance made them aware of its presence and even if they were surprised by its presence, they could have posted an investigator to remain with the vehicle while they sought a warrant. Id. at 1305-06.

Over the years, however, the Supreme Court has chipped away at both of these decisions, and in the case of Coolidge at least, it is not clear there is anything left. The "automobile exception" portion of the Coolidge opinion was a plurality opinion to begin with and thus not a binding one for lower courts. Texas v. Brown, 460 U.S. 730, 737 (1983) (plurality opinion in Coolidge concerning plain view doctrine not binding on lower courts because it was never expressly adopted by a majority of the Court).[11] The notions of the "exigency" of cir-

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[11] Justice Harlan joined part II-D of the opinion – providing a fifth vote for that section only – much of which was devoted to responding to arguments made by a dissenting Justice. Nonetheless, part II-D also appears to be based on the notion that the police had ample opportunity – over two weeks from when they fast began to suspect the defendant's involvement in the crime – to obtain a warrant, and nonetheless failed to do so before seizing the car *while it was on the defendant's property,* taking it to the police station, and searching it. See 403 U.S. at 474 ("Both sides to the controversy [between those who would require a warrant for every entry and those who would dispense with a warrant requirement and evaluate every search for "reasonableness"] appear

cumstances and the "mobility" of an automobile – relied on in both Coolidge and Lasanta – have been expanded almost beyond recognition. See, e.g., Maryland v. Dyson, 527 U.S. 465, 466 (1999) ("'automobile exception' has no separate exigency requirement"); Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more."). Other aspects of both Coolidge and Lasanta have been outright overruled.See Horton v. California, 496 U.S. 128, 137 (1990) (rejecting proposition in Coolidge that the plain view doctrine includes an inadvertent discovery requirement); Florida v. White, 526 U.S. 559 (1999) (recognizing forfeiture exception to warrant requirement for vehicle located on public property and as to which there was probable cause that vehicle had been used to effectuate drug

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to recognize a distinction between searches and seizures that take place on a man's property – his home or office – and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'.") (footnote omitted); id. at 478 ("Since the police knew of the presence of the automobile and planned all along to seize it, there was no 'exigent circumstance' to justify their failure to obtain a warrant. The application of the basic rule of Fourth Amendment law therefore requires that the fruits of the warrantless seizure be suppressed."). As discussed below, even assuming that notion still survives, this case is missing a key factual predicate for its application, *i.e.,* that the vehicle was located on the defendant' s property when it was seized or searched.

transactions and was therefore itself subject to seizure as contraband under Florida law).

The scope of the automobile exception has grown. Supreme Court and Court of Appeals cases since Coolidge have held that the automobile exception permits the police to search any automobile found on public property as long as they have probable cause, regardless of whether there are exigent circumstances, regardless of whether the police had the ability or time to obtain a warrant, and regardless of whether the suspects are all in custody. See, e.g., Labron, 518 U.S. at 940 ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more."); United States v. Howard, 489 F.3d 484, 495 (2d Cir. 2007) ("Whether a vehicle is "readily mobile" within the meaning of the automobile exception has more to do with the inherent mobility of the vehicle than with the potential for the vehicle to be moved from the jurisdiction, thereby precluding a search.") (citation omitted). And "public property" in this context is not just property owned by a governmental entity (like a street); it is any property in which defendant does not have a legitimate expectation of privacy. See White, 526 U.S. at 566 ("because the police seized respondent's vehicle from a public area – respondent's employer's parking lot – the warrantless seizure also did not involve any invasion of respondent's privacy"); United States v. DeJear, 552 F.3d 1196, 1202 (10th Cir. 2009), cert. denied, 131 S. Ct. 363 (2010) (upholding warrantless search of a vehicle conducted in the driveway of a private residence that did not belong to defendant).

Indeed, several Court of Appeals cases have held that the plurality opinion in Coolidge does not even uniformly govern the basic scenario presented in that case, i.e., in which the defendant's vehicle is parked in the driveway of his own residence. See, e.g., United States v. Goncalves, 642 F.3d 245, 251 & n.3 (1st Cir.), cert. denied, 132 S. Ct. 596 (2011) (citing United States v. Blaylock, 535 F.3d 922, 925-27 (8th Cir. 2008) (upholding warrantless search of vehicle parked in defendant's own driveway), cert. denied, 558 U.S. 830 (2009); United States v. Hines, 449 F.3d 808, 810-15 (7th Cir. 2006) (same); United States v. Hatley, 15 F.3d 856, 858-59 (9th Cir. 1994) (same). All of the recent Circuit cases addressing warrantless vehicle searches in private driveways have upheld them. See, e.g., Goncalves, 642 F.3d at 251 & n.4 (citing DeJear, 552 F.3d at 1202; United States v. Brookins, 345 F.3d 231, 234-38 (4th Cir. 2003) (upholding warrantless search of vehicle conducted in private driveway that was not defendant's residence); United States v. Markham, 844 F.2d 366, 367-69 (6th Cir.), cert. denied, 488 U.S. 843 (1988) (same); United States v. Moscatiello, 771 F.2d 589, 599-600 (1st Cir. 1985), vacated on other grounds by, Murray v. United States, 487 U.S. 533 (1988) (same)).

The facts of Coolidge and Lasanta are, in any event, distinguishable from those in this case. While it is true that by the time the Dodge Magnum was searched, all of the relevant suspects were in custody, investigators had secured the area, and there was no apparent reason investigators could not return to the federal courthouse to seek a second warrant (see, e.g., 12/12/13 Hr'g Tr. Vol. I at 102-

03, 125; 12/12/13 Hr'g Tr. Vol. II at 7), it is equally true that the vehicle was not parked on the defendant' s property – as it was in Coolidge and Lasanta. (See supra n.12.)The driveway in which the Dodge Magnum was parked was a common driveway accessible to the tenants of all three floors of 232 Westland Street and also apparently accessible to the tenants of what appears to be a multi-family building next door. (See Gov't Ex. 7; see also 12/12/13 Hr'g Tr. Vol. II at 30 ("shared driveway").) Jones testified that he does not own the property at 232 Westland Street and pays rent to the landlord. He testified that his mother lives on the first floor, he resides periodically on the second floor with his "roommate" Upshaw, and other persons whom he has heard, but not seen, live on the third floor. (2/20/14 Hr'g Tr. Vol. II at 14-15, 39-41, 46-47.) Numerous cases have held that the common areas of apartment buildings and multi-family homes, including common driveways, do not constitute areas of "curtilage" in which residents of individual living units have a legitimate expectation of privacy. See, e.g., United States v. Barrios-Moriera, 872 F.2d 12, 14 (2d Cir. 1989) (no legitimate expectation of privacy in a common hallway); United States v. Holland, 755 F.2d 253, 255 (2d Cir. 1985) (same); Maxis v. Philips, No. 10-cv-1016 (JG), 2011 U.S. Dist. LEXIS 41863, at *25 (E.D.N.Y. Apr. 13, 2011) (no legitimate expectation of privacy in a common driveway.)

Further, Jones's unsuccessful attempt to have the Dodge Magnum towed from the driveway by a commercial tow truck operator and taken to a commercial garage diminishes his expectation of privacy in the vehicle. There is no doubt that had

investigators allowed the tow truck operator to leave the driveway with the Dodge Magnum on the flatbed, the investigators could lawfully have stopped the tow truck on the public roadway en route to the commercial garage, and ordered the vehicle lowered. Once they had done that, and once they had observed the ammunition in plain view, they would have had probable cause to search the vehicle and they would not have needed a warrant under well-established case law. See, e.g., Dyson, 527 U.S. at 466 ("'automobile exception' has no separate exigency requirement"); Labron, 518 U.S. at 940 ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more."); Chambers, 399 U.S. at 51 ("exigent circumstances justify the warrantless search of an automobile stopped on the highway, where there is probable cause").

The same analysis would apply if they had followed the tow truck to the garage and searched the vehicle there – the garage or commercial lot would be considered a "public area" in which Jones had no expectation of privacy. See White, 526 U.S. at 564-66. The fact that investigators chose instead to stop the tow truck from leaving the property in the first instance should not change the analysis, because it does not change the fact that Jones had already decided to surrender whatever expectation of privacy remained in the vehicle.

This case is thus distinguishable from Coolidge and Lasanta in two important ways. First, although the Dodge Magnum was parked in a residential driveway, it was not a driveway in which Jones had any legitimate expectation of privacy because he

could not exclude others from using it. That fact alone takes this case outside the only situation in which Lasanta remains the law – and the only situation in which Coolidge might remain a guide to lower courts. Second, here, Jones had further diminished his expectation of privacy in the vehicle by calling for the tow; he had made the decision to entrust the vehicle to a third party. That being so, this case falls in line with the "public place" cases in which the applicability of the automobile exception to the warrant requirement is well-established.

For all these reasons, the motion to suppress is denied.

IT IS SO ORDERED.

/s/
Michael P. Shea, U.S.D.J.

Dated: Hartford, Connecticut
March 21, 2014