No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ORLANDO G. MCDANIEL – PETITIONER

v.

UNITED STATES – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

Donna L. Biderman, Esq.
LAW OFFICE OF DONNA L. BIDERMAN, PLLC
Court-Appointed (CJA) Counsel for Orlando G. McDaniel
4015 Chain Bridge Road, Suite 32
Fairfax, Virginia 22030
dbiderman@bidermanlaw.com
(703) 966-5434

QUESTIONS PRESENTED

Whether this court should grant this petition for a writ of certiorari to consider whether petitioner's constitutional rights were violated when the police exceeded the scope of the search warrant and seized many additional items.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other

FOURTH AMENDMENT TO THE U.S. CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Orlando McDaniel, by and through his counsel, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia.

OPINION BELOW

The opinion of the Court of Appeals is unpublished and attached hereto as App. A. The Court of Appeals denied a request for rehearing or hearing en banc and that unreported denial is reprinted in the appendix to this petition at App. B.

JURISDICTION

The Court of Appeals entered its Opinion and Judgment December 1, 2017. Petitioner filed a timely petition for rehearing or hearing en banc, which was denied on April 30, 2018. The deadline for filing a petition for writ of certiorari is July 30, 2018. This Court has jurisdiction under Supreme Court Rule 10 to review the Court of Appeals' decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Fourth Amendment to the U.S. Constitution, which prohibits unreasonable searches and seizures. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT OF THE CASE

Orlando G. McDaniel was arrested for allegedly possessing three items which were stolen in three separate burglaries in the District of Columbia: a Rolex watch, a Bremont Martin Baker watch, and a gun registration card. After finding that he had pawned the Rolex watch, the government got a search warrant for his home. When executing the warrant, the Metropolitan Police Department ("MPD") did not discover any items listed on the search warrant, but found two of the stolen items in his home: a Bremont Martin Baker watch and a gun registration card.

Mr. McDaniel was tried in a bench trial held April 5 and 7, 2016, and presided over by the Honorable William Jackson. On April 7, 2016, the court found Mr. McDaniel guilty of counts one (receiving stolen property, a Bremont Martin Baker watch) and two (receiving stolen property, a gun registration card), and not guilty of count three (receiving stolen property, a Rolex watch).[1] On April 19, 2016, the court sentenced Mr. McDaniel to: one count one, 180 days, execution of sentence suspended for all but sixty (60) days, and on count two, 180 days, execution of sentence suspended for all but sixty (60) days, sentences to run consecutively; and $100 to be paid under the Victims of Violent Crimes Compensation Act.

Mr. McDaniel filed a timely notice of appeal on May 3, 2016. After briefing and argument, the D.C. Court of Appeals affirmed the conviction for

[1] The trial court found Orlando G. McDaniel not guilty of possession of stolen property (the Rolex watch) because there was no evidence that he had possessed it within the District of Columbia.

count one, receiving stolen property (the Bremont Martin Baker watch) and reversed and remanded the conviction for count two, receiving stolen property (the gun registration card). The D.C. Court of Appeals held that the record was silent as to "what level of manipulation and handling was required to determine that the card belonged to a man that was not present at [Mr.McDaniel's] home, and had been stolen" and reversed that conviction. (Opinion at 4.) However, the court found that the Bremont Martin Baker watch, found in plain view on Mr. McDaniel's dresser, did not violate Mr. McDaniel's rights "[g]iven the watch's apparent high value and the presence of the watch among vast quantities of women's jewelry..." and confirmed that conviction. (*Id.*) Mr. McDaniel filed a petition for rehearing or hearing *en banc* on December 15, 2017. The D.C. Court of Appeals denied the motion for rehearing or hearing *en banc* on April 30, 2018. This petition for certiorari followed.

STATEMENT OF THE FACTS

In this case, the government alleged that Mr. McDaniel possessed three items stolen in three different burglaries over a one year period by unknown suspects in the District of Columbia. James Graham Reeve's residence was burglarized on December 14, 2013, during which a Bremont Martin Baker watch and other asserted jewelry and electronics were stolen. William Barron Avery's residence at 4634 Yuma Street, NW, Washington, DC, was burglarized on November 31, 2014, during which a gun registration card, several items of

jewelry, assorted keys, a gun safe, and a gun were stolen. Christopher Henick's residence located at 4201 Yuma Street, NW, Washington, DC, was burglarized on December 13, 2014, during which five watches, including a Rolex watch, men's jewelry, a credit card, and other personal items were stolen.

MPD detectives searched a database of pawn shops and found the Rolex watch at a pawn shop in Vienna, Virginia, a short distance outside the District of Columbia. MPD detectives went to the pawn shop to investigate and recover the watch. The MPD detectives discovered that the watch had been pawned by Orlando G. McDaniel, who used his own identification and signed his name to the receipt. Mr. McDaniel had been in the pawn shop four or five times previously and never gave any indication that he knew the Rolex was stolen.

MPD Detectives applied for a search warrant to search Mr. McDaniel's home. The affidavit in support of the search warrant stated:

> [B]ased on the above aforementioned facts and circumstances, the affiant has probable cause to believe that the complainant's stolen property would be located within the listed residence. Your affiant believes that secreted within the residence may be additional evidence of other thefts of complainants of the District of Columbia, *i.e.,* purses, wallets, credit cards, identification, cellphones, and documents.

This broad request was denied by the magistrate. Instead, the search warrant issued by the magistrate specified that the police had:

> Probable cause to believe that on the inside of 6202 12th Street, N.W., in … the District of Columbia, there is now being concealed certain property, silver Rolex watch bearing serial # 125550, Tag Heuer watch with black strap bearing serial # FZ9294, Movado watch with black strap, Visa card bearing the name of [Mr. Henick], … and … I am satisfied that there is probable cause to believe that the property so described is being concealed in the above designated … premises … and

> that the foregoing grounds for issuance of the warrant exist. You are hereby authorized within 10 days of the date of the issuance of this warrant to search in the daytime at any time of the day or night, the designated (premises) for the property specified and [determine] if the property be found there.

Based on this search warrant, on May 16, 2015, eight MPD detectives and officers participated in a search of Mr. McDaniel's home. Mr. McDaniel and another male who stayed in the house were present and detained. During the search, MPD officers found a gun registration, a Bremont Martin Baker watch, and numerous pieces of men's and women's jewelry. The Bremont Martin Baker watch was found on Mr. McDaniel's dresser. There was no evidence that there was jewelry on the dresser where the watch was found, or even in the same room. In all, MPD seized approximately 150 items, of which approximately twenty were women's jewelry, from Mr. McDaniel's residence, which they took back to the police station. Once at the police station, the MPD checked each item to determine whether or not it had been stolen. Out of all the items, only two items were found to have been stolen: the Bremont Martin Baker watch and the gun registration card.

The MPD officer who seized the Bremont watch said he did so because it appeared to be of "significant value" and that the engraving appeared to be a "personalized" item. The watch was on a dresser in Mr. McDaniel's bedroom, but there was no indication whether the watch was upside down or right-side up. An officer seized the gun registration permit because it was in the name of William B. Avery, and he "didn't come into contact with anyone in that house

by that name, and the photograph on the registration is of a white male," while neither Mr. McDaniel nor Mr. Staley is Caucasian. The gun registration permit was between the pages of a bible in Mr. McDaniel's bedroom. Mr. McDaniel was placed under arrest.

At the police station, detectives interviewed Mr. McDaniel for two and a half hours, and videotaped the entire interview. A detective testified that "[d]uring the interview, Mr. McDaniel … did say that he had partaken, and that was – partake was his word." Mr. McDaniel denied any wrongdoing for almost the entire interview. Almost at the end of the interview, Detective Yulfo asked Mr. McDaniel if he was involved in stealing "some of this stuff" without specifying to what he was referring. Mr. McDaniel ambiguously stated "I'm going to say no, but I did partake," but continued to deny participation in the burglaries, and never clarified what "I did partake" meant. When Detective Yulfo stated, okay, you assisted with it, Mr. McDaniel responded, "I, yeah…" and nothing further. Mr. McDaniel also stated, "I have never been in the house, but I touched items that…" before being cut off by the detectives. Those statements are the sum total of any statements that could be seen as inculpatory during the entire interview.

REASONS FOR GRANTING THE PETITION

Summary

Certiorari is warranted to consider the exceptionally important question of what items not listed on a search warrant the police can seize from an

individual's home under the "plain view" doctrine, particularly after a magistrate has specifically narrowed the search warrant to certain items. In its decision, the D.C. Court of Appeals has resolved this question in a way that conflicts with the U.S. Constitution and previous decisions of this Court and other jurisdictions, creating a conflict among the highest courts of the land. Beyond its importance in the abstract, this case presents an important opportunity for this Court to set forth in detail a clear, comprehensive, and consistent standard regarding whether and how a defendant's constitutional rights should be protected.

Petitioner's challenge rests on the principle of reasonable search and seizure. Here, because Mr. McDaniel apparently pawned a stolen Rolex watch in Virginia, the government theorized that he must have had other unknown and unspecified stolen items at his home in the District of Columbia. Based on that theory, the MPD attempted to get a broad search warrant for Mr. McDaniel's house, to search for and seize unenumerated "additional evidence of other thefts of complainants of the District of Columbia." The magistrate denied the broad warrant and instead issued a search warrant for three watches and a credit card which the MPD had specific reason to believe was possessed by Mr. McDaniel. The MPD executed the search warrant at Mr. McDaniel's home. During the search, the MPD found "vast quantities" of jewelry somewhere in the residence, including twenty pieces of women's jewelry, seized approximately 150 items, and brought them back to the

stationhouse. At the police station, the MPD researched the items to determine whether any of the items were stolen. Out of the entire lot of seized items, the MPD found only two stolen two items: the Bremont Martin watch and the gun registration card. This violated Mr. McDaniel's protections against unreasonable search and seizure, thus violating his Constitutionally protected rights under the Fourth Amendment to the U.S. Constitution. The D.C. Court of Appeals found that the items were in plain view and because they had significant value and were among women's jewelry items, the police had probable cause to believe they were stolen and seize the items.

This decision defies all precedent in this Court and all other courts, mistakes the facts, misapplies the law, and defies logic. As such, the law in the District of Columbia has evolved and been interpreted to conflict with this Court's precedent. This Court must correct these serious misapplications.

This Court should grant certiorari to correct these issues. The compelling reasons for his Court to consider this case are that the D.C. Court of Appeals' decision conflicts with many other jurisdictions' highest courts, and misinterprets and misapplies this Court' precedent. This Court should have an opportunity to correct this Memorandum Opinion and Judgment's catastrophic effect.

ARGUMENT

I. THE D.C. COURT OF APPEALS' DECISION VIOLATES THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION, IGNORES THIS COURT'S PRECEDENT AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS

Mr. McDaniel was denied protection against unreasonable search and seizure when, despite the magistrate's determination that a broad search warrant was improper and that the police could search for only four specific items, the police seized approximately 150 items to determine whether they had been stolen. The police had no specific reason to suspect any of the items were stolen, they just believed that the items had a high value and that many items were women's jewelry found in a man's house. The police therefore seized vast quantities of items and brought them back to the police station, wherein they examined each item to see if they could determine that the items had been stolen. They were able to determine that only approximately one percent of the items they had seized were stolen, and Mr. McDaniel was charged with two counts of receiving stolen property. Neither of the two items were listed on the search warrant.

A. The Applicable Law

The Fourth Amendment of the U.S. Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

This Court consistently recognizes that "searches and seizures that take place on a man's property – his home or office – [are different from] those carried out elsewhere." *Payton v. New York*, 445 U.S. 573, 588 n.25 (1980) (citing *Coolidge v. N.H.*, 403 U.S. 443, 474-75 (1971)). This Court recognizes that a person's home is more sacred and has consistently so held. When obtaining a search warrant, only three things are required:

> First, warrants must be issued by neutral, disinterested magistrates. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense. Finally, warrants must particularly describe the things to be seized, as well as the place to be searched.

Dalia v. United States, 441 U.S. 238, 255, 99 S. Ct. 1682, 60 L. Ed. 2d 177 (1979) (citations and internal quotation marks omitted); *see also Andresen v. Md.*, 427 U.S. 463, 480 (1976) (In order for a search to be constitutional, a search warrant must state with particularity the items to be seized). Individual's rights are protected "by requiring the use of warrants, which particularly describe 'the place to be searched, and the persons or things to be seized,' thereby interposing 'a magistrate between the citizen and the police….' " *Warden, Penitentiary*, 387 U.S. at 301 (internal quotations omitted).

Directly on point, this Court has stated that:

> General warrants, of course, are prohibited by the Fourth Amendment. '[T]he problem [posed by the general warrant] is not that of intrusion

> per se, but of a general, exploratory rummaging in a person's belongings…. [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized.' This requirement 'makes general searches… impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'

Andresen, 427 U.S. at 480 (internal citations omitted). A search pursuant to a search warrant, therefore, only entitles the police to search a specific area for specific enumerated objects. Consequently, the search is only valid insofar as the search conducted is limited to the objects of the search and the places in which there is probable cause to believe those objects may be found, as allowed by the magistrate on the search warrant. *Garrison*, 480 U.S. at 84.

Any part of the search extending beyond the limits prescribed in the warrant is a warrantless search, and is therefore, "*per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.*" *Katz*, 389 U.S. at 357. Any seizure of items discovered through a search which exceeds the scope of the warrant must be suppressed unless the government can satisfy the burden of showing that the police conduct was justified.

One established exception to the warrantless search and seizure is for items that are found in plain view and immediately apparent to be contraband. When the police have a valid warrant "to search a given area for specified objects, and in the course of the search come across some other article of incriminating character," they may seize it if it is "immediately apparent to the

police that they have evidence before them…" of a crime. *Coolidge*, 403 U.S. at 465. Probable cause is required to invoke the "plain view" doctrine. *Hicks*, 480 U.S. at 326. "No reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for that same object if it had been known to be on the premises." *Hicks*, 480 U.S. at 327. "[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Brown*, 460 U.S. at 742. Still, the search under the "plain view" doctrine is limited. "Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge*, 403 U.S. at 466.

Where the police have had to conduct additional examinations in order to determine whether an object is contraband, whether it is "immediately apparent" to be contraband is questionable. *See, e.g., Horton v. California,* 496 U.S. 128, 136-37 (1990). Moving or manipulating items constitute a "'search separate and apart from the [initial] search…. Merely inspecting [items] would

not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest. But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy" and constituted a new search. *Hicks*, 480 U.S. at 325. Indeed:

> [T]he 'distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches' is much more than trivial for purposes of the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to respondent – serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

Id.

Any fruits of an illegal search must be suppressed for all purposes at trial. *Wong Sun*, 371 U.S. 471; *see also Payton*, 445 U.S. at 590 (Holding that the mere existence of probable cause does not justify a warrantless entry into a home, absent exigent circumstances or consent, and suppressing fruits of the seizure.).

B. <u>The Decision of the D.C. Court of Appeals</u>

The D.C. Court of Appeal's opinion held that "[a]s to the watch, we conclude that [Mr. McDaniel's] argument [that the police lacked probable cause to seize it] has no merit and affirm the conviction. We vacate the conviction as to the gun registration card." (Op. at 3.) The court vacated the conviction of receiving stolen property of the gun registration card, found

within the pages of a bible during a search for a credit card, because "[t]he record is silent regarding what steps or what inspection the officer pursued when he found the gun registration card in the bible." (Op. at 4.) The court found that *Hicks* required that, "[h]ad the police been forced to flip over, turn, or examine the card at any length to ascertain the information that provided the probable cause to seize the item, then there was no prior probable cause to support the search." (Op. at 4.) However, when considering a watch found on Mr. McDaniel's dresser, the court found that "[g]iven the watch's apparent high value and the presence of the watch among vast quantities of women's jewelry, the police observed indicators of stolen property sufficient to give rise to probable cause." (Op. at 4.) Thus, the court applied *Hicks* to the gun registration card, but simultaneously implicitly found that *Hicks* was inapplicable to the watch.

C. This Court Should Grant Certiorari to Consider These Important Questions

Applying all the legal principles set out above, it is clear that the seizure was illegal because the seizure went beyond the limits of the search warrant and was not allowed under the plain view (or any other) doctrine. The search warrant specified that the items that were the subject of the warrant were a silver Rolex watch bearing serial # 125550, a Tag Heuer watch with black strap bearing serial # FZ9294, a Movado watch with black strap, and a Visa card bearing the name of the complainant Mr. Henick. Any seizure beyond those

items were beyond the limits of the warrant. *See Andresen*, 427 U.S. at 480; *Garrison*, 480 U.S. at 84; *Hayden*, 387 U.S. at 301; *Katz*, 389 U.S. at 357.

Because none of the items seized were the subject of the search warrant, the items needed to be in plain view and obviously contraband for MPD to seize the items as fruits of a crime. *See Hicks*, 480 U.S. at 328. A "general exploratory search from one object to another until something incriminating at last emerges" was not allowed. *Coolidge*, 403 U.S. at 466. Instead, the MPD had to have independent probable cause that the seized items were contraband in order to seize them. *See Hicks,* 480 U.S. at 326.

There are several reasons why the MPD did not have probable cause to seize the items. *First,* the MPD officers' testimony is not consistent with probable cause, but rather only with reasonable suspicion. That is a far cry from the constitutional requirement. The MPD officer testified that when he seized the Bremont Martin Baker watch, which was sitting on a dresser in Mr. McDaniel's bedroom, he did so because it appeared to be of "significant value," the engraving appeared to be a "personalized" item, and the watch had a "unique engraving of 'SLEESTAK' on the back." This does not give rise to probable cause, but rather only reasonable suspicion, and therefore was insufficient for seizure under the Fourth Amendment.

Second, there is no indication that the watch was seen facedown with the engraving up, or that the police officers in the room knew to what SLEESTAK referred. There is no discussion of the manipulation of the watch.

See Hicks, 480 U.S. at 325. The government must show compliance on the record; it is the government's burden to show that the item was not manipulated. This they completely failed to do. There is simply no evidence at all that the watch was immediately apparent as fruits of a crime.

Third, the magistrate specifically denied the search warrant for "various items" and allowed only a narrowly focused search warrant. The MPD detective requested a general warrant and was denied, yet still acted exactly as if the general warrant had been approved. This fact conclusively shows that MPD overstepped its bounds. Indeed, it is for precisely this reason that this Court has said that our Constitution interposes a magistrate between the police and the public, and requires the police to act on the magistrate's orders instead of his or her own suspicions. *See Andresen*, 427 U.S. at 480; *Warden, Penitentiary v. Hayden,* 387 U.S. 294, 301 (1967).

Fourth, the D.C. Court of Appeals was incorrect in its holding that "[g]iven the watch's apparent high value and the presence of the watch among vast quantities of women's jewelry, the police observed indicators of stolen property sufficient to give rise to probable cause." (Op. at 4.) Indeed, the court seems to be under the misimpression that the watch was mixed in with the women's jewelry, on the dresser. This scenario is not, however, born out. The search warrant authorized a search of a residence, and did not limit the search to specific rooms. The police testified that they searched Mr. McDaniel's "premises," without limiting it to any specific area. They testified that the

women's jewelry was recovered from the "premises" or "residence," but never specified that the jewelry was in the same place as the watch. There is no evidence that there was women's jewelry on the dresser where the watch was found, or even in the same room. There is no evidence to suggest that the watch was found mixed in with the women's jewelry. There is no evidence as to how large the residence was. Moreover, the testimony was that there were approximately twenty items of women's jewelry, not "vast quantities." Since approximately 150 pieces were seized, of which approximately twenty were women's jewelry, women's jewelry constituted only approximately 13% of the items seized – nowhere near enough to be called "vast quantities." Any method that allows seizure of items of which 99% are eventually proven to not be fruits of a crime simply cannot be condoned. Simply put, the presence of approximately twenty pieces of women's jewelry in plain view somewhere in the residence cannot constitute probable cause that a watch found on a dresser in a bedroom was stolen property. Moreover, the fact that an item is among other items that may be stolen does not give rise to probable cause that that particular item is likewise stolen. This is precisely the situation that this Court has cautioned runs afoul of the Constitution as part of a general exploratory search to find something – anything – incriminating. *See Coolidge*, 403 U.S. at 466.

Given that there was no probable cause to assume this particular piece was stolen, the court should have applied the same standard to the watch as it

did to the gun registration card. As with the gun registration card, the court should apply *Hicks* to the police action in manipulating the watch. The only evidence was that the watch was on the dresser. There is no evidence that the name "Sleestak," engraved on the back, was facing up. There is no evidence as to how the police manipulated the watch in order to see the engraving. *See Hicks*, 480 U.S. at 325 (Conviction reversed where officers took action which exposed concealed portions of the items.). The fact that there is no evidence how the police manipulated the watch to see indicia that it was stolen leads to the conclusion that the watch must be suppressed.

The seizure of the watch went beyond the search warrant. As such, the seizure could only have occurred if the item was in plain view and immediately apparent to be fruits of a crime. Clearly, the seizure here was illegal. It is hard to imagine how the government can claim otherwise, considering the fact that MPD seized approximately 150 items and brought them back to the station to see if the items were fruits of a crime. At that point, MPD discovered that only two of the approximately 150 items had been stolen. This is precisely the situation that this Court has cautioned runs afoul of the Constitution as part of a general exploratory search to find something – anything – incriminating. *See Coolidge*, 403 U.S. at 466. The case should be reversed and remanded for a new trial where the watch is suppressed.

CONCLUSION

This Court must grant certiorari in order to bring the District's law into concert with the U.S. Constitution and the law as stated by this Court. The Court must grant certiorari to protect the petitioner's constitutional right to reasonable search and seizure. The Court must grant certiorari in order to avoid a grave injustice wrought by the D.C. Court of Appeals. For all these reasons and any other that may appear to the Court, the petitioner respectfully requests that the Court grant his petition for writ of certiorari.

Respectfully submitted,

/s/Donna L. Biderman, Esq.
D.C. Unified Bar No. 425837
LAW OFFICE OF DONNA L. BIDERMAN, PLLC
4015 Chain Bridge Road, Suite 32
Fairfax, Virginia 22030
Telephone (703) 966-5434
Fax (888) 450-8569
Email dbiderman@bidermanlaw.com
Court-Appointed (CJA) Counsel
for Petitioner Orlando G. McDaniel

Dated: July 30, 2018

APPENDIX

APPENDIX A

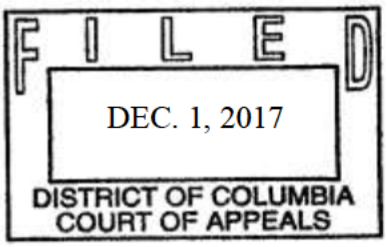
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CM-435

ORLANDO G. MCDANIEL, APPELLANT,

V.

UNITED STATES, APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(CMD-6823-15)

(Hon. William M. Jackson, Trial Judge)

(Argued October 5, 2017 Decided December 1, 2017)*

Before BECKWITH and MCLEESE, *Associate Judges*, and PRYOR, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant, Orlando G. McDaniel, appeals from a conviction for two counts of receiving stolen property. He was charged with three counts of receiving stolen property for a Bremont Martin Baker watch, a gun registration card, and a Rolex watch. Appellant was found not guilty of one count, as to the Rolex watch. He was convicted of two counts, for the Bremont Martin Baker watch and the gun registration card. For each of the two convictions he was sentenced to 180 days, execution of sentence suspended for all but 60 days, with the sentences running consecutively; additionally, he was ordered to pay $100 under the Victims of Violent Crimes Compensation Act. Appellant contends the scope of the search warrant was exceeded and that there was legally insufficient evidence to convict on both charges. We affirm the conviction of receiving stolen property of the Bremont Martin Baker watch and vacate the conviction of receiving stolen property for the gun registration card.

---

* This case was decided by a Memorandum Opinion and Judgment issued November 22, 2017. It is now being withdrawn and replaced with this Memorandum Opinion and Judgment which includes an additional paragraph.

I.

These charges arose from an investigation into three different burglaries, committed by unknown persons. The first burglary took place at James Reeve's residence, at 5925 32nd Street, NW, on December 14, 2013, where a Bremont Martin Baker watch with the nickname "Sleestack" inscribed on the back, among other assorted jewelry and electronics, was stolen. The second burglary took place at William Avery's residence at 4634 Yuma Street, NW, on November 30, 2014, where a gun registration card, along with assorted jewelry and other items, was stolen. Finally, Chris Henick's Rolex watch, along with several other watches and Mr. Henick's Visa, was stolen from his residence at 4201 Yuma Street, NW, on December 13, 2014. In the course of investigation into these burglaries, Detective Wilfred Yulfo of the Metropolitan Police Department ("MPD") performed a search of the pawn shop database, where shops are required to enter serial numbers of items pawned. Yulfo searched the database for Mr. Henick's Rolex watch, and found that the watch had been pawned at Tysons Watch and Jewelry Exchange in Vienna, Virginia. Yulfo discovered that appellant had sold the stolen Rolex to the Tysons Watch Exchange. Yulfo then obtained a search warrant for appellant's home. Though Yulfo requested a search warrant for a broad assortment of "additional evidence of other thefts," the magistrate issued a narrower warrant, only for a specific Rolex watch, a specific Tag Heuer watch, a Movado watch and Mr. Henick's Visa card.

On May 16, 2015, Yulfo and other officers executed the search of appellant's home. Appellant and another male were present. The officers seized approximately 150 items, including various pieces of women's jewelry; however, the only two items identified as stolen were the Bremont Martin Baker watch and gun registration card at issue in this case. The Bremont Martin Baker watch was found on a dresser in the appellant's bedroom. Yulfo seized it because it appeared to be of "significant value" and it bore the name "Sleestack." The gun registration card was found between the pages in the bottom of a bible in appellant's bedroom. After discovering the items, Yulfo placed the appellant under arrest. At the police station, Yulfo and another detective interviewed appellant for two and a half hours, all of which was videotaped. During that interview, appellant mentioned that he did "partake" in the matter in some way.

In the trial court, appellant moved to suppress the tangible evidence that was the fruits of the May 16th search. The trial court denied the motion to suppress. Additionally, appellant objected to the admission of the videotaped interrogation presented as part of the government's evidence, but the trial court found there was

no issue with *Miranda* rights, and denied the motion to suppress.[1] *Miranda v. Arizona*, 384 U.S. 436 (1966). Along with this evidence, the government presented witness testimony of Detective Yulfo and the owners of the stolen property. First, James Reeve, the owner of the Bremont Martin Baker watch, testified that it had been stolen from his home in December 2013. Mr. Reeve explained that "Sleestack" was his call sign when he was in the United States Navy, and he had it engraved on the back of the watch when he purchased it in 2011. Second, William Avery testified that the gun registration card had been stolen from his home in November 2014. Third, Chris Henick testified that the Rolex that was pawned in Virginia, leading the investigators to appellant, was stolen from his home in December 2014.[2] Lastly, Detective Yulfo testified about the investigation of the stolen Rolex that led to the search of appellant's home.

II.

Appellant argues that his Fourth Amendment right to be free from unreasonable searches and seizures was violated by the MPD's seizure of the Bremont Martin Baker watch and gun registration card. As to the watch, we conclude that this argument has no merit and affirm the conviction. We vacate the conviction as to the gun registration card.

The MPD executed a valid warrant for three specific watches and a credit card. It is well established that when the police are lawfully present, they may seize any item that they have probable cause to believe is evidence of a crime, as it would be a "needless inconvenience, and sometimes dangerous . . . to require them to ignore it until they have obtained a warrant particularly describing it." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 68 (1971); *see also Umanzor v. United State*s, 803 A.2d 983, 998-99 (D.C. 2002). Instead, it is only required that the officer be legally present in the place where the evidence is in plain view, "the evidence's incriminating character is immediately apparent," and "the officer has a lawful right of access to the object itself." *Umanzor*, 803 A.2d at 998-99 (citations and internal quotation marks omitted).

Here, the officers were legally searching appellant's home, pursuant to a validly issued search warrant. Appellant cites *Arizona v. Hicks*, 480 U.S. 321, 325-28 (1987), where the Supreme Court held that physically moving a stereo turntable

---

[1] The admission of the statements taken during police interrogation is not on appeal here.

[2] Appellant was found not guilty for receiving stolen property for the Rolex watch because there was insufficient evidence to show that appellant at any point had the watch in the District.

in order to obtain the item's serial numbers was a new search, for which probable cause is required. However, appellant is incorrect in asserting that the officers did not have probable cause to seize the Bremont Martin Baker watch. The Bremont Martin Baker watch was found in plain view, on appellant's dresser. Given the watch's apparent high value and the presence of the watch among vast quantities of women's jewelry, the police observed indicators of stolen property sufficient to give rise to probable cause.[3]

The record is silent regarding what steps or what inspection the officer pursued when he found the gun registration card in the bible. In *Hicks*, the Court held that where the officers "[took] action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions" of items, there was a search that must be supported by probable cause. *Id.* at 325. Here, though the officers could lawfully search for the credit card described in the warrant, once they found the registration card, it is unclear what level of manipulation and handling was required to determine that the card belonged to a man that was not present at appellant's home, and had been stolen. Had the police been forced to flip over, turn, or examine the card at any length to ascertain the information that provided the probable cause to seize the item, then there was no prior probable cause to support the search. *See id.* at 326. We think the government must comply with the opinion rendered in *Hicks* and show compliance on the record. This was not done regarding the gun registration; thus we vacate the conviction for receiving stolen property for the gun registration card.

III.

Second, appellant argues that there is insufficient evidence to find him guilty of receiving stolen property.

When reviewing challenges to the sufficiency of the evidence, we "must review the evidence in the light most favorable to the government, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw

---

[3] Our decision in *Bynum v. United States*, 386 A.2d 684 (D.C. 1978), is not to the contrary. In *Bynum* this court held that the search warrant at issue was not supported by probable cause. *Id.* at 677-678. The court also noted that even if there had been sufficient cause for the warrant, there would not be sufficient probable cause to seize a tape recorder found in plain sight (but not listed in the warrant), even though the address etched on the device "reminded" the officer of an earlier burglary at the address. *Id.* at 687-88. In the present case, there are far more circumstances that could reasonably give the police officers probable cause to seize the watch.

justifiable inferences of fact, and making no distinction between direct and circumstantial evidence." *Fortune v. United States*, 59 A.3d 949, 960 (D.C. 2013) (quoting *Simmons v. United States*, 940 A.2d 1014, 1026-27 (D.C. 2008)). The verdict will be affirmed provided a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Brown v. United States*, 128 A.3d 1007, 1014 (D.C. 2015) (quoting *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc)).

We are satisfied that a reasonable factfinder could determine that the government met its burden of showing all elements of receiving stolen property of the Bremont Martin Baker watch beyond a reasonable doubt. When determining whether the defendant knowingly received stolen property or had reason to know he was receiving stolen property, we have held "a jury reasonably may infer the requisite state of mind for the offense of receiving stolen property where evidence reveals defendant's unexplained (or unsatisfactorily explained) possession of recently stolen property." *Brown*, 128 A.3d at 1017 (quoting *Owens v. United States*, 90 A.3d 1118, 1122 (D.C. 2014)). Here, appellant possessed a personalized watch that clearly did not belong to him; Detective Yulfo testified that the watch was found in appellant's bedroom. Additionally, the government presented testimony from the man who owned the watch, James Reeve, who testified that the watch had been stolen from his home, and identified the unique inscription as his Navy call sign. Additionally, appellant made statements that he did "partake" in the possession of the watch in some manner. Together, there is sufficient evidence to permit a finding that appellant knew or had reason to know that the Bremont Martin Baker watch was stolen property.

We also are satisfied that a reasonable factfinder could find appellant guilty beyond a reasonable doubt of receiving stolen property with respect to the gun registration card. For reasons similar to those previously stated, a factfinder could reasonably conclude that appellant knew or should have known that the card was stolen. Moreover, a reasonable factfinder could conclude beyond a reasonable doubt that the card had at least "some value." D.C. Code § 22-3232 (c)(2) (2012 Repl.). The card was admitted into evidence but was not made part of the record on appeal, so we do not know whether the card was valid or expired during the period of appellant's possession. The United States argues that a reasonable factfinder could infer that the card had not expired, from the facts that Mr. Avery had the card in his possession, that he reported the card as stolen, and that appellant chose to retain the card. Even if the card might have been expired, however, we conclude that the evidence was sufficient. The requirement of value is not heavy: it suffices that the item at issue "had some value -- any value at all, although less than the smallest coin." *Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C.

1988) (internal quotation marks omitted). If nothing else, a reasonable factfinder could assign value to the card because the card's owner might reasonably be concerned that someone would make improper use of the card. *See State v. Green*, No. 1 CA-CR 07-0346, 2008 WL 3856281, at *3 (Ariz. Ct. App. Mar. 13, 2008) (holding that evidence was sufficient to establish value of cancelled credit cards, where defendant had retained cards and cardholder was concerned about possible misuse of cards); *cf. Blackledge v. United States*, 447 A.2d 46, 49 n.2 (D.C. 1982) (suggesting that cancelled credit card that appeared to be valid had value for purposes of receiving stolen property statute).

For the foregoing reasons, we affirm in part, and vacate in part.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable William M. Jackson

Director, Criminal Division

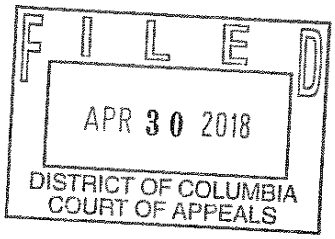
Copies e-served to:

Elizabeth Trosman, Esquire
Assistant United States Attorney

Donna L. Biderman, Esquire

APPENDIX B

District of Columbia
Court of Appeals



No. 16-CM-435

ORLANDO G. MCDANIEL,
Appellant,

v. **CMD6823-15**

UNITED STATES,
Appellee.

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, Fisher, Thompson, Beckwith, * Easterly, and McLeese, * Associate Judges; Pryor, * Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing *en banc*, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

FURTHER ORDERED that the petition for rehearing *en banc* is denied.

PER CURIAM

Copies to:

Honorable William Jackson

Director, Criminal Division

Copies e-served to:

Donna L. Biderman, Esquire
Law Office of Donna L. Biderman, PLLC
4015 Chain Bridge Road, Suite 32
Fairfax, VA 22030

Elizabeth Trosman, Esquire
Assistant United States Attorney