

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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WAYMON SCOTT McLAUGHLIN,

*Petitioner*

v.

UNITED STATES OF AMERICA

*Respondent*

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APPENDIX

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## Appendix A

**UNITED STATES DISTRICT COURT**

NORTHERN DISTRICT OF TEXAS

Fort Worth Division

UNITED STATES OF AMERICA

**JUDGMENT IN A CRIMINAL CASE**

v.

WAYMON SCOTT MCLAUGHLIN

Case Number: 4:16-CR-00212-Y(1)

Dan Cole, assistant U.S. attorney

Leandro Delgado, attorney for the defendant

On March 10, 2017, the defendant, Waymon Scott McLaughlin, was found guilty by a jury on counts 3, 4, 5, and 6 of the superseding indictment filed February 15, 2017. Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

<b><u>TITLE &amp; SECTION</u></b>	<b><u>NATURE OF OFFENSE</u></b>	<b><u>OFFENSE CONCLUDED</u></b>	<b><u>COUNT</u></b>
18 U.S.C. 2113(a)	Bank Robbery	May 6, 2016	3s
18 U.S.C. 2113(a)	Bank Robbery	May 20, 2016	4s
18 U.S.C. 2113(a)	Bank Robbery	May 27, 2016	5s
18 U.S.C. 2113(a)	Bank Robbery	May 27, 2016	6s

The jury found the defendant not guilty of counts 1 and 2 of the superseding indictment.

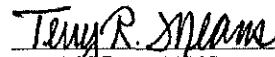
The defendant is sentenced as provided in pages two through four of this judgment. The sentence is imposed under Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission under Title 28, United States Code § 994(a)(1), as advisory only.

The single-count original indictment dated September 7, 2016, is dismissed.

The defendant shall pay immediately a special assessment of \$400.00 for counts 3 through 6 of the superseding indictment.

The defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed August 8, 2017.

  
TERRY R. MEANS  
UNITED STATES DISTRICT JUDGE

Signed August 9, 2017.

## IMPRISONMENT

The defendant, Waymon Scott McLaughlin, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 188 months as to each count, to run concurrently with each other.

The defendant is remanded to the custody of the United States marshal.

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years as to each count, to run concurrently with each other.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

- ( 1 ) not leave the judicial district without the permission of the Court or probation officer;
- ( 2 ) report to the probation officer in a manner and frequency directed by the Court or probation officer;
- ( 3 ) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- ( 4 ) support the defendant's dependents and meet other family responsibilities;
- ( 5 ) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- ( 6 ) notify the probation officer within seventy-two (72) hours of any change in residence or employment;
- ( 7 ) refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- ( 8 ) not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- ( 9 ) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;
- (11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
- (12) not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and
- (13) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement, as directed by the probation officer.

In addition the defendant shall:

- not commit another federal, state, or local crime;
- not possess illegal controlled substances;
- not possess a firearm, destructive device, or other dangerous weapon;
- cooperate in the collection of DNA as directed by the probation officer;
- report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons;

Defendant: Waymon Scott McLaughlin  
Case Number: 4:16-CR-00212-Y(1)

Judgment -- Page 3 of 4

refrain from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the probation officer makes a determination that the defendant is in compliance with the payment schedule;

provide to the probation officer any requested financial information;

refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill; and

pay any remaining balance of restitution in the amount of \$10,761, as set out in this judgment.

### **FINE/RESTITUTION**

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

The defendant is ordered to make restitution in the amount of \$10,761. All restitution payments shall be made by the defendant to the U.S. district clerk, 501 West 10th Street, Room 310, Fort Worth, Texas 76102, for disbursement to:

First Convenience Bank (Counts 3, 5, and 6)  
2009 Chenault Drive, Ste. 106  
Carrollton, Texas 75006  
\$9,814

Woodforest National Bank (Count 4)  
Attn: Bobby Persky, Senior Security Investigator  
25231 Grogans Mill Road, Ste. 175  
The Woodlands, Texas 77380  
\$947

Restitution is due and payable immediately, but if, upon commencement of the term of supervised release, any part of the \$10,761 in restitution ordered by this judgment remains unpaid, the defendant shall make payments on such unpaid balance at the rate of at least \$150 per month, the first such payment to be made no later than 60 days after the defendant's release from confinement and another payment to be made on the same day of each month thereafter until the restitution is paid in full.

This payment schedule does not affect the enforceability of the restitution order and the continuing obligation of Waymon Scott McLaughlin to pay restitution in full as soon as possible. Nothing in this order shall be construed to limit the ability of the United States Attorney's Office to fulfill its statutory obligation to enforce restitution under the Federal Debt Collection Procedures Act, 28 U.S.C. § 3001, *et seq.*, or under any other statutory provision, during supervision or after release.

However, no restitution shall be payable during incarceration from funds deposited into the defendant's inmate trust account or paid to the defendant for work performed during incarceration.

Defendant: Waymon Scott McLaughlin  
Case Number: 4:16-CR-00212-Y(1)

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**RETURN**

I have executed this judgment as follows:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
United States marshal

BY \_\_\_\_\_  
deputy marshal

## Appendix B

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 17-10915

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United States Court of Appeals  
Fifth Circuit

**FILED**

October 2, 2018

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

WAYMON SCOTT MCLAUGHLIN,

Defendant - Appellant

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Appeals from the United States District Court  
for the Northern District of Texas  
USDC No. 4:16-CR-212-1

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Before DENNIS, CLEMENT, and ENGELHARDT, Circuit Judges.

PER CURIAM:\*

Waymon Scott McLaughlin was indicted on six counts of bank robbery by intimidation, in violation of 18 U.S.C. § 2113(a). A jury convicted McLaughlin of four of the six counts of bank robbery by intimidation. McLaughlin was sentenced to four concurrent terms of 188 months of imprisonment based, in relevant part, on enhancements for his aggravating role in counts five and six. McLaughlin now appeals his conviction and

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sentence. Specifically, McLaughlin argues that the district court erred in instructing the jury, in admitting as an exhibit a photograph of his ear, in denying his motion to suppress the robbery note, and in calculating his sentence. As set forth below, we disagree with each of these arguments and therefore AFFIRM McLaughlin's conviction and sentence.

## I. BACKGROUND

McLaughlin was indicted on six counts of bank robbery by intimidation, in violation of 18 U.S.C. § 2113(a). The superseding indictment charged McLaughlin with robbing five FDIC-insured banks in the Fort Worth area a total of six times between December 2015 and May 2016. McLaughlin pleaded not guilty and proceeded to a jury trial.

McLaughlin filed a pre-trial motion to suppress, *inter alia*, a robbery note that was found in a FedEx envelope he was carrying immediately prior to his lawful May 2016 arrest, claiming that the envelope was obtained from a sealed medical envelope during a warrantless search. Following an evidentiary hearing, the district court denied McLaughlin's motion to suppress, finding that the search of the envelope was lawful as both a search incident to arrest and as an inventory search. Additionally, prior to trial, McLaughlin argued that the Government's "newly produced" exhibit, a photograph of his ear, should be excluded because it violated the court's scheduling order and prejudiced McLaughlin's ability to prepare his defense. The district court overruled McLaughlin's objection, admitting Government's Exhibit 83.

At trial, the jury heard evidence of all six charged bank robberies. The jury found McLaughlin not guilty as charged in counts one and two of the superseding indictment; but found McLaughlin guilty as charged in counts three, four, five, and six of the superseding indictment. Having overruled McLaughlin's objection to the aggravating role enhancement, the district court sentenced McLaughlin within the guidelines to 188 months imprisonment for

all four counts, each term to run concurrently. McLaughlin now challenges his conviction and sentence on the grounds discussed below.

## II. DISCUSSION

### A. *Jury Instructions*

McLaughlin appeals the district court's denial of his proposed jury instruction that stated, "to take 'by means of intimidation' means the defendant used force or threatened to use force."<sup>1</sup> Because McLaughlin preserved the issue on appeal, we "review [the] district court's denial of [McLaughlin's] proffered jury instruction for abuse of discretion," affording the district court "substantial latitude in formulating jury instructions." *United States v. Porter*, 542 F.3d 1088, 1093 (5th Cir. 2008). A refusal to give a requested instruction constitutes reversible error only if such instruction: "(1) is a substantively correct statement of the law, (2) is not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the defendant's ability to present a given defense." *Id.* (citing *United States v. Jobe*, 101 F.3d 1046, 1059 (5th Cir. 1996)). It is within a trial judge's discretion to deny a jury instruction if the instruction sought fails to meet any one of these elements. *Id.* The district court's instructions will be affirmed if "the court's

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<sup>1</sup> The district court instructed the jury:

"By means of intimidation" means to say or do something in such a way that a person of ordinary sensibilities hearing or seeing such thing would be fearful of bodily harm. It is not necessary to prove that the alleged victim was actually frightened, and neither is it necessary to show that the behavior of the defendant was so violent that it was likely to cause terror, panic, or hysteria. However, a taking would not be by "means of intimidation" if the fear, if any, resulted from the alleged victim's own timidity rather than some intimidating conduct on the part of the defendant. The essence of the offense is the taking of money or property accompanied by intentional, intimidating behavior on the part of the defendant.

charge, as a whole, is a correct statement of the law and . . . clearly instructs jurors as to the principles of the law applicable to the factual issues confronting them.” *United States v. Spalding*, 894 F.3d 173, 187 (5th Cir. 2018) (quoting *United States v. Kay*, 513 F.3d 432, 446 (5th Cir. 2007)).

On appeal, McLaughlin argues that the district court erred because his requested instruction accurately states the law as clarified by this court in *United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017). Further, McLaughlin claims that the pattern jury instruction used by the district court was insufficient because not merely fear, but a threat of force is required by the bank robbery statute. Moreover, McLaughlin contends that the court not only denied his request, it directly called the issue to the jury’s attention and effectively instructed the jury that the use of force was irrelevant to its decision when it directed the jury to strike through the words “force, violence or,” in the definition of the crime, 18 U.S.C. § 2113(a). Finally, McLaughlin asserts that the instruction was critical in his case, urging us to vacate all four counts of conviction.

The district court did not err in refusing to give McLaughlin’s proffered jury instruction. McLaughlin’s challenge instantly fails because his proposed jury instruction is not an accurate statement of law. *See Russell v. Plano Bank & Trust*, 130 F.3d 715, 719 (5th Cir. 1997) (“Where a party argues on appeal that the district court erred in refusing to give a proffered jury instruction, that party must show as a threshold matter that the proposed instruction correctly stated the law.”) (internal quotation and citation omitted). The use of force is not necessary to prove robbery by intimidation; rather, the use of force is an alternative method of proving bank robbery under § 2113(a), which was not alleged in this case. *See United States v. Higdon*, 832 F.2d 312, 314 (5th Cir. 1987) (“The requirement of a taking ‘by force and violence, or by intimidation’

under section 2113(a) is disjunctive. The government must prove only ‘force and violence’ or ‘intimidation’ to establish its case.”).

Nor does McLaughlin’s proposed jury instruction accurately reproduce the holding in *United States v. Brewer*—that federal bank robbery in violation of 18 U.S.C. § 2113(a) categorically qualifies as a crime of violence under U.S.S.G. § 4B1.2(a)(1) because robbery by intimidation, the “least culpable conduct” under the statute, requires at least an *implicit* threat to use force. 848 F.3d 711, 714–16 (5th Cir. 2017). The *Brewer* court reaffirmed that an express threat to use force is not required for a conviction of robbery by intimidation. *See id.* at 715. McLaughlin’s omission of the word “implicit”—arguably the single most important word in the court’s holding—without further qualifying the type of threat of force required misstates the law and would have misled the jury.

Moreover, the district court’s definition of taking by intimidation accurately encapsulates the Fifth Circuit Pattern Jury Instruction (Criminal) § 2.80A (2015), and is further supported by our decision in *United States v. Higdon*. 832 F.2d 312, 315 (5th Cir. 1987) (“[I]ntimidation results when one individual acts in a manner that is reasonably calculated to put another in fear. . . . [A] taking by intimidation under section 2113(a) occurs when an ordinary person in the teller’s position reasonably could infer a threat of bodily harm from the defendant’s acts.”). “It is well-settled that a district court does not err by giving a charge that tracks this Circuit’s pattern jury instructions and that is a correct statement of the law.” *United States v. Whitfield*, 590 F.3d 325, 354 (5th Cir. 2009) (citing *United States v. Turner*, 960 F.2d 461, 464 (5th Cir. 1992)).

Finally, we reject McLaughlin’s related assertion that the jury was misled regarding the requirement of an implicit threat of force when the district court directed the jury to strike through the words “force and violence,

or" in the written jury instructions defining bank robbery under 18 U.S.C. § 2113(a). Because McLaughlin failed to assert an objection before the district court, this unpreserved issue is reviewed for plain error. *See United States v. Sellers*, 926 F.2d 410, 417 (5th Cir. 1991). This argument fails for several reasons. First, the statute is disjunctive: section 2113(a) requires a taking "by force and violence, or by intimidation." 18 U.S.C. § 2113(a) (emphasis added). "The government must prove only 'force and violence' or 'intimidation' to establish its case." *Higdon*, 832 F.2d at 314.

Second, the record indicates that the district court instructed the jury to strike these words to reflect the superseding indictment, which charged McLaughlin with multiple counts of robbery by intimidation, not robbery by force or violence. Moreover, the district court judge clarified to the jury his reason for the modification: "It is true that Title 18, 2113, makes it a crime for anyone to take from a person by force, violence, or intimidation any money, et cetera, but that's not alleged in this case. So I don't want you to be confused between a statement of what the statute is and the later presentation of the three elements." Therefore, the district court properly adapted the instruction to the allegations of the indictment. *See United States v. Bizzard*, 615 F.2d 1080, 1081–82 (5th Cir. 1980). Taken as a whole, we are satisfied that the district court correctly instructed the jurors on the law. *See United States v. Pace*, 10 F.3d 1106, 1121 (5th Cir. 1993).

For these reasons, the district court did not abuse its broad discretion in refusing McLaughlin's jury instruction.

#### B. *Government's Exhibit 83 - Photograph of McLaughlin's Left Ear*

Next, McLaughlin challenges the district court's admittance into evidence Government's Exhibit 83, a photograph of his left ear, which he argues should have been excluded because it violated the court's discovery order and did not give the defense fair notice. It is within the sound discretion

of the district court whether or not to impose sanctions for a discovery violation. *See United States v. Dvorin*, 817 F.3d 438, 453 (5th Cir. 2016). In making this determination, district courts should consider: “(1) the reasons why disclosure was not made; (2) the amount of prejudice to the opposing party; (3) the feasibility of curing such prejudice with a continuance of the trial; and (4) any other relevant circumstances.” *Id.* (quoting *United States v. Garrett*, 238 F.3d 293, 298 (5th Cir. 2000)). “Any sanction imposed should be the least severe penalty necessary to ensure compliance with the court’s discovery orders.” *Id.* A district court’s determination not to impose sanctions is reviewed for abuse of discretion. *Id.* “The standard of review for discovery matters is steep. We review alleged errors in the administration of discovery rules under an abuse of discretion standard and will not reverse on that basis unless a defendant establishes prejudice to his substantial rights.” *United States v. Holmes*, 406 F.3d 337, 357 (5th Cir. 2005).

We affirm the district court’s admission of Government’s Exhibit 83.<sup>2</sup> The exhibit at issue is a photograph of McLaughlin’s left ear that was produced eight days before trial. *See United States v. Bentley*, 875 F.2d 1114, 1118 (5th Cir. 1989) (affirming the district court’s refusal to exclude evidence as a sanction for the government’s untimely disclosure of evidence the night before trial). The district court did not find, nor is there any indication in the record, that the Government’s failure to disclose the photograph sooner was intentional or in bad faith. *See Dvorin*, 817 F.3d at 453. In fact, McLaughlin concedes that there is no evidence that the Government intentionally produced the exhibit late; rather, the Government provided the photograph to defense counsel the same day it was taken. McLaughlin did not request a continuance upon receiving the photograph nor did McLaughlin reassert his objection to the

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<sup>2</sup> McLaughlin did not further advance this challenge at oral argument.

exhibit at trial. Furthermore, the photograph is of McLaughlin's ear, which he *inevitably* brought with him to court, and is not alleged to be an inaccurate or modified depiction. Thus, the Government could have simply pointed to McLaughlin's ear in the courtroom. *See, e.g., United States v. Weeks*, 919 F.2d 248, 253 (5th Cir. 1990) (referring to a photograph of the defendant as a "physical demonstration"). Considering these facts, the district court did not abuse its discretion in declining to exclude the photograph or impose sanctions.

Equally fatal to his argument on appeal, McLaughlin failed to make a specific showing that the tardiness of the disclosure prejudiced his substantial rights. Moreover, although it is uncontested that the Government relied heavily on Exhibit 83 in its closing argument, the Government did not solely rely on the ear identification to prove McLaughlin's guilt—the record contains surveillance photographs of McLaughlin's entire face, testimony of numerous bank tellers, as well as other corroborating, incriminating physical evidence. McLaughlin has not shown that the photograph was inadmissible or that any alleged discovery violation by the Government necessitated the exclusion of the photograph, the "most extreme sanction possible." *See Bentley*, 875 F.2d at 1118; *see also United States v. Sarcinelli*, 667 F.2d 5, 7 (5th Cir. 1982) (reversing the district court's exclusion of evidence for prosecutor's failure to timely comply with the discovery orders because a less severe sanction could have been imposed). Thus, the district court did not abuse its discretion in allowing into evidence Government's Exhibit 83.

McLaughlin's assertion that he was denied an opportunity to be heard is meritless. The district court considered the essence of the argument now presented on appeal when it overruled McLaughlin's preliminary objection to the photograph.

*C. Denial of McLaughlin's Motion to Suppress*

In his third argument on appeal, McLaughlin contends that the district court improperly denied his motion to suppress the robbery note that he claims was discovered during an unlawful search of an envelope he was carrying at the time of his arrest.<sup>3</sup> When reviewing a district court's ruling on a motion to suppress, we review factual findings for clear error and legal conclusions de novo. *United States v. Ortega*, 854 F.3d 818, 825 (5th Cir. 2017). "Factual findings are clearly erroneous only if a review of the record leaves this Court with a 'definite and firm conviction that a mistake has been committed.'" *United States v. Hearn*, 563 F.3d 95, 101 (5th Cir. 2009) (quoting *United States v. Hernandez*, 279 F.3d 302, 306 (5th Cir. 2002)). The evidence is viewed "in the light most favorable to the prevailing party," here the Government. *United States v. Santiago*, 410 F.3d 193, 197 (5th Cir. 2005). Our review is particularly deferential "where a district court's denial of a suppression motion is based on live oral testimony . . . because the judge had the opportunity to observe the demeanor of the witnesses." *Id.* Such deference applies to our review, as the district court based its conclusion on its finding that Officer Dallas Connor's recitation of events at the suppression hearing was credible. The district court's ruling "should be upheld if there is any reasonable view of the evidence to support it." *United States v. Gonzalez*, 190 F.3d 668, 671 (5th Cir. 1999) (internal quotation marks and citation omitted).

McLaughlin argues that the robbery note was inadmissible because it was recovered during a warrantless search and neither of the warrant exceptions presented by the Government and ultimately relied on by the district court—search incident to arrest and inventory search—is applicable. "Warrantless searches are *per se* unreasonable under the Fourth Amendment,

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<sup>3</sup> The note read: "This is bank Robber [sic] give me Twenties Fifties hundreds."

subject to a few specific exceptions.” *United States v. Mata*, 517 F.3d 279, 284 (5th Cir. 2008). A search incident to arrest is a reasonable search permitted by the Fourth Amendment that does not require a search warrant. *Chimel v. California*, 395 U.S. 752, 762–63 (1969). Incident to a lawful arrest, police may search the arrestee’s person and “the area within his immediate control— . . . the area from within which he might gain possession of a weapon or destructible evidence.” *Id.* at 763. The search incident to arrest exception does not extend to a search that is remote in time or place from the arrest. *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

In conducting a search incident to arrest, officers may search the arrestee himself, as well as certain containers that were located either on the arrestee’s person or within his reach at the time of his arrest, provided the search is contemporaneous with the arrest. *See United States v. Robinson*, 414 U.S. 218, 235–36 (1973) (upholding search of closed cigarette package on arrestee’s person); *see also United States v. Johnson*, 846 F.2d 279, 282 (5th Cir. 1988) (per curiam). *But see Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (declining to extend the search incident to arrest exception as applied in *Robinson* to searches of data on an arrestee’s cell phone). “For searches which are incident to arrest we review *de novo* the application of the proper legal standard to the established facts.” *United States v. Johnson*, 18 F.3d 293, 294 (5th Cir. 1994). A search incident to arrest must be objectively reasonable. *Robinson*, 414 U.S. at 236.

McLaughlin argues that the search of the envelope containing the robbery note was not incident to arrest because the officer searched the envelope and seized the robbery note when McLaughlin was handcuffed and beyond reaching distance. McLaughlin argues that even if the officers had a right to search the envelope for contraband and weapons, they were prohibited

from reading the contents of the envelope, which he claims was predominately marked as containing medical records, attempting to analogize *Riley v. California*. 134 S. Ct. at 2485 (holding that the search incident to arrest exception does not apply to the contents of an arrestee's cell phone).

The district court concluded that the search was lawful and the robbery note was legally admissible, finding that Officer Connor conducted the search of the unsealed envelope—which was removed from McLaughlin's person at the time of his arrest—in good faith and contemporaneous with and incident to McLaughlin's lawful arrest. We agree. There is no dispute regarding the legality of McLaughlin's arrest, which was executed pursuant to an arrest warrant for robbery. When he was arrested, McLaughlin had just exited a convenience store and was carrying an envelope underneath his arm. At the suppression hearing, Officer Connor testified that the strip of glue on the envelope had never been moistened, and it did not visually appear to ever have been sealed. Considering Officer Connor's testimony and upon its own examination of the envelope, the district court conclusively found that the envelope was unsealed and that the unsealed envelope was held close enough to McLaughlin's person to justify a search incident to arrest.

Additionally, the search was prompt and close to the point of McLaughlin's arrest. Less than five minutes after McLaughlin was handcuffed, Officer Connor searched the unsealed envelope (an open container) for weapons, contraband, and identification information. Officer Connor testified that she first searched the envelope within a couple of minutes of McLaughlin's arrest, prior to McLaughlin being placed in the police car. McLaughlin's testimony that he was inside of the patrol car when he saw Officer Connor search the envelope is not definitively inconsistent. McLaughlin admitted that he was not fixated on Officer Connor and that she could have previously opened the envelope without him seeing. Officer Connor further

testified at the suppression hearing that she had been informed that McLaughlin—a suspect in numerous bank robberies, including two robberies that occurred that day—had fled from police days earlier and that a firearm was recovered during that pursuit. Officer Connor noted, based on her 24 years of experience as a police officer, that the envelope was large enough to contain a weapon.

When looking inside the envelope, Officer Connor discovered and read the bank robbery note. McLaughlin correctly observes that the Government failed to show the spatial distance between McLaughlin and the envelope and that Officer Connor was not concerned for her safety at the time she read the note. However, these facts are of no moment given that McLaughlin was carrying the unsealed envelope under his arm at the time of his arrest and that the search was conducted at the scene of the arrest (a public area) only moments after McLaughlin's arrest. *See Robinson*, 414 U.S. at 235–36; *see also Riley*, 134 S. Ct. at 2484 (discussing *Robinson*, the only Supreme Court decision applying *Chimel*'s search incident to arrest analysis to a search of an item found on the arrestee's person: “[T]he Court did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search. It merely noted that, '[h]aving in the course of a lawful search come upon the . . . package of cigarettes, [the officer] was entitled to inspect it.'”) (quoting *Robinson*, 414 U.S. at 236).

Accordingly, the district court did not err in finding that the search of the unsealed envelope was a lawful search incident to arrest.<sup>4</sup> We therefore affirm the district court's denial of McLaughlin's motion to suppress.

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<sup>4</sup> McLaughlin's reliance on *Riley* and implausible attempt to compare the contents of an envelope to the contents of a cell phone is wholly unfounded. Such a comparison was unequivocally rejected by the Supreme Court in *Riley*: “Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person.” *Riley*, 134 S. Ct. at 2489. The Court specifically differentiated the privacy concerns

Having concluded that the search was reasonable as a search incident to arrest, we need not decide if this was also a valid inventory search.<sup>5</sup>

#### D. Aggravating Role Sentencing Enhancement

McLaughlin argues that the district court erroneously applied a two-level enhancement in counts five and six for his aggravating role as an “organizer, leader, manager, or supervisor.”<sup>6</sup> He objected to the sentencing enhancement, preserving this issue for appeal. We review the district court’s application of the Sentencing Guidelines *de novo* and its factual findings for clear error. *United States v. Ochoa-Gomez*, 777 F.3d 278, 281 (5th Cir. 2015). The determination that McLaughlin held an aggravating role under § 3B1.1(c) is a factual finding reviewed for clear error. *Id.* (citing *United States v. Gonzales*, 436 F.3d 560, 584 (5th Cir. 2006)). There is no clear error if the district court’s finding is “plausible in light of the record read as a whole.” *United States v. Bowen*, 818 F.3d 179, 192 (5th Cir. 2016) (citation omitted). A finding of fact is clearly erroneous “only if, based on the entire evidence, we are left with the definite and firm conviction that a mistake has been committed.” *Id.* (internal quotation marks and citation omitted).

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of a cell phone from those implicated by the search of a cigarette pack, a wallet, or purse. *Id.* The degree of invasion of privacy is infinitely higher with a cell phone (i.e., immense storage capacity), while the likelihood of concealing a weapon in a cell phone is much lower than the envelope at issue. *See id.* Finally, contrary to McLaughlin’s assertions, it was not readily apparent that the envelope seized *during his arrest* contained medical documents. “The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee’s reduced privacy interests upon being taken into police custody.” *Id.* at 2488. Thus, McLaughlin’s heightened privacy interest argument fails.

<sup>5</sup> During oral argument, Appellee emphasized the validity of the search as a search incident to arrest.

<sup>6</sup> Based on a multiple count adjustment, McLaughlin’s total offense level was 33 and his criminal history was classified as a category II, resulting in a guideline range of 151 to 188 months imprisonment. Absent the aggravating role enhancement, McLaughlin’s sentencing guideline range would have been 135 to 168 months imprisonment. *See U.S.S.G. Ch. 5, Pt. A (Sentencing Table).*

Pursuant to Section 3B1.1(c) of the Sentencing Guidelines, a defendant's offense level is increased by two levels if the defendant was "an organizer, leader, manager, or supervisor in any criminal activity." U.S.S.G. § 3B1.1(c) (emphasis added). In distinguishing a leadership or organizational role from one of mere management or supervision, courts consider the following factors:

[T]he exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

*Id.* at cmt. n.4.<sup>7</sup> Although this distinction is unnecessary under § 3B1.1(c), the factors are instructive in determining whether McLaughlin held an aggravating role in the offense. To warrant an adjustment, a defendant must be the organizer, leader, manager, or supervisor of at least one other participant.<sup>8</sup> U.S.S.G. § 3B1.1 cmt. n.2; *accord Ochoa-Gomez*, 777 F.3d at 282. A "participant" is defined as "a person who is criminally responsible for the commission of the offense,<sup>9</sup> but need not have been convicted." U.S.S.G. § 3B1.1(c) cmt. n.1. "All that is required is that the person participate knowingly in some part of the criminal enterprise." *United States v. Glinsey*, 209 F.3d 386, 396 (5th Cir. 2000) (citing *United States v. Boutte*, 13 F.3d 855, 860 (5th Cir. 1994)).

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<sup>7</sup> "The application notes accompanying a Guideline generally bind federal courts unless they are inconsistent with the text of the Guideline." *United States v. Ochoa-Gomez*, 777 F.3d 278, 282 (5th Cir. 2015).

<sup>8</sup> An aggravating role adjustment is applicable, even where a defendant did not exercise control over another participant, if he exercised management responsibility over the property, assets, or activities of a criminal organization. *United States v. Delgado*, 672 F.3d 320, 345 (5th Cir. 2012) (en banc), *cert. denied*, 568 U.S. 978 (2012).

<sup>9</sup> The term "offense" includes the contours of the underlying scheme, which is broader than the offense charged. *United States v. Wilder*, 15 F.3d 1292, 1299 (5th Cir. 1994).

On appeal, McLaughlin argues that the district court erred by imposing the aggravating role enhancement because (1) there was insufficient evidence that he was an organizer, leader, manager, or supervisor of at least one participant; and (2) the district court applied the incorrect legal standard for assessing the criminal responsibility of Aldenishae Calton (Calton), who he contends is not a “participant” as defined in U.S.S.G. § 3B1.1 since she did not commit the underlying crime and did not have actual knowledge of the bank robberies.

According to the PSR, McLaughlin acted as a leader, organizer, manager, or supervisor of at least one participant in counts five and six based on the following:

McLaughlin recruited Calton and Glover into the offense.<sup>10</sup> McLaughlin utilized Calton to drive him to at least two banks on May 27, 2016, where he committed robberies. McLaughlin told Calton which banks to go to, and provided Calton with a portion of the proceeds after each robbery. Calton was found to be in possession of \$506 when McLaughlin was arrested. Calton is considered a participant in the offense, pursuant to the definition at USSG §3B1.1, comment (n.1). In considering the factors at USSG § 3B1.1, comment (n.4), McLaughlin was in charge of organizing and directing Calton, claimed the larger share of the fruits of the crime, and was the primary participant in the commission of the offense.

Overruling McLaughlin’s objection, the district court adopted the PSR as its findings of fact and adjusted McLaughlin’s offense level upward based on his aggravating role in counts five and six. *See United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (A PSR generally bears sufficient indicia of reliability). A review of the record shows that, because the district court’s finding is

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<sup>10</sup> McLaughlin contests the district court’s adoption of this finding, pointing to Calton’s testimony that she was recruited by Marquita Glover. This does not affect our conclusion that the district court did not err in imposing the aggravating role sentencing enhancement in McLaughlin’s guideline calculation.

plausible in light of the record as a whole, it did not clearly err in imposing the two-level aggravating role enhancement. McLaughlin's assertion that there was insufficient evidence upon which to base the aggravating role enhancement is unavailing. McLaughlin was convicted of four counts of robbery by intimidation, including counts five and six. It is uncontested that as the bank robber, McLaughlin exercised extensive participation and decision-making in the commission of the offense, while Marquita Glover (Glover) and Calton parked and waited in the car. *See* § 3B1.1 cmt. n.4.

Further evidence supports that McLaughlin acted as an organizer, leader, manager, or supervisor of Calton in the criminal activity: Calton drove McLaughlin to the location of the bank robberies in counts five and six; McLaughlin directed Calton to drive to the Kroger's store on Altamesa, the location of the bank robbery in count five; and McLaughlin had control of the stolen cash and directly paid Calton after three of the bank robberies. *See id.*; *United States v. Gordon*, 248 F. App'x 521, 525 (5th Cir. 2007) (per curiam). Finally, the record supports the district court's finding by a preponderance of the evidence that McLaughlin claimed the majority of the criminal proceeds. Specifically, the crime scene officer, Jose Palomares, recovered a second FedEx envelope from McLaughlin, Glover, and Calton's hotel room, which contained \$3,200 of the \$3,796 recovered that day (reflecting the bill denominations as demanded in the robbery note), along with optical paperwork that belonged to McLaughlin. These facts are consistent with the district court's finding that McLaughlin held an aggravating role within the meaning of Section 3B1.1(c) in counts five and six.

McLaughlin's second challenge that the enhancement was erroneous because Calton does not qualify as a participant and lacked the knowledge for participant status is equally unconvincing. McLaughlin erroneously asserts that Calton cannot qualify as a participant because she was not criminally

responsible for the bank robberies. To the contrary, a participant need only “participate knowingly in some part of the criminal enterprise.” *Glinsey*, 209 F.3d at 396. At sentencing, the district court found that the evidence at trial established that Calton was a participant for purposes of the aggravating role enhancement, finding that she had sufficient knowledge of the offense to make her criminally responsible. Although Calton testified that she “didn’t know” whether something illegal was going on, the record plausibly supports the district judge’s deduction that the totality of the circumstances proved that Calton had the requisite knowledge that something “nefarious was going on, and probably, even specific like there [were] bank robberies happening.”

Specifically, Calton testified at trial that she knew Glover and McLaughlin needed money to get Glover’s boyfriend, Timothy Lewis, out of jail and that she would be paid to drive them.<sup>11</sup> Calton testified that she drove Glover and McLaughlin to Wal-Mart on East Berry, Kroger on Altamesa Boulevard, and Wal-Mart on Vickery Boulevard where McLaughlin would get out of Calton’s Nissan Altima with a FedEx envelope, enter the store, and return with money.<sup>12</sup> McLaughlin exited each store with cash and paid Calton a portion of the criminal proceeds at least three different times, totaling \$506.00 over a span of only a few hours. Finally, in Calton’s interview with the FBI on the day of McLaughlin’s arrest, Calton admitted that she knew that McLaughlin was unlawfully obtaining money from the banks that she drove him to that day. Accordingly, Calton qualifies as a participant under the enhancement.

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<sup>11</sup> On cross examination, defense counsel stated to Calton, “If what you said is what happened, you basically just told law enforcement under oath that you’re the getaway driver.”

<sup>12</sup> Calton also drove McLaughlin and Glover to Wal-Mart in Waco where he got out with the FedEx envelope, but did not return with money because the “line was too long.”

Therefore, because its finding is “plausible in light of the record as a whole,” the district court’s imposition of the Section 3B1.1(c) aggravating role enhancement was not clearly erroneous. *See Bowen*, 818 F.3d at 192.

### **III. CONCLUSION**

For the foregoing reasons, McLaughlin’s conviction and sentence are AFFIRMED.

## Appendix C

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

3 UNITED STATES OF AMERICA . CRIMINAL ACTION NO.  
4 V. . 4:16-CR-212-Y-1  
5 WAYMAN SCOTT MCLAUGHLIN . Fort Worth, Texas  
 . February 28, 2017

6

14 APPEARANCES:

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24 Proceedings recorded by mechanical stenography; transcript  
25 produced by computer-aided transcription.



1                   THE COURT: Please be seated, ma'am.

2                   Go ahead, sir.

3                   MR. COLE: Thank you, Your Honor.

4                   DALLAS CONNOR, testified under oath as follows:

5                   **DIRECT EXAMINATION**

6                   BY MR. COLE:

7                   Q. State your name, please.

8                   A. Dallas Connor.

9                   Q. And how are you employed?

10                  A. I'm a Fort Worth police officer.

11                  Q. And how long have you been employed as a police officer?

12                  A. Twenty-four years.

13                  Q. Are you assigned to a particular squad right now?

14                  A. Yes. I'm assigned to the Criminal Intelligence Unit.

15                  Q. And as part of your assignment with that unit, do you also  
16                  participate in locating fugitives, individuals with arrest  
17                  warrants outstanding?

18                  A. Yes. We assist the fugitive unit regularly.

19                  Q. Okay. And were you working in that capacity in May of  
20                  2016?

21                  A. I was.

22                  Q. And on May 27, particularly May 27, 2016, were you working  
23                  in that capacity regarding an arrest warrant for Waymon -- an  
24                  individual named Waymon Scott McLaughlin based on a bank  
25                  robbery that occurred in Grand Prairie?

1 A. Yes, I was.

2 Q. And had you -- prior to that date, had you received any  
3 information regarding either that bank robbery or the behavior  
4 of the suspect after that bank robbery?

5 A. Yes. We had information regarding some other offenses and  
6 behaviors by the defendant. So I was aware of the  
7 situation.

8 Q. Okay. Specifically, regarding this Grand Prairie bank  
9 robbery, was it your understanding that that occurred on  
10 May 20, 2016.

11 A. Yes.

12 Q. And was there any information or were you aware of any  
13 information that indicated that he had fled from officers on  
14 that day?

15 A. Yes. I was working that day and I was aware that he had  
16 been in a pursuit and fled from the police on that day, and a  
17 weapon was recovered during that pursuit.

18 Q. Okay. Was it your understanding that he had been in  
19 possession of that weapon?

20 A. Yes. It was thrown from the vehicle.

21 Q. Okay. Was that a firearm?

22 A. It was.

23 Q. Now, subsequent to the May 20 -- to the incident on  
24 May 20, did your office develop information that indicated  
25 that he may have been working with someone else to either help

1 him evade or, I guess, more specifically working with someone  
2 else to pick him up after he had evaded police?

3 A. Yes. We were told that there was someone else involved.

4 Q. And had your department identified a phone number of who  
5 they believed that person to be?

6 A. They had.

7 Q. Did your office obtain, I guess, what you would call a  
8 ping order to ping the location of that phone?

9 A. Yes. That's the information I had received.

10 Q. And was your department trying to locate Waymon Scott  
11 McLaughlin by pinging that phone?

12 A. Yes, they were.

13 Q. Okay. On May 27, 2016, did you -- during the day, did you  
14 develop information or were you advised that Waymon Scott  
15 McLaughlin may have been involved in additional bank robberies  
16 on May 27, 2016?

17 A. Yes, two on that date.

18 Q. Okay. And did you receive any information regarding a  
19 possible description of a getaway vehicle?

20 A. Yes. We had information that it was a white Nissan  
21 Altima.

22 Q. Okay. So by that afternoon, were you attempting to locate  
23 Mr. McLaughlin by either locating the vehicle or locating the  
24 phone that you were pinging?

25 A. Yes, many officers were. Yes, that's what we were doing

1 that day.

2 Q. Okay. Well, around 6 o'clock p.m. of that day, did you  
3 spot a vehicle that you believed to be the getaway vehicle?

4 A. Yes.

5 Q. Okay. And when you spotted that vehicle, what happened?

6 A. I was on the South Freeway, which is I-35W. I had  
7 received information that the vehicle was possibly northbound  
8 on 35. So I placed myself in a position to start watching the  
9 freeway, and when I got information that the vehicle was  
10 possibly at a location, I got onto the freeway and started  
11 driving approximately 55 miles an hour until I spotted the  
12 vehicle, which passed me.

13 Q. Can I stop you for a second?

14 A. Uh-huh.

15 Q. Prior to this time, had you been provided with photographs  
16 of an individual that you believed to be Waymon Scott  
17 McLaughlin?

18 A. I had.

19 Q. Okay. Did you have some idea of who you were looking  
20 for?

21 A. Yes, I did.

22 Q. Okay. I'm sorry. Please continue.

23 A. So the vehicle passed me at a high rate of speed. I sped  
24 up and started to follow the vehicle --

25 THE COURT: Excuse me. Were you in a marked vehicle?

1                   THE WITNESS: I was not. I was in an undercover  
2 vehicle.

3                   THE COURT: Go ahead.

4                   A. I began following the vehicle and relaying to the other  
5 officers involved to our location. We went northbound on 35  
6 and then eastbound on East Loop 820 until we got to the  
7 Mansfield Highway exit. At that time the vehicle exited. It  
8 looped back around to the north side access road and pulled  
9 into a convenience store.

10                  At that time the vehicle pulled up near the front of the  
11 convenience store, and I believe that the defendant exited the  
12 vehicle. I advised other officers. At that time the vehicle  
13 pulled away, and it immediately pulled into an adjacent motel  
14 that is at the north end of that convenience store. I advised  
15 officers of that as well.

16                  I placed myself in my undercover vehicle at the gas pumps  
17 in front of the store. My partner and several other officers  
18 from my unit and the fugitive unit placed a perimeter around  
19 the store.

20                  I could see inside the store. Because we knew the history  
21 of the defendant and what we were dealing with, we felt it was  
22 unsafe for the general public to make entry into the store.  
23 So we waited.

24                  I could see a little bit into the store. It was a blocked  
25 view, but I could see what I thought that he was in line or

1 standing in front of the counter. There were other people.  
2 Nobody was acting as if something strange was happening. A  
3 few minutes later, he exited the convenience store.

4 Q. Let me stop you for a second.

5 This individual, when you saw him based on his appearance,  
6 did he appear to be the Waymon Scott McLaughlin that you were  
7 looking for?

8 A. Yes. I had seen previous pictures, and I believed it to  
9 be him, not only because of his appearance, but he also had  
10 the exact clothing description that we had already been  
11 relayed that he had had on earlier in the day, that he was  
12 still wearing exactly the same clothes. He was the right  
13 height, build.

14 Q. Now, by clothes that he had on earlier in the day, was  
15 that specifically clothes that you were advised that the  
16 individual who had robbed the banks on that day was wearing?

17 A. Yes.

18 Q. And you mentioned that you didn't want to go into the  
19 store because of some concern for the general public. Is that  
20 because the defendant had fled in the past and possessed a  
21 weapon in the past?

22 A. Yes, it was.

23 Q. Okay. So at this point he's in the store beginning to  
24 exit the store. What happened?

25 A. He exited the store. He had a plastic sack in his hand,

1 and he had an envelope underneath his arm, the upper part of  
2 his arm. Basically, he fish hooked out of the store. At that  
3 time, there was a drive-through at the side of the building.  
4 We felt like we had a good backdrop, and it was a safe  
5 location to take him down.

6 So we made the signal over the police radio. We all  
7 exited our vehicles in a quick response and put him to the  
8 ground and took him into custody for his arrest warrant for  
9 the bank robbery.

10 Q. Okay. So as he was being taken to the ground, you  
11 mentioned that he had a white envelope in his possession. Is  
12 that correct?

13 A. He did.

14 Q. Okay. So tell us what happens to this envelope during  
15 this time.

16 A. I took possession of it. He was placed in handcuffs. It,  
17 of course, came out. I took possession of that. We sat him  
18 up. He was on his stomach. We searched him for firearms,  
19 weapons, contraband, and we set him up on his bottom. He had  
20 previously been on his chest.

21 I started taking possession of all of the property. I  
22 already had the envelope in my hand. The envelope was not  
23 sealed. It was open. I looked inside of it -- because we  
24 were outside and it was windy, I just kind of looked inside of  
25 it to see if there was any kind of weapons, a knife, razor

1 blade, contraband, any identification information that would,  
2 you know, confirm his identity, and I just kind of flipped  
3 through the top of it and looked inside the envelope.

4 Q. Okay. So from the time that handcuffs were placed on him  
5 to the time you were looking in that envelope, was it a matter  
6 of hours, minutes, seconds?

7 A. Minutes.

8 Q. By minutes, just a couple of minutes, two or three  
9 minutes?

10 A. Yeah, within five minutes.

11 Q. Okay. Now --

12 THE COURT: Wait a minute. Wait a minute.

13 What was your question about timing? Could you repeat it?

14 BY MR. COLE:

15 Q. Specifically, my question was, after -- from the time he  
16 was placed in handcuffs until the time that you looked inside  
17 that envelope, what period of time were we talking about  
18 transpired?

19 A. Less than five minutes.

20 THE COURT: Thank you.

21 BY MR. COLE:

22 Q. The envelope you indicated it was not sealed?

23 A. It was not.

24 Q. You have been a police officer I believe you said for 24  
25 years, 25 years?

1 A. Yes.

2 Q. Okay. Is this envelope large enough to contain any kind  
3 of weapon?

4 A. Yes.

5 Q. A knife?

6 A. Yes.

7 Q. A gun?

8 A. Yes.

9 Q. Drugs?

10 A. Yes.

11 Q. Now, did you bring that envelope with you to court  
12 today?

13 A. I did.

14 Q. Do you have that with you?

15 A. Yes. It's right in front of me.

16 MR. COLE: Your Honor, the government would like to  
17 make the physical exhibit available, would move to enter the  
18 exhibit, and would like to make it available for the Court's  
19 inspection, but we intend to use this exhibit at trial. So I  
20 have, also, photographs of it if it pleases the Court to  
21 substitute for the purposes of the record.

22 THE COURT: Is there objection?

23 MR. DELGADO: None, Your Honor.

24 THE COURT: I'll examine the envelope if necessary,  
25 return it to the government, and accept a photograph as a

1 substitute for the record.

2 MR. COLE: Okay. Thank you, Your Honor.

3 MR. COLE: Forgive me if I didn't, but, Your Honor, I  
4 would move to enter that exhibit now for the limited purpose  
5 of being examined.

6 THE COURT: And the number on it?

7 MR. COLE: It would just be Exhibit Number 1.

8 THE COURT: Government's Exhibit 1, there being no  
9 objection, is admitted.

10 BY MR. COLE:

11 Q. Can you take a look at that envelope and describe if it is  
12 the type of envelope that can be sealed?

13 A. Yes.

14 Q. Okay. Is it a type of envelope that has a glue either the  
15 kind of glue that you lick or by moisten in order to seal  
16 it?

17 A. Yes.

18 Q. By looking at it, can you tell has that strip of glue ever  
19 been moistened?

20 MR. DELGADO: Objection, Your Honor. I don't think  
21 she's qualified to offer that --

22 THE COURT: I think a layman can tell whether -- have  
23 a layman's opinion about whether an envelope has been licked  
24 and sealed or not. So the objection is overruled.

25 BY MR. COLE:

1 Q. In your opinion?

2 A. In my opinion, I believe it has not been moistened in any  
3 way.

4 Q. Is there any indication -- from just visually looking at  
5 it, is there any -- does it look like the glue has been  
6 affixed and it's been torn apart or anything like that?

7 A. No. It looks consistent all the way across. It doesn't  
8 look like it's been moistened, and then the bottom part of the  
9 envelope where it would attach to the paper, it's not damaged  
10 where the glue would be against it.

11 Q. When you took possession of it, was it taped closed? Was  
12 it duct tape closed, or was it somehow sealed in some other  
13 fashion?

14 A. No, it was not.

15 Q. Now, this arrest took place in a public area; is that  
16 correct?

17 A. Yes.

18 Q. And the two other occupants of the vehicle that the  
19 defendant was in, they traveled to a nearby hotel?

20 A. Yes.

21 Q. Okay. Before I go on, do you see the individual you  
22 arrested? Do you see him here today?

23 A. Yes.

24 Q. Can you describe his appearance and where he's seated?

25 A. He's wearing the orange jumpsuit. He's at the defense

1 table.

2 Q. Okay. Now, does he look different today than he looked on  
3 that day you arrested him?

4 A. Yes, he does.

5 Q. How does he look different?

6 A. He has a very long beard today. The day that we arrested  
7 him, he had what I would call a 5 o'clock shadow as far as  
8 facial hair is concerned.

9 Q. So these other individuals, they traveled to a nearby  
10 hotel room?

11 A. Yes. I saw them pull into the parking lot.

12 Q. And did officers go attempt to interview them or intercept  
13 them?

14 A. They did.

15 Q. After the defendant was arrested, were hotel keys found on  
16 his person?

17 A. Yes.

18 Q. And were these individuals that traveled to the hotel, did  
19 they travel to that room?

20 A. They did.

21 Q. Was a search warrant obtained for that room?

22 A. Yes.

23 Q. Okay. And were those two individuals, those two females,  
24 transported to the Fort Worth Police Department for  
25 interview?

1 A. They were. .

2 Q. Okay. So after they were transported for interview, was  
3 there any person, whether at the convenience store or at the  
4 hotel, who could take custody of the defendant's personal  
5 property?

6 A. No, there was not.

7 Q. Are you familiar with the Fort Worth Police Department's  
8 general orders and, specifically, General Order 314.02?

9 A. Yes, I am.

10 Q. Okay. Did you bring those general orders with you  
11 today?

12 A. I did.

13 Q. I'm going to direct your attention to Section 314.02,  
14 Section A1.

15 MR. COLE: And, Your Honor, I have attached this  
16 general order. It's an attachment to my motion if the Court  
17 would like to follow along. It is attached to the  
18 government's response to defendant's motion.

19 THE COURT: All right.

20 BY MR. COLE:

21 Q. Specifically, regarding Fort Worth PD General Order  
22 314.02A1, could you read that, please?

23 A. Incidental to arrest, officers shall search all bags,  
24 purses, and large items for weapons and contraband before  
25 submitting the property to the property room or to the jail

1 intake personnel.

2 Q. And can you -- move down to Section C. Can you read 1 and  
3 2?

4 A. One, routine searches shall be limited to padding of  
5 pockets of outer garments and searching purses, sacks, and  
6 other personal possessions they have with them.

7 Two, if the officer is reasonably certain that the  
8 prisoner is concealing a dangerous weapon, the search may be  
9 carried further. If possible, a witness should be present and  
10 extreme safety precaution shall be taken.

11 Q. Let me stop you.

12 Based on your understanding that the defendant previously  
13 possessed a firearm during a chase with law enforcement  
14 officers, were you approaching him with the understanding that  
15 he may be armed?

16 A. Yes.

17 Q. More so than, say, somebody you would just stop on a  
18 traffic incident?

19 A. Yes.

20 Q. Then, finally, if you could read Section E1, please?

21 A. One, any personal property of the prisoner not submitted  
22 at the time of the arrest shall be submitted to the property  
23 room using appropriate forms.

24 Q. Okay. Just a couple more questions here.

25 When a -- the -- when an individual is arrested by the

1       Fort Worth Police Department and booked into jail, not for an  
2       interview but booked into jail on that warrant, who operates  
3       the jails that the Fort Worth Police Department books their  
4       inmates into?

5       A. Mansfield Police Department, Mansfield Law Enforcement  
6       Center, is who our contract is for the Fort Worth Police  
7       Department.

8       Q. And is the Fort Worth Police Department property room  
9       co-located with the Mansfield Jail or is it separate?

10      A. It's separate.

11      Q. In fact, is the Mansfield Jail operated by a completely  
12       separate city government?

13      A. Yes.

14      Q. And is the Fort Worth police property room several miles  
15       away from the Mansfield Jail?

16      A. It is.

17      Q. So does the Fort Worth Police Department maintain a  
18       property room at the Mansfield Jail?

19      A. We do not.

20      Q. Okay. So when you are booking an individual into  
21       property -- or into jail, if you need to book their personal  
22       property into the Fort Worth PD property room, that has to go  
23       to a different location than the jail; is that correct?

24      A. Yes.

25      Q. According to your general orders, I believe you mention in

1 your general orders that -- specifically, in Section A1,  
2 incident to arrest, officer shall search all bags, et cetera.  
3 Then in Section C1, routine searches shall be limited to the  
4 padding of pockets, et cetera, and Section E1, any personal  
5 property of the prisoner not submitted at the time of arrest  
6 shall be submitted to the property room did the general orders  
7 afford you any discretion to decide whether you're going to  
8 search someone incident to arrest or inventory property prior  
9 to it being submitted to the property room, or are you  
10 required by the general orders to search all individuals and  
11 their personal property incident to arrest?

12 MR. DELGADO: Objection, compound and confusing, the  
13 question.

14 THE COURT: I understood it.

15 You may answer.

16 A. Yes.

17 BY MR. COLE:

18 Q. Okay. And, second, regarding booking personal property  
19 into the property room, are you afforded discretion as to what  
20 you inventory, or are you required to inventory all personal  
21 property?

22 A. Yes. We are required to inventory all personal  
23 property.

24 Q. So if you decided not to search Mr. McLaughlin and his  
25 property incident to arrest, would you actually be violating

1 your general orders?

2 A. We would -- I would.

3 Q. And if you booked his personal property into the property  
4 room without inventorying that, would that be a violation of  
5 your general orders?

6 A. It would.

7 THE COURT: Let me challenge a little bit there.

8 I would infer, though, if you were in an arrest situation,  
9 you are not required to search if you believe there is no  
10 threat?

11 THE WITNESS: Yes. We are required to search because  
12 they can't be taken into a jail facility without being  
13 searched.

14 THE COURT: Okay. So you answered correctly then,  
15 that if you arrest, you are required by your rules to search?

16 THE WITNESS: Yes.

17 THE COURT: Okay. Go ahead.

18 MR. COLE: Your Honor, I have nothing further at this  
19 time. Does the Court need to examine the envelope at this  
20 time.

21 THE COURT: I would like to see it, yes.

22 Thank you.

23 (Brief pause in proceedings)

24 MR. COLE: Your Honor, I apologize. I do have one  
25 additional question.

1                   THE COURT: Go ahead.

2 BY MR. COLE:

3 Q. When you looked in the envelope, did you see a bank  
4 robbery note in there?

5 A. I did.

6                   THE COURT: I wondered if you were going to ask that  
7 question, and if you hadn't, I was going to see if Mr. Delgado  
8 asked, and if he didn't either, I was going to ask.

9                   You did see it?

10                  THE WITNESS: I did.

11                  THE COURT: Did you read it?

12                  THE WITNESS: I did.

13                  THE COURT: Did you recognize it as a note to a  
14 teller or inferred that?

15                  THE WITNESS: Yes. I believed it to be a bank  
16 robbery note, and I made the case agent aware.

17                  THE COURT: I'm looking at the contents of  
18 Government's Exhibit 1. So far I haven't found a note or copy  
19 of a note -- oh, there it is.

20                  (Brief pause in proceedings)

21                  THE COURT: He introduced himself, this is a bank  
22 robber. Did you know that's what it says?

23                  MR. COLE: I knew that's what it says, but I didn't  
24 know if anyone else noticed that.

25                  THE COURT: Whoever wrote it, introduced himself as a

1 bank robber.

2 MR. COLE: Yes.

3 THE COURT: I've examined the contents of  
4 Government's Exhibit 1, and I will comment that it appears to  
5 me as well that the adhesive at the top of the envelope has  
6 not been moistened and that the place where the envelope flap  
7 would have been mashed down to form a seal does not look like  
8 it has ever had any adhesive applied to it by the closure of  
9 the seal by mashing it down after having been moistened.

10 There seems to be a little note here that's probably not a  
11 part of your exhibit -- oh, that was a note to me from my  
12 clerk.

13 THE CLERK: I'm sorry.

14 THE WITNESS: I was like, I didn't remember a note.

15 THE COURT: All right. I will place this back in  
16 here.

17 MR. COLE: Your Honor, while you're doing that, may I  
18 follow up with one last question?

19 THE COURT: Yes, sir.

20 BY MR. COLE:

21 Q. You indicated that you looked in the envelope for weapons,  
22 contraband, identifying information. You were operating under  
23 the understanding that he had robbed a bank that day,  
24 correct?

25 A. Yes.

1 Q. And would this envelope have been -- was this envelope the  
2 correct size the store proceeds from a bank robbery?

3 A. Yes.

4 MR. COLE: I don't have any further questions, Your  
5 Honor.

6 THE COURT: All right. To whom shall I return this?

7 MR. COLE: You can return it to the witness, Your  
8 Honor. Thank you.

9 THE COURT: Mr. Delgado, are you going to be needing  
10 to examine this?

11 MR. DELGADO: No, Your Honor.

12 THE COURT: You may step down -- I guess we'll have  
13 cross examination. Thank you.

14 **CROSS EXAMINATION**

15 BY MR. DELGADO:

16 Q. Agent Connor, is it?

17 A. Officer.

18 THE COURT: And before you go on, I want to follow up  
19 on one thing.

20 You have testified that you read the note?

21 THE WITNESS: I did.

22 THE COURT: When?

23 THE WITNESS: There at the scene after the arrest.

24 THE COURT: So when you were noting other things, you  
25 saw the note and you read it at that time?

1                   THE WITNESS: I did, yes, sir.

2                   THE COURT: Thank you.

3                   I'm sorry, sir. Go ahead.

4 BY MR. DELGADO:

5 Q. Just on that point, were you concerned for your safety at  
6 that time?

7 A. At that time, no.

8 Q. So when you read the note, you said just now that you were  
9 looking for the envelope, looking to see what was in there.  
10 You see the note and you read what it said. At that time you  
11 were not concerned for your safety?

12 A. No. At that time the defendant was in custody.

13 Q. I want to sort of review the things that you testified  
14 about with the prosecutor.

15 You said that you had received some information that the  
16 defendant, the person you were looking for, for committing a  
17 bank robbery May 20, that that person was armed or that a  
18 firearm had been thrown out of a vehicle on May 20?

19 A. Yes.

20 Q. The information that you received, did that include any  
21 allegation that Waymon McLaughlin was seen with a weapon?

22 A. Yes. He was believed to be the driver of the vehicle on  
23 that day. There had been a bank robbery that day.

24 Q. Did you say before there were two people involved in that  
25 bank robbery?

1 A. On that occasion, on the 20th, that was information --  
2 there were several offenses. I don't know if it was the 20th,  
3 but we had worked on this numerous days. So days of offenses,  
4 we received information that there was a second person  
5 involved, possibly a driver.

6 Q. Okay. And then you said on the day when the gun was  
7 thrown out of the vehicle, you were told that Mr. McLaughlin  
8 was believed to be the driver?

9 A. Yes.

10 Q. Were you told specifically that he was seen with a weapon  
11 that day?

12 A. Yes, because he was the driver in the vehicle, and the  
13 weapon was thrown out the window of the vehicle. So --

14 Q. There are multiple windows to a vehicle. Was there  
15 someone else in the vehicle, no?

16 A. The information that I received was that it was assumed  
17 that Mr. McLaughlin had a weapon.

18 Q. Now, on May 27, there are two other bank robberies that  
19 occurred you said. That's the day that Mr. McLaughlin is  
20 arrested, correct?

21 A. Yes.

22 Q. And you say that when you came upon him, you recognized  
23 him based on his face. You have also said he was wearing the  
24 exact same clothes that the robber was wearing that day?

25 A. Yes.

1 Q. Can you describe those clothes?

2 A. Yes. It was a darker color either shirt or jacket. I  
3 remember that it was open in the front -- I'm not sure if it  
4 was a shirt or a jacket, but it was dark either denim or navy.  
5 He had lighter colored pants on and a T-shirt and a Yankees  
6 ball cap.

7 Q. What was the color of the pants?

8 A. The pants, I would say they were either light blue or  
9 white. They were very light-colored is my recollection. I'm  
10 not 100 percent certain of the color.

11 Q. And the length?

12 A. The length, I don't have a recollection of the length. My  
13 recollection is that they were lighter colored than the shirt  
14 or jacket.

15 Q. But you cannot remember if they were shorts or jeans?

16 A. I'm not 100 percent certain, but I think that it was long  
17 pants.

18 Q. Now, let's discuss the arrest what happened.

19 You said when you came up on him, you and the other  
20 officers -- he was coming out of the convenience store right  
21 there at the gas station. Is that correct?

22 A. Yes.

23 Q. Are you the person who goes and makes contact with him,  
24 physical contact?

25 A. I was not the first person that had physical contact with

1 him.

2 Q. Where was this envelope when he was first approached by  
3 the police officer?

4 A. It was under his arm. If you held your elbow up against  
5 your body, it would have been sandwiched between his body and  
6 his arm.

7 Q. Can you describe what happens to the envelope and what  
8 happens to the handcuff and who takes the envelope by name?  
9 Can you describe that, please?

10 A. By name, it was -- we kind of all converged on him at  
11 once. My partner, Officer Addie, was the first person, I  
12 think, that may have made physical contact with him. Officer  
13 DJ Scott, Officer Hill, they kind of all converged on him at  
14 once. I was behind Officer Addie. When he went to the  
15 ground, I was near his feet, the back of his legs. So the  
16 property, he went to the ground with it.

17 Q. Was the envelope with him --

18 THE COURT: Excuse me. What's the first name of the  
19 officer named Hill?

20 THE WITNESS: Hill? Joseph Hill.

21 THE COURT: Thank you. Thank God it wasn't Alan.  
22 Thank you.

23 A. So at that point handcuffs were the first priority so that  
24 we had control of the defendant.

25 BY MR. DELGADO:

1 Q. Where was the envelope when he was handcuffed?

2 A. Well, it was under his arm when he went to the ground. So  
3 it either went to the ground or still remained next to his  
4 body. My focus at that point, as all the other officers, are  
5 his hands. They are the biggest threat for officer safety.  
6 My focus was not if it was still between his body or if it had  
7 landed on the ground.

8 Q. Describe again what happened after that.

9 A. He was placed in handcuffs. At that point, officers --  
10 and I'm not sure which officer -- checked his waistband,  
11 pockets. We were looking for any type of weapons. That's the  
12 most important thing. And then either I picked up or Officer  
13 Addie picked up and handed me the envelope. We were basically  
14 getting things out of his reach, the bag that he had from the  
15 convenience store, moved everything out of his reach. Those  
16 are all general practices --

17 Q. Why were you getting things out of his reach?

18 A. Officer safety issues. At that point, we don't know  
19 what's inside of it. So we have to use every precaution to  
20 make sure that there was not any kind of weapons and that we  
21 have control of the situation.

22 Q. So because of those precautions and because of officer  
23 safety, you removed you said the envelope in the bag that he  
24 had when he came out of the convenience store to prevent him  
25 from reaching for those items?

1 A. Yes, or -- I mean, that's just what we do. That way  
2 you're preserving everything. You're controlling the  
3 situation.

4 Q. So what happened next? You removed the envelope and the  
5 bag from his reach. Other officers had searched him at this  
6 point, and then what happened?

7 A. We had taken his ball cap off his head. I took possession  
8 of that. His pockets were empty. Because we didn't have a  
9 bag or anything, it was kind of an officer deal. We usually  
10 will dump the contents of the pocket into a ball cap. That  
11 way they're all contained. So I took possession of all of his  
12 personal effects, everything out of his pockets, off of his  
13 person into the ball cap. So I had the envelope and the ball  
14 cap.

15 Q. And you took possession of the things that were also  
16 removed from his waistband?

17 A. Yes.

18 Q. What were those items?

19 A. I believe there was some money. There were keys,  
20 glasses -- and the keys were like car keys, hotel keys. I  
21 remember them -- I thought they were Dominos gift cards or  
22 something, but they were actually hotel keys, loose change. I  
23 can't remember what else. I think reading glasses.

24 Q. Other than the things that were found inside the envelope,  
25 was there any other evidence seized, any other contraband that

1 you remember?

2 A. Yes, there was marijuana.

3 Q. Did you take possession of that, also, in the ball cap?

4 A. Yes.

5 Q. So you forgot that. Anything else that you put in the  
6 ball cap?

7 A. I'm trying to recall. There may have been other items  
8 that were in his pockets.

9 Q. Okay. But --

10 A. The only contraband was marijuana.

11 Q. Correct.

12 Is that everything that was seized from him incident to  
13 his arrest that was put in the ball cap?

14 A. Yes.

15 MR. DELGADO: Your Honor, I would like to approach  
16 the witness with an attachment that was included in the  
17 motion, the police report reflecting what happened during the  
18 arrest. It is at Page 24-1. The government has seen and I  
19 believe there is no objection.

20 MR. COLE: There is no objection to that, Your  
21 Honor.

22 THE COURT: All right. Go ahead.

23 MR. DELGADO: And it is attachment Page 2 of 19 of  
24 Document 24-1 to the motion.

25 BY MR. DELGADO:

1 Q. I don't know if you have seen this before, but you are  
2 familiar with these police reports.

3 Do you know what this is looking at it?

4 A. Yes. This is a copy of an incident report, Fort Worth  
5 Police Department incident report. There are two different  
6 ways that it can print. This is the one that is in our  
7 in-house computer system. So I am familiar with it.

8 MR. DELGADO: Does the Court need help locating the  
9 document?

10 THE COURT: Tell me, again, what it is, just tell me  
11 the number.

12 MR. DELGADO: It's Document 24-1. It begins at Page  
13 2, I believe.

14 THE COURT: Page 2 of 4, is that what you're looking  
15 at?

16 MR. DELGADO: 1 of 4.

17 THE COURT: 1 of 4, okay, that page.

18 BY MR. DELGADO:

19 Q. So you can review it if you want. It has some highlights,  
20 but if you look at the narrative, you can read it if you want.

21 Do you agree that this is the description of the arrest?  
22 It was not written by you, and one of the questions I have is  
23 that I see your name included in there, but it wasn't written  
24 by you. So when I ask you about the police practices about  
25 who writes the police report, you wrote there were multiple

1 officers involved.

2 A. Okay. I'm reviewing it, but I'm not sure what the  
3 question is. Yes, this is the police report.

4 Q. I don't think there is any disagreement that that police  
5 report reflects --

6 MR. COLE: It is the police report concerning the  
7 arrest.

8 BY MR. DELGADO:

9 Q. So first question, you participated in the arrest. You  
10 didn't write this police report. Can you explain how the Fort  
11 Worth Police Department decides who writes these police  
12 reports when there are multiple officers involved?

13 Q. Someone is selected, probably someone -- in this case  
14 Officer Sims, I believe, wrote this narrative. He was one of  
15 the fugitive officers. This was a fugitive operation. My  
16 unit was there assisting the fugitive unit, but we do often  
17 times -- because I work in the undercover unit, when they need  
18 additional undercover officers, we assist them. Generally,  
19 the person that writes the report is one of the lead officers  
20 on the scene, kind of like a case agent for federal-type  
21 offenses.

22 Q. And Officer Sims is not here today. So I'm going to have  
23 to rely on you. Can you please read the highlighted portion  
24 of that arrest that I previously highlighted?

25 A. Search incident to arrest. Officer Hill located a clear

1 plastic baggy containing a green leafy substance, which  
2 Officer Hill believed from his training and experience to be  
3 marijuana located in ARR, which stands for arrested person,  
4 McLaughlin's front shirt pocket. The total weight of this  
5 green leafy substance was 0.5 ounces. Arrested person  
6 McLaughlin also had two key cards from the Knights Inn in his  
7 front left jeans pocket with Room 111 written on them.

8 Q. What you read, did not include the envelope that we're  
9 discussing, did it?

10 A. What I read did not include the envelope.

11 Q. You have previously testified that the waistband of the  
12 person -- in Mr. McLaughlin's pocket was searched, I believe,  
13 before you looked into the envelope?

14 A. Correct.

15 MR. DELGADO: I have no more questions about that.

16 Thank you.

17 THE WITNESS: Uh-huh.

18 BY MR. DELGADO:

19 Q. Now, during the arrest, you obtained -- you took custody  
20 of this envelope. You said it was not sealed, and you  
21 testified today that it did not -- it does not look like today  
22 the envelope was ever sealed, that the glue seems in tact.  
23 Did you at that time believe it had ever been sealed when you  
24 first took custody of it? Did you form that opinion then that  
25 it was not sealed?

1 A. I didn't closely examine the adhesive on the envelope. It  
2 was clear to me that it was open.

3 Q. Sorry. So when Mr. McLaughlin came out of the store with  
4 the envelope in his hand, did you see where the flap is?

5 A. At that time, no.

6 Q. So the first time that you see the envelope up close to be  
7 able to tell whether it was sealed or not, you said at the  
8 time it was not sealed, that is your impression. When was the  
9 first time that you see it close enough that you recall being  
10 able to form the opinion that it was not sealed?

11 A. I guess when I looked into it because the flap was open.

12 Q. Again, after he had been handcuffed, it was not within  
13 reach because you were concerned for officer safety?

14 A. Right.

15 Q. So that is the first time in your mind that it was not  
16 sealed and you can look into it?

17 A. Correct.

18 Q. Okay. About your testimony today, that the glue looked in  
19 tact and it looks to you like it has never been sealed, do you  
20 know if that envelope has been tested to see if it was ever  
21 sealed?

22 A. I don't know of any such test or if it has been  
23 processed.

24 Q. That is described in the defendant's motion regarding this  
25 issue?

1 A. I don't know anything about a motion.

2 Q. Could you be wrong about the envelope having ever been  
3 sealed, ever?

4 A. Possibly.

5 THE COURT: I couldn't.

6 MR. DELGADO: Is that on the record?

7 THE COURT: Yes.

8 MR. DELGADO: I object to that.

9 THE COURT: That's my finding. It's clear as a bell  
10 that it's never been sealed.

11 MR. DELGADO: I still object.

12 THE COURT: I still overrule it.

13 MR. DELGADO: Understood.

14 BY MR. DELGADO:

15 Q. Now, you reviewed with the attorney for the government  
16 Fort Worth Police Department arrest procedures Policy 1314.02.  
17 Do you remember that a few minutes ago?

18 A. Yes, sir.

19 Q. Do you have it with you?

20 A. I still have a copy.

21 Q. Would you mind telling us specifically what -- which of  
22 the policies that you reviewed with the attorney or any of the  
23 other policies in this document would allow you to search an  
24 item not incident to arrest, we saw that one, but subsequent  
25 to the arrest, what I would call an inventory search?

1 A. What policies?

2 Q. Yes, which one? Sorry, may I ask? We saw the one  
3 incidental to arrest you may do this, and I'm wondering about  
4 a search that happens not incident or at the time of arrest  
5 but later, which of the policies raises that issue?

6 A. A search of a person?

7 Q. Well, a search of an item.

8 A. A such of an item.

9 MR. COLE: Your Honor, I object because I think --  
10 we're not discussing the facts of this case now. I believe  
11 what the witness has testified to this is clearly incident to  
12 arrest. If it happens five minutes after the arrest, that's  
13 still incident to the arrest. Counsel for the defendant is  
14 asking her to conjecture about something that's not before the  
15 Court.

16 MR. DELGADO: If the government is willing to rest on  
17 the search solely on the basis that it was incident to the  
18 arrest, I will withdraw this line of questioning. The  
19 response -- there was an argument that it was also justified  
20 alternatively as an inventory search. So if that is  
21 withdrawn, I can eliminate this line of questioning.

22 MR. COLE: I'm not going to withdraw either one of  
23 those.

24 THE COURT: Tell me why your question now relates --  
25 you're going on to the inventory. Is that right?

1 MR. DELGADO: Correct.

2 THE COURT: Tell me -- let me look at your question  
3 before I -- it got away from me. Just rephrase your question  
4 and maybe that will help.

5 MR. DELGADO: And I can actually let the Court know  
6 why I'm asking.

7 BY MR. DELGADO:

8 Q. Well, my question is, which of these policies allows you  
9 or describes or covers a search that would be described as an  
10 inventory search?

11 A. I'll have to look specifically, but I can't place any  
12 items in the property room without -- even the document like  
13 the report you showed me --

14 Q. Correct.

15 A. -- where it lists the items, one could call it a list, an  
16 inventory, but no items can be placed inside the property room  
17 unless they are documented. So the policy, I guess, in E1,  
18 where it says, all property of a prisoner not submitted at the  
19 time of the arrest -- so that would be later -- must be  
20 submitted to the property room using the appropriate forms.

21 Q. That is E1 that you were reading from?

22 A. I was reading from E1.

23 Q. Okay. So you sitting here today, do you have to justify a  
24 search of an item that is collected from the defendant, and  
25 when that search doesn't happen, let's say, incident to the

1 arrest, the search of that item later, you would justify based  
2 on E1?

3 A. E1, I mean, it's hypothetical.

4 Q. Correct.

5 A. The items were taken out of a vehicle incident to arrest,  
6 I mean --

7 Q. Here's the hypothetical. Somebody is arrested. There is  
8 an item that is closed, a closed container. You cannot see  
9 into it. That item is retrieved from the person during the  
10 arrest. It is not opened at the arrest. That person is taken  
11 away. My question is, which of these policies justifies you  
12 opening that closed container later?

13 A. Depending on what the item was, say it was something that  
14 contained liquid or something that was deemed questionable by  
15 the property room, and all of these guidelines aren't in front  
16 of me and I don't know them verbatim, but that item if I got  
17 to the property room and they thought there was a safety issue  
18 or some kind of issue that it needed to be opened, it would be  
19 opened and documented accordingly.

20 If the item was something that required a search warrant,  
21 at a later date it would be secured in the manner in which it  
22 was received by the officers, and a warrant would be obtained  
23 at a later time.

24 Q. Thank you.

25 So I understand that's what would happen. My question is,

1 which of these policies covers that or describes that is what  
2 would happen.

3 A. I don't have that policy in front of me because I would  
4 need the full property room, but that is the practice that I  
5 am aware of.

6 Q. That is the practice. And your understanding is that  
7 there is some policy that would cover that, but you can't cite  
8 it today?

9 A. Yes, sir.

10 MR. DELGADO: I have no more questions.

11 THE COURT: Is there redirect?

12 MR. COLE: Just briefly.

13 **REDIRECT EXAMINATION**

14 BY MR. COLE:

15 Q. Regarding a closed container, you understand -- for  
16 example, if you arrest somebody and they had a briefcase with  
17 a combination lock, would you consider that a closed  
18 container?

19 A. Yes.

20 Q. An envelope that is flopping open that appears to have  
21 never been sealed, would you consider that a closed  
22 container?

23 A. No.

24 MR. COLE: No further questions, Your Honor.

25 THE COURT: You may step down, ma'am. Thank you.

1 The government may call its next witness.

2 MR. COLE: Nothing further, Your Honor. The  
3 government rests.

4 THE COURT: The defendant may call his first witness.

5 MR. DELGADO: The defense calls Mr. McLaughlin.

6 THE COURT: Please raise your right hand and be  
7 sworn.

8 (Defendant McLaughlin sworn by the clerk)

11 MR. DELGADO: Your Honor, I would like to clarify  
12 before I begin the questioning.

13                   Was there a finding before that the envelope has not been  
14 sealed, or is the Court stating an opinion that the envelope  
15 had not been sealed.

16 THE COURT: Well, I will at this point call it a  
17 tentative finding. I'll make it a final finding unless you  
18 present something that makes me change that.

19 MR. DELGADO: Okay. I would still object, by the  
20 way.

21 THE COURT: Duly noted.

22 MR. DELGADO: Thank you.

23 WAYMAN SCOTT MCLAUGHLIN, testified under oath as follows:

**DIRECT EXAMINATION**

25 BY MR. DELGADO:

1 Q. Mr. McLaughlin, how are you?

2 A. All right.

3 Q. Do you recall being arrested on May 27?

4 A. Yes, I do.

5 Q. Do you recall -- who arrested you, the agency? Do you  
6 know the name?

7 A. All I can say it was Fort Worth because nobody said  
8 nothing to me when I was arrested.

9 Q. Okay. And where did this arrest happen?

10 A. At a convenience store.

11 Q. Say that again?

12 A. At a convenience store.

13 Q. Okay. What did you have on you when you were arrested?

14 A. I had a JPS envelope under my arm.

15 MR. DELGADO: May I approach, Your Honor?

16 THE COURT: Yes, sir.

17 BY MR. DELGADO:

18 Q. Did the envelope look like this?

19 A. Yes.

20 MR. DELGADO: Your Honor, may the record reflect that  
21 Mr. McLaughlin was referring to a photocopy that the  
22 government previously alluded to of the envelope that the  
23 Court examined?

24 THE COURT: Yes, sir.

25 BY MR. DELGADO:

1 Q. Did you have anything else on you? The agent testified  
2 that you had a plastic bag or something.

3 A. Yeah. I had a plastic bag of marijuana in my shirt  
4 pocket.

5 Q. Describe what happened when you were arrested. I believe  
6 the agent said you were coming out of the store; is that  
7 correct?

8 A. Yes.

9 Q. So tell the Court what happened when the agents approached  
10 you at that time?

11 A. Like she said, I came out of the store. There is a  
12 drop-in box and a big wall there, and as I proceeded to go  
13 around the corner away from the people coming into the store,  
14 numerous officers came out of no where and said, get on the  
15 ground, get on the ground. And I proceeded to get on the  
16 ground.

17 Q. Where did you have the envelope with you?

18 A. I had it up under my arm.

19 Q. So you said the agents told you to get on the ground.  
20 What did you do?

21 A. I put the envelope on the ground and I got on the  
22 ground.

23 Q. Okay. What happens next?

24 A. When I got on the ground, the officers frisked me, asked  
25 me did I have any weapons. I said no. They rolled me over,

1 patted me down. Another officer came and made sure I was  
2 patted down, picked me up against the car.

3 Q. Had you been handcuffed at this point?

4 A. Yeah. Before they got me up off the ground, I was  
5 handcuffed.

6 Q. You said they got you up off the ground, and then what  
7 happens?

8 A. The other officer helped get me up. He picked me up  
9 against the car, rubbed me down real tight, seeing that I  
10 didn't have no weapons, nothing that could poke him. Then he  
11 took the bags that I had, and everything else was on top of  
12 the hood of the car.

13 Q. Where were you when the things were put on the hood of the  
14 car?

15 A. Up against a wall.

16 Q. What happens next?

17 A. Like I said, there was like several officers around me.  
18 They wouldn't say nothing to me. They was kind of just  
19 looking at me, and they were calling somebody on some cell  
20 phone saying he wouldn't answer. Then a Fort Worth police  
21 pulled up -- a black and white car pulled up maybe about ten  
22 feet from the incident.

23 Q. What do you mean by the incident?

24 A. Well, where they had me.

25 Q. From where you were?

1 A. Yes.

2 Q. Okay.

3 A. So when he pulled up, they put me in the car -- he patted  
4 me down again and put me in the car and rolled down the  
5 window, because he said he couldn't keep the door open and it  
6 was hot. So he rolled down the window.

7 Q. Was this a marked unit?

8 A. Yeah, it was a marked unit.

9 Q. Were you still handcuffed?

10 A. Yes.

11 Q. And then what happened next?

12 A. I was sitting in the car, and the agents was sitting there  
13 talking. I did see the officer, the female officer.

14 Q. Are you referring to Officer Connor who just testified?

15 A. Yes, yes.

16 She was looking around at the property. Officers was over  
17 here talking. She opened the envelope, and when she opened  
18 the envelope, she said to one of the officers, we got  
19 evidence.

20 Q. Was the envelope sealed when you came out of the store?

21 A. Yeah, it was sealed.

22 Q. When you said that Officer Connor had looked at the  
23 envelope, could you see her opening the envelope?

24 A. I couldn't see her opening it because I'm in the police  
25 car and she's like at an angle.

1 Q. Okay.

2 A. When I say an angle, I'm looking at her back but, also,  
3 her side because I'm in the police car. So I can't really see  
4 her but I can see the side of her and the back of her, and I  
5 can't see the envelope.

6 Q. Why is it that you believe it was opened at that time?

7 A. Because she turned around and said, Bob, we got evidence.  
8 If I had it sealed --

9 A. When she moved away from the envelope, could you see the  
10 envelope again in clear view once she moved away?

11 A. Yeah.

12 Q. Did it look opened at that time?

13 A. Yes.

14 Q. How far away were you from the envelope at that point when  
15 Officer Connor gets in front of the envelope and says, we have  
16 evidence?

17 A. About ten feet.

18 Q. Again, you were still in the back of the parked vehicle  
19 handcuffed with the door closed?

20 A. Yes.

21 Q. Were there officers between you and the envelope in  
22 addition to Officer Connor?

23 A. Yes.

24 Q. How many approximately?

25 A. About five.

1 Q. What was in the envelope?

2 A. My birth certificate and my medical stuff that the  
3 hospital asked me to bring to them.

4 Q. Can you be more specific about what medical stuff you had  
5 in there? \*

6 A. Well, I had gotten bitten by a spider and I went to JPS,  
7 and by me being in the shelter, I had come back with some  
8 proper paperwork because I was out of the shelter, and they  
9 wanted to make sure who I was. So they gave me that envelope,  
10 and I had to come back with the papers that they had gave me  
11 from the hospital of doing the insert on my leg and come back  
12 with something saying that I was who I was, and that's why I  
13 had the birth certificate and the other paperwork that was  
14 suppose to be in it.

15 Q. And, again, the paperwork said you had a bite from a  
16 spider and you went to the doctor for that treatment?

17 A. Yes.

18 Q. And they asked you subsequently to bring some identifying  
19 information. That's why they gave you the envelope?

20 A. Yes.

21 Q. When you went to see the doctor for the bite, what did  
22 they put in the envelope?

23 A. What did they put in envelope?

24 Q. Correct.

25 A. Some paperwork that I had to fill out.

1 Q. Okay. Regarding the medical visit you had just had?

2 A. Yes.

3 Q. Do you recall any more details about the documents?

4 A. The spider bite and the reference of who I was.

5 Q. Was it the diagnosis of what you had in your thigh for the  
6 spider bite?

7 A. Yes.

8 Q. Was it an abscess?

9 A. Yes.

10 Q. Did it contain also medical prescriptions to treat that  
11 infection?

12 A. Yes.

13 MR. DELGADO: No more questions.

14 THE COURT: Cross examination?

15 MR. COLE: Briefly, Your Honor.

16 **CROSS EXAMINATION**

17 BY MR. COLE:

18 Q. Let's see. On the date you were arrested, did you have  
19 reading glasses -- were you wearing reading glasses at the  
20 time?

21 A. No.

22 Q. Did you have them in your possession? Did you have  
23 reading glasses with you?

24 A. I know I had the case, but I don't know if I had the  
25 glasses in them.

1 Q. Did you maybe at your detention hearing or some previous  
2 hearing, did you ask for Detective Scott Thompson to retrieve  
3 your reading glasses? Were those retrieved for you by Fort  
4 Worth PD?

5 A. Some glasses were gave, but I don't know who they were  
6 gave from.

7 Q. Okay. Okay. Were those your glasses?

8 A. Yes.

9 Q. Okay. They help you read?

10 A. Yes.

11 Q. Okay. At the time you were arrested, were you wearing a  
12 white and blue New York Yankees baseball cap?

13 MR. DELGADO: Objection, relevance as to the issue of  
14 suppression of the envelope.

15 MR. COLE: Your Honor, I think it goes to relevance  
16 as to why the officers arrested this individual.

17 MR. DELGADO: There was an arrest warrant. We're not  
18 conceding the arrest itself.

19 THE COURT: Sustained.

20 BY MR. COLE:

21 Q. You testified that the envelope contained your JPS records  
22 and birth certificate; is that correct?

23 A. Yes, sir.

24 Q. Did it also contain a Fed Ex envelope?

25 A. No.

1 Q. So it's your testimony there was no Fed Ex envelope in  
2 there?

3 A. Yes.

4 Q. Did it contain a bank robbery note?

5 A. No.

6 Q. Oh, okay. So it's your testimony there was no bank  
7 robbery note in there?

8 A. Yes, sir.

9 Q. Okay. Now, when's the first time -- when you were out  
10 there, when's the first time that you saw Officer Connor?

11 A. When I saw Officer Connor, I was handcuffed and I looked  
12 at each one of them. After they got me off the ground, she  
13 was I think the only female there.

14 Q. Okay. So that was after you were handcuffed that you saw  
15 her?

16 A. Yes, sir.

17 Q. And when you saw her, did you fixate on her and keep your  
18 eyes on her the entire time?

19 A. No, sir.

20 Q. Okay. So when was the first time that you saw her -- I  
21 believe you said that once you were in the vehicle, you saw  
22 her open up this envelope and say there was some evidence,  
23 right?

24 A. Yes, sir.

25 Q. But you couldn't say what she was doing before that

1 because you just testified that you weren't fixated on her?

2 A. No.

3 Q. So she could have opened that envelope half a dozen times  
4 and you wouldn't have known that?

5 A. Yes.

6 THE COURT: Do you agree with that?

7 DEFENDANT MC LAUGHLIN: Yes.

8 BY MR. COLE:

9 Q. You testified that this envelope was sealed; is that  
10 correct?

11 A. Yes.

12 Q. How was it sealed?

13 A. I sealed it.

14 Q. But how? How was it sealed? Did you lick that glue and  
15 close it?

16 A. I opened up and I licked it, and then I sealed it.

17 Q. And did it stay sealed for you? Is that your testimony  
18 today, that it stayed sealed?

19 A. Well, I was assuming that it was sealed because when I  
20 shut it and I put it up under my envelope, it was sealed.

21 Q. Were you assuming it was sealed or was it sealed?

22 A. It was sealed.

23 Q. Okay. When did you seal it?

24 A. In the morning.

25 Q. Of that --

1 A. Of the 27th.

2 Q. When did you go to the doctor for your spider bite?

3 A. I went to the doctor -- I can't say what day it was.

4 Q. But it wasn't May 27, 2016?

5 A. No, it wasn't that day. I was going that day --

6 Q. But just coincidentally on that day, you chose to seal  
7 that envelope. That's your testimony today?

8 A. No. I had the paperwork in front of me. I was going to  
9 the doctor. That's why I had the JPS folder with me.

10 Q. Why hadn't you sealed it before that?

11 A. Why hadn't I sealed it before that?

12 Q. Why didn't you seal it before May 27? Why did you choose  
13 that day to seal it?

14 A. Because that's the day I filled out the paperwork.

15 Q. And it's your testimony that you licked that glue,  
16 moistened it, stuck it to the envelope and it sealed?

17 A. Yes.

18 Q. And it remained sealed all day?

19 A. Yes.

20 MR. COLE: Nothing further, Your Honor.

21 THE COURT: So if you licked it, there should be DNA  
22 evidence on that envelope?

23 DEFENDANT MCLAUGHLIN: Uh-huh. Yeah, I licked it.

24 THE COURT: All right. Redirect?

25 MR. DELGADO: I have nothing for the defense.

1 THE COURT: Okay. You may step down, sir.

2           Mr. Cole, there is some uncertainty as to when Officer  
3 Connor first -- she said she opened the envelope within five  
4 minutes of the arrest. Do you know if she has testimony about  
5 whether that was before or after he was placed in the police  
6 car?

7 MR. COLE: Your Honor, she did not testify to that.  
8 I could bring her back for rebuttal.

9 THE COURT: I would like to hear that.

10 MR. COLE: Okay. I call Officer Connor back.

11 THE COURT: Please recall that you're still under  
12 oath.

13 DALLAS CONNOR, testified under oath as follows:

**DIRECT EXAMINATION**

15 BY MR. COLE:

16 Q. When you -- going back to the time of the arrest, when did  
17 you -- where was the defendant when you first opened the  
18 envelope?

19 A. Sitting on the ground.

20 Q. Are you certain of that?

21 A. I am.

22 Q. After he was arrested, how long was it until a marked unit  
23 arrived?

24 A. A few minutes. We didn't have marked units out there. It  
25 was all undercover vehicles and the fugitive vehicles, maybe

1 five to ten minutes. It wasn't long. I mean, we had searched  
2 him -- officers didn't arrive until after he had been searched  
3 and all of his property had been taken off of him.

4 Q. At some point, did Detective Scott Thompson arrive?

5 A. He did.

6 Q. Was he kind of the case officer or the detective who had  
7 been investigating these robberies?

8 A. He was.

9 Q. When he arrived where was the defendant at that time?

10 A. In a marked patrol unit.

11 Q. Okay. And did you mention anything to Detective Thompson  
12 regarding what you found in the envelope when he arrived.

13 A. Yes. I advised him that I had seen what I believed to be  
14 a robbery note in the envelope.

15 Q. You just heard the defendant testify?

16 A. I did.

17 Q. And he indicated that -- I believe he indicated that you  
18 said something like, we have evidence, when he was placed in  
19 the car. Do you recall that?

20 A. I don't.

21 THE COURT: In fact, he said you said, Bob, we've got  
22 evidence. Was there a Bob out there?

23 THE WITNESS: There is a Bob. I'm not certain if  
24 Sergeant Abbott's first name is Bob. I think it is.

25 THE COURT: Addie?

1                   THE WITNESS: No. The sergeant over the fugitive  
2 unit, his first name is Bob. He was there, but I'm not  
3 certain that he was there initially. I don't remember him  
4 being there at the time of the arrest. He was on the scene at  
5 some point. I don't know the time of his arrival.

6                   The statement, I found evidence, isn't something --

7                   THE COURT: I think he said, we've got evidence, is  
8 what he quoted you as saying.

9                   THE WITNESS: It doesn't sound like something I would  
10 say, just in my opinion.

11                  THE COURT: Let me zero in on what I need to know.

12                  We've got conflicting testimony -- well, sort of  
13 conflicting. It's not necessarily inconsistent that he saw  
14 you looking in the envelope while he was in the police car.

15                  Did you look in the envelope while he was in the police  
16 car?

17                  THE WITNESS: Yes, probably.

18                  THE COURT: Okay. And then you say you also looked  
19 in the envelope while he was still on the ground?

20                  THE WITNESS: Yes, sir.

21                  THE COURT: When did you first find the note, the  
22 bank robbery note?

23                  THE WITNESS: When I first started gathering all the  
24 property, pretty quick within a few minutes of him being  
25 placed in handcuffs. He was still on the ground. He was not

1 in the patrol car yet.

2 THE COURT: So when you opened the envelope, did you  
3 look at everything in the envelope?

4 THE WITNESS: I did see the other envelope because  
5 there was the Fed Ex envelope. I saw the birth certificate.  
6 I kind of thumbed through the papers just to see if there was  
7 anything in between them. What brought the note to my  
8 attention is that it was like a spiral, like it had been  
9 ripped out of a spiral notebook. It wasn't like the other  
10 papers. So that brought attention to it, and it was a  
11 handwritten paper where the other papers were in printed form  
12 and whatnot.

13 So it was distinctively different from the other papers,  
14 but I looked in between all the papers -- I actually didn't  
15 even pull it out. I just thumbed through the top between to  
16 see if there were any -- kind of like a razor blade or a baggy  
17 of drugs or anything, just thumbed through all of them. I  
18 didn't take everything out for fear the wind would blow  
19 something away or something like that.

20 THE COURT: When you saw the note, did you read it?

21 THE WITNESS: I did.

22 THE COURT: So you saw and read the note the first  
23 time you opened the envelope?

24 THE WITNESS: I does.

25 BY MR. COLE:

1 Q. Just briefly, do you recall whether the defendant's window  
2 was down or up in the police vehicle?

3 A. It was down. It was hot that day.

4 Q. Okay. And were you near that vehicle when Scott Thompson  
5 arrived?

6 A. Yes.

7 Q. And you had a discussion about evidence that you saw in --  
8 that you had previously seen in the envelope at that time?

9 A. Yes. I told him what I had seen. I knew that he was the  
10 case agent, and he was in charge of the case. So I had made  
11 him aware of what I had seen.

12 MR. COLE: Notion further, Your Honor.

13 THE COURT: Cross examination?

14 **CROSS EXAMINATION**

15 BY MR. DELGADO:

16 Q. You previously said that when you opened the envelope the  
17 first time, you opened it the first time, you had made sure  
18 that the defendant was not within reach because you were  
19 concerned about officer safety, correct?

20 A. That's always a concern no matter what we're doing.

21 Q. My question is you previously said that you had made sure  
22 he was not within reach because you were concerned about  
23 officer safety, correct?

24 A. Yes.

25 Q. And do you know if there is any way for Mr. McLaughlin to

1 know Bob's first name?

2 A. I have no idea. I'm not even certain of Bob's first name.  
3 I think he goes by Bob.

4 MR. DELGADO: Nothing further.

5 However, in light of the questioning about what Mr.  
6 McLaughlin said, I would like to recall him to clarify that  
7 quote.

8 THE COURT: Sure. You may step down, ma'am.

9 MR. DELGADO: The defense calls Mr. McLaughlin.

10 THE COURT: Please recall that you are still under  
11 oath.

12 DEFENDANT MCLAUGHLIN: Yes, sir.

13 WAYMAN SCOTT MCLAUGHLIN, testified under oath as follows:

14 **DIRECT EXAMINATION**

15 BY MR. DELGADO:

16 Q. Mr. McLaughlin, a few minutes ago you were quoting her  
17 prior testimony about what you recall Officer Connor saying  
18 when she saw what was in the envelope, and I believe the quote  
19 was, we've got evidence. Could you be paraphrasing what she  
20 said, or do you distinctly remember that expression, or was it  
21 something to that effect?

22 A. It was something to that effect.

23 MR. DELGADO: Nothing further, Your Honor.

24 THE COURT: Is there cross?

25 MR. COLE: No, Your Honor.

1                   THE COURT: You may step down, sir.

2                   The defendant may call his next witness.

3                   MR. COLE: No further witnesses from the defense,  
4 Your Honor.

5                   THE COURT: Do you wish to argue?

6                   MR. DELGADO: I do, yes.

7                   THE COURT: Let's hear from the government first.

8                   MR. COLE: Your Honor --

9                   THE COURT: Briefly, please.

10                  MR. COLE: Yes, Your Honor.

11                  I don't believe that any of the evidence conflicts. I  
12 believe that we have uncontroverted evidence that --

13                  THE COURT: Well, we have one conflicted. Your  
14 witnesses say the envelope was not sealed. He says it was  
15 sealed.

16                  MR. COLE: I'm sorry. I'm sorry. I'll get to that  
17 in turn.

18                  First, just briefly, one, this isn't a closed container.  
19 Any law pertaining to closed containers I would argue doesn't  
20 apply here. I believe that after the Court has reviewed this  
21 envelope, it is clear all of us have had sealed envelopes a  
22 thousand times in our life, and it's clear that this envelope  
23 had never been sealed. It's not a closed container. It never  
24 was a closed container.

25                  The search was conducted incident to arrest. That's

1 uncontroverted testimony. The defendant may have heard  
2 Officer Connor talk about whether or not she found evidence or  
3 not when he was in the police car, and she said that she had  
4 discussion with Officer Thompson about what she found  
5 previously. So that is consistent. That testimony is  
6 consistent with one another.

7 There is unconverted testimony that this search was  
8 conducted incident to arrest in accordance with Fort Worth PD  
9 policy, and even if it had not been, the doctrine of  
10 inevitable discovery would apply because this item would have  
11 had to have been inventoried. Pursuant to Fort Worth PD  
12 policy, the officer acted without discretion, acted in  
13 accordance to a mandate in Fort Worth PD policy that she  
14 conduct a search incident to arrest, and there has been no  
15 testimony to indicate that she conducted the search at a later  
16 time. The defendant just heard a conversation with her, most  
17 likely her and Scott Thompson, but he did not see what she was  
18 doing at the time he was arrested. He didn't observe that.  
19 So the only testimony we have is her testimony, which was that  
20 she conducted the search incident to arrest.

21 THE COURT: Thank you.

22 Mr. Delgado.

23 MR. DELGADO: I will try to be brief. I apologize if  
24 I'm not.

25 The first thing we heard from the government in argument

1 is that the search was incident to the arrest and that it  
2 called pursuant to established policy. He called it a  
3 mandate. Officer Connor testified when you asked her directly  
4 whether she always has to do these searches when somebody is  
5 arrested, and she said that they have to do these searches,  
6 and, yet, the police report that describes the search incident  
7 to arrest does not describe the search of the envelope.

8 Not only that, but even if they omitted to include it in  
9 the police report, which seems rather egregious when there is  
10 a mandate from the Fort Worth Police Department that they  
11 conduct these searches incident to arrest --

12 THE COURT: Well, there is a mandate that they do it.  
13 She didn't say there was a mandate that they document that it  
14 was done.

15 MR. DELGADO: Correct, but if that is true, it would  
16 seem odd to me --

17 THE COURT: It does seem odd, yes.

18 MR. DELGADO: Then the next point, putting the police  
19 report aside, which I think is weighty evidence, it tells you  
20 what happened during the arrest. It says, this is a search  
21 incident to the arrest. This is what happened pursuant to the  
22 policy that police officers are aware about.

23 But taking the testimony as it was, the Court (sic) was  
24 that he was not within reach of the envelope, and the Fifth  
25 Circuit has repeatedly in *United States v. Johnson* 1994. The

1 cite is 16 F.3d 69. It reversed a trial court denial of a  
2 motion to suppress because the item searched was within -- was  
3 not within the immediate control of the defendant. The reason  
4 for that exception is that there is a concern that the  
5 defendant might be in possession of a weapon or destructible  
6 evidence. The agent testified that she made sure that was not  
7 going to happen.

8 Then, again, in 2003 in Nealy, 345 F.3d 366, the Court  
9 explained, the Fifth Circuit explained, that the holding that  
10 I just referred to was that officers illegally searched a  
11 defendant's briefcase during his arrest when the briefcase  
12 rested eight feet away from the defendant not in reaching  
13 distance and, therefore, not under his immediate control. So  
14 I would say that the search was not incident to the arrest.

15 As to the inventory search, the government --

16 THE COURT: So are you saying that if he has it in  
17 his possession, it can only be searched if it remains in his  
18 possession?

19 MR. DELGADO: Within his immediate control, the Fifth  
20 Circuit has said no.

21 THE COURT: Well, what's his immediate control? Once  
22 it's out of his hands, is it in his immediate control?

23 MR. DELGADO: Well, I can tell you that eight feet  
24 away is not within his immediate control per the Fifth Circuit  
25 in U.S. v. Nealy and, actually, U.S. v. Johnson.

1                   THE COURT: We don't have any evidence about how far  
2 this envelope was away.

3                   MR. DELGADO: I believe his testimony was -- I don't  
4 recall, but I believe it meets that eight feet threshold, not  
5 that that would be dispositive. By his testimony, he was in  
6 the back of the police car.

7                   THE COURT: Which is in conflict with her testimony  
8 that she looked at the envelope while he was on the ground.

9                   MR. DELGADO: Which conflicts with the police report  
10 which says that the incident to the arrest search did not  
11 include.

12                  THE COURT: It didn't say it didn't include it. It  
13 just didn't record that it did.

14                  MR. DELGADO: Yes. So there is no explicit conflict  
15 there. That is right.

16                  I would say by Mr. McLaughlin's testimony, the search was  
17 not incident to the arrest and by the officer's testimony.

18                  Now, as to the inventory search, the reason why I was  
19 asking about the regulations is because the law says that for  
20 a search to be pursuant to that exception, the inventory  
21 search, there must be standardized regulations that must be  
22 sufficiently -- that must sufficiently limit the discretion of  
23 the law enforcement officers to prevent inventory searches  
24 from becoming evidentiary searches. The testimony today from  
25 the government is that such policy does exist somewhere, but

1 the officer was not able to point out to a written policy that  
2 allows for a search of these kind of small items to happen  
3 later, not subsequent -- not during the arrest.

4 And, briefly, I would say that, even if the Court finds  
5 that search was not incident to the arrest or the inventory  
6 search exception I believe when we're talking about a sealed  
7 medical envelope that contains sensitive and private  
8 information indicates that on the face of the envelope as the  
9 documents indicate, that search still violates the Court's  
10 amendment due to the privacy concerns implicated here.

11 The Supreme Court recently said in 2014 in finding that  
12 not all items are subject to an incident to arrest exception,  
13 namely, cell phones are not included in that search, they said  
14 that the fact that an arrestee has diminished privacy interest  
15 does not mean that the Fourth Amendment falls out of the  
16 picture entirely. Not every search is acceptable solely  
17 because a person is in custody --

18 THE COURT: Slow down a little bit. I can hear you,  
19 but I bet my court reporter is about ready to hit you.

20 MR. DELGADO: I just saw her nod.

21 THE COURT: You just what?

22 MR. DELGADO: I just saw her nod.

23 THE COURT: Okay. That means she's going to come hit  
24 you.

25 MR. DELGADO: The last sentence of that quote from

1 Chief Justice Roberts is to the contrary. When privacy  
2 related concerns are weighty enough, a search may require a  
3 warrant, notwithstanding the diminished expectations of  
4 privacy of the arrestee. I think that in this case when we're  
5 talking about a sealed medical envelope that indicates it  
6 contains medical records, even in a search incident to the  
7 arrest exception is going to apply or the inventory search is  
8 going to apply, notwithstanding that, the item is suppressible  
9 under the reasoning of United States v. Riley and given the  
10 privacy concerns.

11 Basically, what I'm saying is that even up until this  
12 point, the Court looks at the law and says, okay, search  
13 incident to the arrest may apply to some containers, not  
14 others, the specific container that we're talking about here,  
15 which is a medical envelope, indicating it contains medical  
16 records on its face would be private enough that the officers  
17 would be required to get a warrant. Again, however, I think  
18 that neither exception applies for the reason I indicated.

19 THE COURT: Which was the case that you said involved  
20 the briefcase that was --

21 MR. DELGADO: Yes. They are cited in our motion.  
22 It's United States v. Johnson. I've cited a few with the same  
23 name, United States v. Johnson, 16 F.3d --

24 THE COURT: 16, not 846? Okay.

25 MR. DELGADO: It's 16 F.3d 69, which is explained

1 further in U.S. v. Nealy.

2 THE COURT: I know what you're talking about now, but  
3 I had 846 in front of me because my law clerk thought you were  
4 talking about that one.

5 MR. DELGADO: No. There are two -- there are  
6 actually three.

7 THE COURT: Actually, there are three. There's one  
8 withdrawn that you cited and the one that replaced it that you  
9 also cited, and then there's also the one that you just cited,  
10 and they are all Johnson.

11 MR. DELGADO: Correct.

12 THE COURT: I presume different Johnsons.

13 MR. DELGADO: They are, except for the withdrawing.  
14 They are referring to the same case.

15 THE COURT: You cited it correctly and honestly. I  
16 was looking.

17 MR. DELGADO: And I would say to the Court and the  
18 law clerk --

19 THE COURT: Because I didn't want you to get in  
20 trouble on the 4th Floor.

21 MR. DELGADO: I would just say in conclusion that all  
22 the cases cited support our position.

23 THE COURT: All right. Thank you.

24 Rebuttal?

25 MR. COLE: Very briefly, Your Honor. I know we're on

1 a tight schedule.

2 Again, first, this search was conducted incident to  
3 arrest, and it was in the lunge area of this defendant. Now,  
4 we didn't talk about feet, and I apologize to the Court for  
5 not bringing out whether it was three feet away from the  
6 defendant or ten feet away from the defendant, but I believe  
7 that the lunge area, the courts afford officers a wide degree  
8 of latitude in determining where the lunge area is, and this  
9 search was conducted just minutes from the time the handcuffs  
10 were placed on him. It was an unsealed envelope, and I  
11 believe the Court has tentatively made that finding, and I  
12 believe that the evidence supports a continuation of that  
13 finding that this envelope was never sealed.

14 The defendant's observations in the back of the car are  
15 not inconsistent at all with how Officer Connor testified.  
16 The defendant testified that he did not see what all she was  
17 doing, and it is entirely consistent that she had a discussion  
18 with Detective Thompson while he was in the back of the car  
19 concerning what she had previously found.

20 Finally, opposing counsel brings up cases concerning a  
21 cell phone. This isn't a cell phone. A cell phone can't  
22 contain weapons. This is an officer safety search. They also  
23 had information that he had just been involved in a bank  
24 robbery that day. This envelope could have contained cash.  
25 This officer was entirely acting reasonably to search,

1 according to the standard operating procedure to search this  
2 item. This isn't a cell phone. We're talking apples and  
3 oranges. We're talking about those two different case law.  
4 This case law doesn't apply to cell phones.

5 So for that reason, Your Honor, we believe that this was a  
6 good search, and the evidence found pursuant to this search  
7 should be allowed.

8 MR. DELGADO: May I make one final point?

9 THE COURT: Sure. Go ahead.

10 MR. DELGADO: I would just like to say, even if the  
11 envelope was not sealed, the defense's possession is that just  
12 like the briefcase that's in the Johnson case and the other  
13 containers that are addressed in the case law, I don't  
14 actually believe that they were sealed because they were able  
15 to open them, but they were not locked. Given the testimony  
16 that he was not within reach of that envelope, it would be not  
17 incident to arrest.

18 THE COURT: All right, sir. Thank you.

19 I find that on May 27, 2016, Waymon Scott McLaughlin was  
20 arrested legally pursuant to an arrest warrant. I find that  
21 during that arrest and pursuant to it, an unsealed envelope --  
22 I finally find that, not tentatively -- an unsealed envelope  
23 was removed from his possession held close enough to him to  
24 justify a search of the unsealed envelope and that that search  
25 incident to arrest was lawful and appropriate under the laws

1 of the United States and that the note found in it and all  
2 other items found in it are legally admissible evidence. And  
3 if not, I find that the note and the envelope which contained  
4 it were properly taken from him and were then subsequently  
5 properly inventoried and taken into the custody -- final  
6 custody and placed in the property room of the -- or at least  
7 among the property of the Fort Worth Police Department, and  
8 that upon that inventory, the note was or inevitably would  
9 have been found. So that provides an independent basis for  
10 concluding -- the Court's conclusion that the note is  
11 admissible and is not subject to suppression under the Fourth  
12 Amendment.

13 Is there any other finding that the Court needs to make in  
14 this matter?

15 MR. COLE: Not from the government, Your Honor.

16 MR. DELGADO: Not from the defense, Your Honor.

17 THE COURT: Okay. That concludes our hearing and  
18 announces the decision of the Court. A written order, a brief  
19 written order, will follow.

20 We'll be in recess until further call.

21 (Brief pause in proceedings)

22 THE COURT: After consultation with counsel at the  
23 bench, the Court has offered and the defendant has accepted an  
24 order in limine that would require the government to notify  
25 the Court prior to presenting to any witness or asking any

1 witness about a photograph that may be taken after this day of  
2 the defendant and allow the Court to hear the defendant's  
3 objection before -- and receive a ruling before any  
4 presentation of such a photograph or any questions about such  
5 photograph.

6 MR. DELGADO: Thank you.

7 MR. COLE: Thank you, Your Honor.

8 THE COURT: Mr. Cole, we need that photograph of the  
9 exhibit.

10 MR. COLE: Yes.

11 (End of proceedings, 3:30 p.m.)

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## I N D E X

	Witnesses:	Direct	Cross	Redirect	Recross
2					
3	Dallas Connor	3	22	38	
4	Waymon McLaughlin	39	46		
5	Dallas Connor (recalled)	51	55		
6					
7	Waymon McLaughlin (recalled)	56			

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10 EXHIBIT S

	Exhibit Number	Offered	Admitted
11			
12	Government's 1	12	12

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20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the record of proceedings in the above-entitled matter, and  
that the transcript was prepared by me and under my  
supervision.

24           s/ Ana P. Warren  
25           Ana P. Warren, CSR #2302  
          U.S. District Court Reporter

March 20, 2017  
Date

## Appendix D

Fort Worth Police Department General Orders

2. Department Approval Process

- a. The Victim Assistance Coordinator will review the case to verify it meets the criteria for a U visa and will consult with the detective to verify the victim is cooperative with the investigation if it is ongoing or with the Tarrant County District Attorney's Office if charges have already been filed.
- b. The Form I-918B must contain an original signature from the Chief of Police or designee. The form should be signed in a color of ink other than black for verification purposes.

C. Retention of Records

The Victim Assistance Section will be responsible for retaining copies of each signed U visa application for a period of three (3) years or as directed by the City of Fort Worth Record Retention Policy.

## 314.00 ARREST PROCEDURES

### 314.01 AUTHORITY TO ARREST

- A. Arrests may be made when a warrant of arrest has been issued by an authorized magistrate or when arrest without a warrant is authorized under the laws of the United States, laws of the State of Texas, or the ordinances of Fort Worth.
- B. The following limitations apply to warrantless arrests:
  1. Article 14.03 of the Code of Criminal Procedure states that a peace officer outside of the officer's jurisdiction may arrest, without warrant, a person who commits an offense within the officer's presence or view, if the offense is a felony, a violation of Title 9, Chapter 42, Penal Code (Offenses Against Public Order and Decency), a breach of the peace, or an offense under Section 49.02, Penal Code (Public Intoxication). A peace officer making an arrest under this subsection shall, as soon as practicable after making the arrest, notify a law enforcement agency having jurisdiction where the arrest was made. The law enforcement agency shall then take custody of the person committing the offense and take the person before a magistrate in compliance with Article 14.06, Code of Criminal Procedure.
  2. A police officer outside of the officer's jurisdiction is precluded from any traffic code enforcement by the Code of Criminal Procedure Article 14.03 (g).
  3. On-duty officers may make warrantless arrests for pursuits originating in Fort Worth and during activities operating under an inter-local agreement as consistent with the Texas Code of Criminal Procedure and chapter 362 of the Texas Local Government Code.

### 314.02 SEARCHING OF PRISONERS *(Revised 2/18/16)*

- A. The transporting officer shall be held accountable for any prisoner arriving at the jail booking area or juvenile detention center with a weapon or contraband. Therefore, officers accepting prisoners from other officers shall search (subject to provision C below) the prisoners themselves before accepting custody and responsibility for the prisoner.
  1. Incidental to arrest, officers shall search all bags, purses, and large items for weapons and contraband before submitting the property to the Property Room or to the jail intake personnel.

NOTE: Field strip searches are strictly prohibited.



Fort Worth Police Department General Orders

- B. Prisoners of the same gender as the arresting officer shall be thoroughly searched at the time of arrest.
- C. Searches of prisoners of the opposite gender shall be accomplished in the following manner:
  - 1. Routine searches shall be limited to patting the pockets of the outer garments, and searching purses, sacks, or other personal possessions they have with them.
  - 2. If the officer is reasonably certain that the prisoner is concealing a deadly weapon, the search, may be carried further. If possible, a witness should be present and extreme safety precautions shall be taken.
  - 3. If any doubt exists, the prisoner shall be handcuffed and the search shall be conducted by a member of the department that is the same gender as the prisoner. In the event an officer of the same gender is not immediately available to perform the search, the officer shall transport the prisoner to the jail or juvenile detention center. Upon arrival at the jail, and before the prisoner is placed in the holding area, the officer shall inform the jail supervisor that because of the prisoner's gender, the prisoner has not been thoroughly searched. If the arrested person is a juvenile, the officer should request the dispatcher to notify the personnel at the detention center that a juvenile prisoner is en route and needs to be searched by juvenile detention personnel in the presence of the transporting officer prior to admission into the juvenile detention facility
- D. Search Guidelines for Transgender Individuals
  - 1. All searches will be conducted by officers of the same gender as the detainee, based on the gender guidelines in General Order 321.07, Bias-Free Policing and in accordance with established department procedures.
    - a. Prior to search, officers are to first refer to the arrestees government-issued identification. If the subject does not have any government-issued identification, officers will be guided by the following information:
      - (1) Arrestees who state they do not have male genitalia, and do not have any government-issued identification in their possession will generally be searched by female officers.
      - (2) Arrestees who state they do have male genitalia, and do not have any government-issued identification in their possession will generally be searched by male officers.
    - b. In the event an officer of the same gender is not immediately available to perform the search, the officer shall transport the prisoner to the jail or juvenile detention center. Upon arrival at the jail, and before the prisoner is placed in the holding area, the officer shall inform the jail supervisor that because of the prisoner's gender, the prisoner has not been thoroughly searched.
    - c. Officers will not conduct more invasive searches of transgender individuals than other individuals.
    - d. Officers will not remove identity or appearance-related items, such as prosthetics, clothing, wigs, and cosmetics items if those items would not be removed from non-transgender arrestees. However, identity or appearance-related items may be removed if the items are evidence or create a safety hazard.
    - e. The possession of a needle which is purported to be for hormonal use will not be presumed to be evidence of criminal misconduct, especially if the person being stopped or arrested has documentation from a physician confirming that it is being used for legitimate medical treatments.

Fort Worth Police Department General Orders

- E. The transporting officer shall witness the intake officer's inventory of the prisoner's personal property. Upon completion of the inventory, the FWPD officer shall sign the Prisoner Property Sheet.
  - 1. Any personal property of the prisoner not submitted at the time of arrest shall be submitted to the Property Room using the appropriate forms.
- F. Searching of prisoners possibly having infectious diseases.
  - 1. Latex gloves shall be worn whenever a prisoner has open sores, lesions, skin disorders, body fluids, blood, secretions, excretions, vomit, urine, or similar signs present.
  - 2. Officers shall use extreme care when searching persons arrested for drug use or persons with suspected infectious diseases, and shall use extreme care to avoid breaking the skin with needles or other objects.
  - 3. Officers shall immediately and thoroughly wash hands or other skin surfaces after contact with blood or other body fluids, after contact with substances that contain visible blood, and after removing gloves.

**314.03 PRISONER PICK UPS**

- A. When officers are requested to pick up an individual detained by a third person, they shall make an independent investigation to determine if an offense has been committed and that there are reasonable and sufficient grounds for holding the subject.
- B. The officer shall obtain information from all witnesses as well as sufficient complaint information to complete a thorough preliminary investigation.

**314.04 HANDCUFFING PRISONERS**

- A. An arrest occurs when the person's liberty of movement is restricted, restrained, or the person has a reasonable belief that they are not free to leave and either yields to the officer or is physically forced to yield. Handcuffs should be used to protect the officer, citizens, and the prisoner; to prevent the prisoner from escaping; to maintain control of the prisoner; and, to minimize the possibility of escalation of the situation to a point necessitating more drastic means of restraint.
- B. All prisoners should be handcuffed; however, circumstances may render the handcuffing of a prisoner inappropriate. The use of handcuffs in such situations shall remain a judgment of the officer. The primary concern should be the safety of the officer, the public, and the prisoner. The factors that should be considered in the decision not to use handcuffs are age, health, physical condition including any disabilities or injuries, mental condition, the possibility of the prisoner escaping, and the possibility of escalation of the incident. An officer shall continually monitor the actions of an unhandcuffed prisoner and if the prisoner gives any indication of becoming belligerent or constituting a potential hazard, the prisoner should be handcuffed.
- C. When handcuffs are used, the prisoner's hands normally shall be cuffed behind the back, unless inappropriate and/or harmful.
- D. Whenever a prisoner is handcuffed, the officer shall immediately either roll the prisoner on their side, place the prisoner in a sitting position, or help the prisoner into a standing position. Extreme caution shall be exercised with a prisoner that is obese, intoxicated by alcohol or drugs, or has an injury to the chest or stomach since cuffing behind the back and laying the prisoner in a prone position could lead to positional asphyxia.
- E. Officers are strictly prohibited from using a hogtie in any manner or form.

## Appendix E

