No. _____

IN THE
Supreme Court of the United States

JOSE AMADOR,
DIANA MEKAEIL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Tenth Circuit

Petition for a Writ of Certiorari

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
PAIGE A. NICHOLS
Assistant Federal Public Defender
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
117 SW 6th Avenue, Suite 200
Topeka, Kansas 66603
Tel: (785) 232-9828
Email: paige_nichols@fd.org
Counsel for Petitioner Amador

VIRGINIA L. GRADY
Federal Public Defender
JOHN C. ARCECI
Assistant Federal Public Defender
COLORADO FEDERAL PUBLIC DEFENDER
633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Email: john_arceci@fd.org
Counsel for Petitioner Mekaeil

QUESTION PRESENTED

Petitioners Jose Amador and Diana Mekaeil moved to suppress the fruit of law enforcement's warrantless search of their hotel room. In the motion, they predicted that the government would be unable to bear its burden of establishing an exception to the exclusionary rule. They discussed one exception in particular, but did not fully describe the government's burden with respect to that exception. But neither did they explicitly urge the district court to hold the government to a lower burden than the law requires.

The district court denied the motion in an order that plainly failed to hold the government to its required burden. On appeal, the Tenth Circuit sua sponte held that the petitioners invited the district court's error by not fully describing the government's burden, thus precluding appellate review. But the Tenth Circuit did not find that the petitioners *deliberately* invited error. At least three other circuits require such a finding.

The question presented is:

Whether a finding of invited error requires a finding of deliberateness.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jose Amador and Diana Mekaeil respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's panel opinion is unpublished, but available at 2018 WL 4382199; it is included as Appendix A. The Tenth Circuit's unpublished orders denying rehearing en banc are included as Appendices C (Amador) and D (Mekaeil). The district court order denying suppression is included as Appendix B.

JURISDICTION

The United States District Court for the District of Kansas had jurisdiction under 18 U.S.C. § 3231, which provides the federal district courts with exclusive jurisdiction over offenses against the United States. The petitioners timely appealed the denial of their motion to suppress to the United States Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1291. The Tenth Circuit affirmed in an unpublished decision. On October 26, 2018, Tenth Circuit denied the petitioners' separate petitions for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

A. Legal Background

1. The Fourth Amendment protects against unreasonable searches and seizures of "persons, houses, papers, and effects." U.S. Const. Amend. IV. Evidence discovered during a Fourth Amendment violation must be suppressed. *Weeks v. United States*, 232 U.S. 383 (1914). "[I]t shall not be used at all," unless an exception to the exclusionary rule applies. *Murray v. United States*, 487 U.S. 533, 538 (1988) (citation omitted).

"[T]he Fourth Amendment has drawn a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 586 (1980). Intruding into a person's home without a warrant is "presumptively unreasonable." *Id.*; *Katz v. United States*, 389 U.S. 347, 357 (1967) ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment"). Likewise a person's hotel room. *Stoner v. California*, 376 U.S. 483, 489-90 (1964).

Officers who cross this firm line and only later secure a warrant to return and seize what they have seen make it much harder for the government to use the evidence seized. The Fourth Amendment prohibits that use unless the government can establish that the second, judicially approved search was "genuinely independent" of the first, warrantless search. *Murray*, 487 U.S. at 542. This is a two-pronged task. The government must "convinc[e] a trial court that no information gained from the illegal entry affected either [1] the law enforcement officer's decision to seek a warrant or [2] the magistrate's decision to grant it." *Id.* at 540 (numbering

added). We will refer to these below as the officer prong and the magistrate prong of the independent-source exception to the exclusionary rule.

2. Invited error is a centuries-old equitable doctrine of preclusion. Its laudable purpose is to prevent litigants from deliberately leading the district court into error in order to create an appellate issue in case of a loss. In its original form, it was enforced against plaintiffs in civil cases who requested nonsuits only to later seek to set the nonsuit aside in favor of a new trial, thus creating an endless loop of litigation against the defendants. *Francisco v. Chicago & A.R. Co.*, 149 F. 354 (8th Cir. 1906). These days, the doctrine is commonly applied when litigants intentionally secure the jury instructions or evidentiary rulings of their choice and then later argue that those instructions or rulings were reversible error. *See, e.g., McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 476 (5th Cir. 2015); *United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606-07 (9th Cir. 1991).

Invited error is often described as a form of waiver. Pet. App. 16a (Tenth Circuit opinion in this case describing doctrine as "a species of waiver"); *United States v. Lerma*, 877 F.3d 628, 632 (5th Cir. 2017) ("[s]tatements amounting to invited error are a species of waiver") (citation omitted); *Fryman v. Federal Crop Ins. Corp.*, 936 F.2d 244, 251 (6th Cir. 1991) ("the doctrine of 'invited error' is a branch of the doctrine of waiver"). Invited error and waiver have overlapping elements, but also subtle differences. Invited error occurs when a litigant deliberately leads a court to a desired result ("the court should do X because X, rather than Y, is correct"), and later

challenges that result. Waiver occurs when a litigant deliberately relinquishes or abandons a known right ("I know I have a right to Y, and Y is correct, but I am willing to forego Y in favor of X"), and later attempts to assert that right. *United States v. Olano*, 507 U.S. 725, 733 (1993) (defining waiver as the "intentional relinquishment or abandonment of a known right"). In waiver cases as in invited-error cases, the litigant will ordinarily be held to his or her original position, that is, barred (estopped) from claiming error on appeal. *Id*.

B. Factual Background

Law-enforcement officers went into Jose Amador and Diana Mekaeil's hotel room without a warrant to confirm a maid's report that she had seen drugs and paraphernalia in the room. Pet. App. 2a-4a. The officers later returned to the room with a search warrant predicated on their earlier entry in order to seize what they had seen. *Id*. 6a. The investigation ultimately led to a federal indictment charging Mr. Amador and Ms. Mekaeil with a drug conspiracy, and charging Mr. Amador with several gun crimes. *Id*. 2a.

C. District Court Proceedings

In the district court, Mr. Amador joined defendant Ms. Mekaeil's timely motion to suppress the fruit of the officers' warrantless search of the hotel room. Pet. App. 7a, 16a. The motion attempted to anticipate and rebut possible government defenses to suppression. First, it argued in detail that the affidavit in support of the later search warrant lacked probable cause absent the officer's unlawful observations in the room. *Id*. 16a-17a. This argument echoed the magistrate prong of the independent-source

exception, though it did not mention independent source or *Murray*. *Id*. Second, the motion argued summarily that "without the warrant," the government could not establish "that the evidence from the search of [R]oom 150 would have been inevitably discovered, or discovered through independent means, or that such evidence was so attenuated from the illegality as to dissipate the taint of the unlawful conduct." *Id*. 17a. The motion requested an order suppressing all evidence seized from the room. *Id*. 16a. No part of the motion explicitly urged the district court to hold the government to a lower burden than the law requires.

The government responded, arguing that exigent circumstances justified the initial warrantless entry into the room; the search-warrant affidavit established probable cause for the warrant even with the fruit of the warrantless search excised; and the officers executed the warrant in good faith. *Id*. 17a-18a. The government did not mention the independent-source doctrine or *Murray*. R1.42.

The district court denied the motion to suppress. Pet. App. 20a-28a. The district court first ruled that the government failed to establish exigent circumstances, and that the officers' initial warrantless search of the hotel room was unconstitutional. Pet. App. 24a-25a. But the district court nonetheless determined that the exclusionary rule need not apply because "even if the illegal information is excised from the warrant (i.e., the officers' observations of the items in the room), the affidavit still contains probable cause for a search warrant to issue." *Id*. 27a. This ruling looked like a ruling on the magistrate prong of *Murray*. *Id*. But the district court did not

mention the independent-source doctrine, reference *Murray*, or consider whether the government had met *Murray*'s officer prong. *Id*. 20a-28a.

D. Tenth Circuit Proceedings

On appeal, Mr. Amador observed that the district court conducted the wrong legal analysis. Appeal 17-3018, Br. 37-43. The only applicable exception to the exclusionary here was the independent-source exception recognized in *Murray*. *Id*. Br. 37-43. Under *Murray*, the government was required to prove that the search warrant was a "genuinely independent" source of the evidence found in the hotel room. 487 U.S. at 540, 542. That proof required *two* "onerous" showings: (1) that no information gained from the illegal entry affected law enforcement's decision to seek the warrant (the officer prong), and (2) that no information gained from the illegal entry affected the magistrate's decision to grant the warrant (the magistrate prong). *Id*. Mr. Amador pointed out in his opening brief that the district court did not conduct this analysis (likely because the government failed to invoke independent source); that the government waived independent source by failing to invoke it; and that the record failed to establish an independent source under *Murray* in any event. Appeal 17-3018, Br. 37-43. Ms. Mekaeil made similar arguments in her opening brief. Appeal 17-3135, Br. 16-24.

The government argued in response that the *petitioners*, not the government, waived any right to a proper *Murray* ruling by not fully setting out the law of independent source in their motion to suppress. Appeal 17-3018, Gov't Br. 35-36; Appeal 17-3135, 31-37. This question was front-and-center at oral argument: who

bears what burden in the district court when the defendant challenges a warrantless search. Mr. Amador explained in his reply brief, at oral argument, and in a post-argument letter that the burden is squarely on the government to establish—both legally and factually—an exception to the exclusionary rule. Appeal 17-3018, Reply 9-11; *id*., Supp. Auth. filed March 30, 2018. In other words, the government's failure to satisfy its burden was its own fault, not the petitioners'. *Id*.

The Tenth Circuit affirmed. Pet. App. 13a-19a. It side-stepped the burden question and sua sponte held that the petitioners had invited both the government's failure to invoke independent source and the district court's improper analysis by not discussing independent source in detail, not citing *Murray*, and not arguing the first prong of *Murray*. *Id*. 16a n.4, 17a. According to the Tenth Circuit, the petitioners' motion thus "induced the district court to consider only the second prong of the *Murray* test." *Id*. 19a. The Tenth Circuit did not consider whether this inducement was deliberate. *Id*. 13a-19a.

Petitioners timely petitioned for rehearing en banc, asking the full court to consider whether the panel had misapplied the invited-error rule. Mr. Amador explained in his petition that "this is simply not an invited error case." Appeal 17-3018, Pet. for Reh. En Banc 11. He emphasized that the suppression motion "did not affirmatively urge the district court to limit its legal analysis in any way. And nothing about the motion suggests an affirmative, intentional relinquishment of Mr. Amador's Fourth Amendment right to suppression unless the government bore its burden of invoking and establishing a recognized exception to the exclusionary rule."

Id. Ms. Mekaeil adopted Mr. Amador's petition in full. Appeal 17-3135, Pet. for Reh. En Banc. The Tenth Circuit denied both petitions in summary orders. Pet. App. 29a, 30a.

REASONS FOR GRANTING THE WRIT

Must invited error be deliberate? This is an important question that divides the circuits and must be resolved by this Court.

A. The circuit courts sharply disagree about whether invited error must be deliberate.

As noted above, this Court defines waiver as the "intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733. In the quarter century since *Olano*, the circuits have disagreed about whether and how to apply this definition in the invited-error context. This Court has yet to address the issue.

At least three circuits require record evidence of deliberateness to support a finding of invited error. The **Ninth Circuit**, for instance, requires record evidence that the litigant "affirmatively acted to relinquish a known right." *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc). Thus, if a criminal defendant requests a jury instruction only to complain about that instruction on appeal, the defendant will still not be held to have invited error unless the record shows that "the defendant considered the controlling law, or omitted element, and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction." *Id*. (no invited error where no evidence that defendants considered omitted element, "but then, for some tactical or other reason, rejected the idea"); *accord United States v. Laurienti*, 611 F.3d 530, 543 (9th Cir. 2010) (discussing cases). The **Third Circuit** likewise requires evidence that the litigant acted "with knowledge of the error" or "for tactical

reasons." *Gov't of Virgin Islands v. Rosa*, 399 F.3d 283, 291-92 (3d Cir. 2005) (no invited error where record reflected "no indication that [defendant's] attorney knew of and considered the controlling law"); *accord United States v. Brown*, 849 F.3d 87, 90-91 (3d Cir. 2017) (counsel's explicit agreement to error not invited error where no record evidence that defendant was "aware of the rights implicated"). And the **Second Circuit** requires an "intelligent, deliberate course of conduct" in order to find invited error. *United States v. Bastian*, 770 F.3d 212, 218-19 (2d Cir. 2014) ("We find no such deliberate conduct in this case, where so far as appears in the record, Bastian neither sought nor gained any tactical advantage from giving up his right to indictment.").

The **Tenth Circuit** has explicitly rejected this approach, adopting instead the view of the Ninth Circuit judges who disagreed with the majority in *Perez*. *United States v. Aptt*, 354 F.3d 1269, 1281, 1283-84 (10th Cir. 2004) (favorably citing *Perez*, 116 F.3d at 851-52 (Kleinfeld, J., concurring[1])). In *Aptt*, the Tenth Circuit expressed "no desire to assume [the] role" of playing "after-the-fact backseat drivers to defense counsel, constantly revisiting whether there were arguments that (in our opinion) the trial attorney should have raised." 354 F.3d at 1284. Instead, the court announced that it would continue to find invited error even in the face of "apparent confusion" on the part of counsel. *Id*. The onus is thus on defendants in the Tenth Circuit who believe that their counsel inadvertently invited error to make that argument through

[1] Judge Kleinfeld and other judges concurred in the judgment in *Perez*, but "disagree[d] with the majority's rejection of unreviewability of invited error except where the record shows that counsel knew of the legal entitlement being waived." 116 F.3d at 849.

a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), in a later collateral proceeding under 28 U.S.C. § 2255. *Id*. Consistent with *Aptt*, in petitioners' case the Tenth Circuit did not consider—at all—whether counsel *deliberately* understated the government's burden in the petitioners' motion to suppress. Pet. App. 13a-19a.

The **Seventh Circuit** has also rejected any deliberateness requirement, explaining that "a court cannot easily discern whether the attorney bypassed a challenge for strategic reasons (which would result in waiver) or whether the attorney simply failed to recognize error that he otherwise would have raised." *United States v. Natale*, 719 F.3d 719, 730 (7th Cir. 2013). In *Natale*, the Seventh Circuit contrasted its own invited-error approach with that of the Third and Ninth Circuits, noting that "as our cases have applied this [invited-error] rule, a defense attorney who has not objected to a proposed instruction will nearly always waive any potential objection, regardless of whether his 'no objection' resulted from a reasoned, strategic decision or from a negligent failure to recognize the error." *Id*. at 729, 729 n.2.[2] The **Eighth Circuit** has likewise explicitly rejected the Ninth Circuit's approach, holding that "[w]e do not think *Olano* justifies a departure from our panel precedents that a defendant who requests and receives a jury instruction may not challenge the giving

[2] The Seventh Circuit cited an unpublished Tenth Circuit case as consistent with *Perez* (Ninth Circuit) and *Rosa* (Third Circuit). 719 F.3d at 729 n.2 (citing *United States v. Rucker*, 417 Fed. Appx. 719, 721-22 (10th Cir. 2011)). *Rucker* indeed declined to find that counsel who acquiesced in a jury instruction invited error absent record evidence of "any deliberate decision to forego a claim." 417 Fed. Appx. at 722. *Rucker* is inconsistent with *Aptt*.

of that instruction on appeal." *United States v. Mariano*, 729 F.3d 874, 880-81 (8th Cir. 2013).

This circuit split is long-standing and entrenched. The upshot is that litigants who do not intentionally contribute to district court error in Washington or Connecticut or Pennsylvania will get appellate review, while litigants who make the same mistakes in Kansas or Indiana or Minnesota will not. There is no reason to think that the circuits will settle this discrepancy on their own. The Seventh, Eighth, and Tenth Circuits have all explicitly considered the Ninth Circuit's position and rejected it. Review is necessary, for only this Court's guidance will resolve the issue and guarantee litigants consistent access across the circuits to appellate review.

B. The cost of the invited-error doctrine makes this an important question.

Simply put, "invited error is irremediable." *Francisco*, 149 F. at 355. As the Seventh Circuit observed in *Natale*, an approach that does not consider deliberateness "can sometimes produce especially harsh results." 719 F.3d at 730. Here the invited-error doctrine was invoked to deny the petitioners appellate review of a plainly incorrect district court order denying a Fourth Amendment claim that should have been granted. Fairness to individual litigants aside, whenever appellate review is denied—especially of a constitutional claim—the law suffers. *Cf. Zadeh v. Robinson*, 902 F.3d 483, 498-99 (5th Cir. 2018) (Willett, J., concurring dubitante) (noting the "constitutional stagnation" that results when appellate courts avoid ruling on the merits of Fourth Amendment claims by finding qualified immunity: "constitutional clarity—matter-of-fact guidance about what the Constitution requires—remains exasperatingly elusive").

The cost of the invited-error doctrine is high; this Court must ensure that it is properly applied.

C. This case is an ideal vehicle for the question presented.

This case presents no procedural impediments to reviewing the invited-error question. The petitioners timely sought appellate review of the district court's order denying their motion to suppress. The Tenth Circuit sua sponte denied that review on invited-error grounds without considering whether the petitioners *deliberately* invited error. And the petitioners argued in their petitions for rehearing en banc that—especially absent evidence of "an affirmative, intentional relinquishment of [their] Fourth Amendment right to suppression unless the government bore its burden of invoking and establishing a recognized exception to the exclusionary rule"—the Tenth Circuit's application of the invited-error doctrine in petitioners' case was wrong.

If this Court were to hold that the invited-error doctrine may not bar an appeal absent record evidence of deliberateness, then the petitioners would be entitled to a decision by the Tenth Circuit on the merits of their Fourth Amendment claim. Review is necessary, and this case is the right vehicle.

D. The Tenth Circuit's invited-error practices stand in need of correction.

The Tenth Circuit's refusal to consider deliberateness before barring review on invited-error grounds flatly contradicts this Court's definition of waiver as the "*intentional* relinquishment or abandonment of a *known* right." *Olano*, 507 U.S. at 733 (emphases added). The purpose of the doctrine is to prohibit litigants from strategically gaming the system. *See, e.g., Francisco*, 149 F. at 357 ("The courts are

not organized for the purpose of permitting the plaintiff in an action to experiment with a certain state of facts . . . and then permit him to withdraw from the scene of conflict and state a new cause of action and mend his licks in another direction."). That purpose is not served when litigants inadvertently contribute to error.

Neither is a non-deliberate invited-error rule necessary to protect district courts. Here, for instance, the petitioners were in no way responsible for accurately guiding the government and the district court through the government's possible defenses to their suppression motion. The petitioners did all they were required to do when they moved to suppress the fruit of the officers' warrantless search of their hotel room. "[T]he general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking (an) exemption (from the requirement) to show the need for it." *Chimel v. California*, 395 U.S. 752, 762 (1969) (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)). Thus, once the defendant establishes that a warrantless search occurred,[3] the burden shifts to the government to invoke and establish either one of the "jealously and carefully drawn" exceptions to the warrant requirement, or a recognized exception to the exclusionary rule. *Jones v. United States*, 357 U.S. 493, 499 (1958). By concluding that the petitioners invited error by not mentioning *Murray* or setting out its two-pronged analysis, the Tenth Circuit stood this long-settled Fourth Amendment law on its head. It was the government—not the petitioners—that bore the burden of invoking and satisfying *Murray*.

[3] There is no dispute that the officers' initial entry into the hotel room was warrantless.

Moreover, any view that the district court was at the mercy of the petitioners' incomplete legal analysis is inconsistent with this Court's view of courts as the arbiters of law in general. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). When a question of law is at issue (here the applicable legal framework for an exception to the exclusionary rule), appellate review should be conducted "in light of all relevant precedents, not simply those cited to, or discovered by, the district court." *Elder v. Holloway*, 510 U.S. 510, 512 (1994) (reversing *Elder v. Holloway*, 975 F.2d 1388 (9th Cir. 1991)).

In *Elder*, the district court granted summary judgment on qualified-immunity grounds to the officer-defendant in a 42 U.S.C. § 1983 action. 975 F.2d at 1390. But the district court's ruling overlooked on-point legal authority regarding whether the right at issue was clearly established. *Id*. at 1391-92. On appeal, a panel of the Ninth Circuit held that the plaintiff had invited this error by only presenting other authority to the district court, reasoning that "if the court 'gets it wrong' because the universe of cases proffered by the plaintiff in support of his claim that the right was clearly established turns out to be less than all of the potentially relevant legal facts, the plaintiff has invited whatever error occurs." *Id*. at 1395. The Ninth Circuit thus affirmed. *Id*. at 1396.

The plaintiff unsuccessfully sought en banc review. *Elder v. Holloway*, 984 F.2d 991 (9th Cir. 1993) (Kozinski, J., et al., dissenting from order rejecting rehearing en banc). Four judges would have granted review. *Id*. They observed that under the panel's version of invited error, "a government official's conduct is not evaluated under the standard announced by the Supreme Court . . . but on the basis of what case law the plaintiff's lawyer managed to dredge up and cite below." *Id*. at 993. They warned that "[t]his is a drastic departure from the way questions of law are decided and reviewed in our system, where the adversaries present their versions of the law to the court and the court renders its determination after making an independent assessment of what the law is." *Id*. at 993-94.

This Court agreed, and reversed the panel decision. 510 U.S. at 516. This Court observed that the panel decision would not deter official misconduct, instead releasing officials from liability simply "because of shortages in counsel's or the court's legal research or briefing." *Id*. at 515. This Court held that a court reviewing a qualified-immunity judgment should not hold a party to the law it cited below, but rather "use its full knowledge of its own and other relevant precedents." *Id*. at 516 (cleaned up). Any other approach "could occasion appellate affirmation of incorrect legal results." *Id*. at 515 n.3.

The Tenth Circuit held the petitioners here to the law they cited below in order to affirm an erroneous district court order that left official misconduct—law enforcement's unconstitutional, warrantless entry into the petitioners' hotel room—undeterred. The Tenth Circuit's invited-error jurisprudence in this and other cases

cannot be squared with this Court's Fourth Amendment jurisprudence, its waiver jurisprudence, or its view of courts as capable arbiters of law. Review is necessary.

CONCLUSION

For the above reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief

PAIGE A. NICHOLS
Assistant Federal Public Defender
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
117 SW 6th Avenue, Suite 200
Topeka, Kansas 66603
Phone: (785) 232-9828
Email: paige_nichols@fd.org
Counsel for Petitioner Amador

VIRGINIA L. GRADY
Federal Public Defender

JOHN C. ARCECI
Assistant Federal Public Defender
COLORADO FEDERAL PUBLIC DEFENDER
633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Email: john_arceci@fd.org
Counsel for Petitioner Mekaeil

FILED
United States Court of Appeals
Tenth Circuit

September 14, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE AMADOR,

Defendant - Appellant.

No. 17-3018
(D.C. No. 6:16-CR-10016-EFM-1)
(D. Kan.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DIANA MEKAEIL,

Defendant - Appellant.

No. 17-3135
(D.C. No. 6:16-CR-10016-EFM-2)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BRISCOE**, **BALDOCK**, and **EID**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Defendants Jose Amador and Diana Mekaeil were indicted by a federal grand jury on drug trafficking and firearms charges after incriminating evidence was seized from their hotel room, rental truck, and a backpack carried by Amador. Amador and Mekaeil moved to suppress the evidence seized from the hotel room, but their motion was denied by the district court. As part of its ruling, the district court also held that Amador's warrantless arrest, which preceded the search of the hotel room, was reasonable. Amador and Mekaeil then each entered into written plea agreements, reserving their right to appeal the district court's denial of their motion to suppress. Both defendants now appeal. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

I

Factual background

On November 16, 2015, Brianna Hines-Black was working as a housekeeper at the Hampton Inn and Suites in Mulvane, Kansas. The hotel was attached to the Kansas Star Casino, a gambling facility owned by the State of Kansas. At approximately 1:57 p.m. that afternoon, Hines-Black knocked on the door of Room 150.[1] Receiving no response to her knocks, Hines-Black entered Room 150 with the intent of cleaning it. Upon entering the room, Hines-Black observed several items in open view that caught her attention. These included a container of a flammable substance that she believed might be lighter fluid, two glass pipes that she later

[1] According to Hines-Black, there was not a "Do Not Disturb" sign on the door of Room 150. She testified that had such a sign been present on the door, hotel policy would not have allowed her to knock on the door or enter the room.

described to law enforcement agents as crack pipes, a scale, a beaker, and what appeared to be a plastic bag full of crack in an open drawer.

After observing these items, Hines-Black proceeded to clean the room to the best of her ability and then left the room at 2:08 p.m., approximately eleven minutes after she entered it. Hines-Black then went immediately to her supervisor, a woman named Kendra, and told her about the items she had seen in Room 150. Kendra informed Hines-Black that she would take care of the situation.

Kendra contacted Joseph Shanks, the manager of the hotel, and informed him about what Hines-Black had seen in Room 150. Shanks, in turn, contacted enforcement agents who were assigned to the casino by the Kansas Racing and Gaming Commission. One of those agents, Craig Pentecost, was specifically assigned to investigate. Pentecost called the Mulvane Police Department and asked them to send an officer to the hotel to assist in the investigation.

Pentecost then proceeded to the hotel and spoke with both Shanks and Hines-Black. Shanks provided Pentecost with a copy of the bill for Room 150, which indicated the room had been rented by a woman named Diana Mekaeil from November 15, 2016, to November 16, 2016. Hines-Black told Pentecost that when she entered Room 150, she noticed several butane lighters, what appeared to be glass crack pipes sitting out on a desk, and a bag of crack in an open desk drawer.

Officer Brandon Bohannon of the Mulvane Police Department arrived at the hotel and Pentecost briefed him on the situation. Bohannon and Pentecost mutually decided that the Mulvane Police Department would take the lead on the matter.

Bohannon then spoke with Hines-Black. After doing so, Bohannon and Pentecost decided to enter Room 150. According to Pentecost, he was concerned that the room was being used as a methamphetamine lab. Bohannon was concerned about the presence of a flammable substance in the room and whether it presented a health hazard to the facility.

At approximately 2:38 p.m., Pentecost and Bohannon approached Room 150, knocked on the door, and announced "Police department." ROA, Vol. 3 at 41.[2] No one responded to their knocks. Consequently, with the assistance of Shanks, Pentecost and Bohannon entered Room 150. Inside the room, Pentecost and Bohannon observed, in open view on a table, two butane lighters, a can of acetone, a large box of plastic sandwich bags, two glass pipes, a plastic measuring cup, a metal measuring spoon, a roll of cellophane wrap, and a set of digital scales. The men also noticed that the smoke detector in the room had been covered with a red plastic-type bag. Based upon their observations, Pentecost and Bohannon decided to leave the room, seal it, and obtain a search warrant.

Bohannon contacted his supervisor, Lieutenant Matthew O'Brien, and asked him to report to the scene. When O'Brien arrived at the hotel, Bohannon took him inside Room 150 and showed him the items that were in plain view. They then left Room 150 and O'Brien concluded that they needed a warrant to search the room.

[2] All citations to the record on appeal in this opinion are intended to refer to the record in Appeal No. 17-3018.

In the meantime, another Kansas Racing and Gaming Commission agent reviewed surveillance footage from the hotel to determine who had been in Room 150. The footage revealed that a man and a woman had been occupying the room. At approximately 3:58 p.m., those two individuals entered the hotel lobby and headed to Room 150. As they did so, they were taken into custody by Mulvane police officers. The male suspect was determined to be Amador and the female suspect was determined to be Mekaeil. At the time of his arrest, Amador was carrying a backpack that contained a stolen .45 caliber loaded handgun, approximately ¼ pound of cocaine, 1 ½ pounds of methamphetamine, an unspecified quantity of black tar heroin, and prescription pills. Both Amador and Mekaeil were determined to be in possession of room keys for Room 150.

O'Brien ultimately prepared an application for a search warrant that stated, in pertinent part, as follows:

> That the basis for this probable cause is: Your Affiant, Matthew T. O'Brien, #102, is currently a Detective Lieutenant with the Mulvane Police Department and is currently assigned to the Investigation Unit. Your Affiant was informed by Mulvane Police Officer Brandon Bohannon that he was called to the Hampton Inn, room 150, located at 785 Kansas Star Drive, City of Mulvane, County of Sumner, Kansas, of drugs being found in room 150. Upon arrival Officer Bohannon stated he met Kansas Racing Gaming Commission Special Agent Craig Pentecost and Hampton Inn housekeeping employee Brianaa [sic] Black. Ms. Black stated that she was servicing room 150, when she observed in plain view on a table a scale, meth pipe, Ziploc sandwich bags, acetone, and other items. Officer Bohannon further informed your Affiant that Miss Black escorted him and Agent Pentecost in the room and they observed in plainview [sic] the above listed items and in an open desk drawer in plain view he observed two clear plastic bags containing what appeared to be crystal methamphetamine. Officer Bohannon also stated he observed numerous lap tops [sic] computers,

> Ipads [sic], numerous cell phones, checkbook in another name, jewerly [sic] and other items.
>
> Your Affiant had learned from the Hampton Inn that room 150 was rented by Diana Mekaeil of Wichita, Kansas and that their [sic] were two people in the room.
>
> Kansas Racing Gaming Commission Special Agent Craig Pentecost informed your Affiant that the Kansas Star Casino Surveillance officer has searched surveillance video and observed that on November 16, 2015 at 1103 hours, a female later identified as Diana Mekaeil and a male later identified [sic] Jose Amador enter room 150 and exited the room around 1110 hours. Agent Pentecost stated the surveillance video captured Diana Mekaeil and Jose Amador entered [sic] a red 2015 Dodge Ram Pick up [sic] truck bearing Kansas 826FBZ and drive away.
>
> Officer Bohannon further informed your Affiant that at approximately 1530 hours, Diana Mekaeil and Jose Amador arrived at the Hampton Inn and were arrested as they exited the red Dodge Ram pick up [sic] truck. Pursuant to the arrest Officer Bohannon searched Jose Amador's backpack he was carrying and observed in the backpack approximately ¼ lb of cocaine, 1 ½ lbs of methamphetamine, black tar heroine [sic], pills, "cotton candy" methamphetamine, and a stolen 45. [sic] Calibrie [sic] firearm stolen out of McPherson. Additionally, Officer Bohannon stated that both Mekaeil and Amador had on [sic] their possession a key to room 150.
>
> Your Affiant was informed by Mr. Tate Jackson of Enterprise who advised that the 2015 Dodge Ran pick up [sic] truck was rented by a Paul Schaffer and it was done on line [sic] and no further information was provided.
>
> Your Affiant had learned that Diana Mekaeil [sic] numerous arrests for possession of illegal drugs and no tax stamp and Jose Amador had several arrests for burglary and one for firearms possession.
>
> Based on your Affiant [sic] over forty years of law enforcement experience, believes that there is illegal contraband in the 2015 Dodge Ram Pick up [sic].

ROA, Vol. 1 at 61-62.

A search warrant was ultimately issued and executed for Room 150 and the rental truck that was used by defendants.

Procedural background

On January 12, 2016, a federal grand jury returned a four-count indictment against Amador and Mekaeil. Count One charged both defendants with conspiracy to possess with the intent to distribute, and to distribute, methamphetamine, in violation of 21 U.S.C. § 841(b)(1)(A)(ii)(II). Counts Two, Three, and Four charged Amador with being a felon in possession of firearms and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Mekaeil moved to suppress all evidence seized during the execution of the search warrant for Room 150. Amador subsequently sought and was granted leave to join Mekaeil's motion.[3] On June 13, 2016, the district court held an evidentiary hearing on defendants' motion to suppress.

On June 30, 2016, the district court issued a memorandum and order denying the defendants' motion to suppress. In doing so, the district court concluded "that the officers' initial search was unconstitutional because law enforcement did not have consent to enter the room and exigent circumstances did not exist for a warrantless search." ROA, Vol. 1 at 74. "Nevertheless," the district court concluded that "the later obtained search warrant and subsequent search were based on probable cause absent the officers' illegal observations." Id. Specifically, the district court noted

[3] It is undisputed that Room 150 was rented solely in Mekaeil's name. At no point during the district court proceedings, however, did the government challenge Amador's standing to challenge the search of Room 150. "Because [his] standing, or lack thereof, is rooted in substantive Fourth Amendment law rather than Article III, the [g]overnment has waived any objection as to [his] standing." United States v. DeGasso, 369 F.3d 1139, 1143 n.3 (10th Cir. 2004).

that "[s]uch information include[d] a statement that [Hines-Black] observed a scale, meth pipe, ziplock sandwich bags, acetone, and other items in room 150 when she cleaned it." Id. at 80.

In October of 2016, the government, in anticipation of entering into plea agreements with the defendants, filed separate informations against Amador and Mekaeil. The information filed against Amador charged him with one count of possessing a firearm in furtherance of a drug trafficking crime, i.e., possession with the intent to distribute methamphetamine, in violation of 18 U.S.C. § 924(c), and one count of knowingly and intentionally using a communication facility, i.e., a telephone, to facilitate the distribution of methamphetamine, in violation of 21 U.S.C. § 843(b). The information filed against Mekaeil charged her with a single count of knowingly and intentionally using a communication facility, i.e., a telephone, to facilitate the distribution of methamphetamine, in violation of 21 U.S.C. § 843(b). Both defendants subsequently filed pleadings waiving their right to indictment.

On October 28, 2016, Mekaeil entered into a written plea agreement with the government. On November 1, 2016, Amador likewise entered into a written plea agreement with the government. Under the terms of their respective plea agreements, defendants agreed to plead guilty to the counts alleged against them in the informations. Defendants also agreed to waive any right to appeal or collaterally attack their convictions or sentences, but they both specifically reserved the right to appeal the denial of their motion to suppress. For its part, the government agreed to dismiss the indictment, to recommend sentences at the low end of the applicable

Guideline range, and to recommend that defendants receive three-level reductions for acceptance of responsibility.

On January 18, 2017, the district court sentenced Amador to a term of imprisonment of 108 months, to be followed by a three-year term of supervised release. On June 9, 2017, the district court sentenced Mekaeil to a term of imprisonment of 48 months, to be followed by a one-year term of supervised release.

Both defendants filed timely notices of appeal.

II

Amador argues that the officers lacked probable cause to arrest him at the hotel prior to the search of Room 150. Further, both Amador and Mekaeil challenge the district court's denial of their motion to suppress the evidence seized during the execution of the search warrant for Room 150. We conclude, as explained in greater detail below, that both of these issues lack merit.

A. Amador's arrest

Amador challenges the legality of his warrantless arrest. More specifically, Amador argues that the officers lacked probable cause to arrest him in the lobby of the hotel, prior to the search of Room 150. Generally speaking, we review de novo a district court's determination of whether probable cause existed to arrest a defendant. United States v. Valenzuela, 365 F.3d 892, 896 (10th Cir. 2004).

1) Was the issue raised and addressed below?

We begin by addressing whether Amador actually raised this argument below. It is undisputed that the written pleadings defendants filed in the district court "did

not challenge the evidence seized from the search incident to arrest and did not assert that Defendants' arrests were illegal." ROA, Vol. 1 at 81 n. 17. During the hearing on defendants' motion to suppress, Mekaeil's counsel argued that the arrests of Mekaeil and Amador were illegal because they were "based off of what [the officers] had seen with their own eyes when searching [Room] 150 without a warrant," and that, consequently, any evidence found on the defendants at the time of their arrest should have been excluded from the application filed in support of the search warrant for Room 150. ROA, Vol. 3 at 122. Amador's counsel did not expressly join in this argument or make the same argument. Instead, he argued only that the defendants' arrests "w[ere] predicated upon the fruits of the [illegal] search [of Room 150], not by observation of any illegal conduct, [sic] that was committed in the presence of the officers." Id. at 133.

The district court, in its memorandum and opinion denying defendants' motion to suppress, included a footnote that addressed the arguments made at the hearing by Mekaeil's counsel and stated, in pertinent part:

> During the hearing, in response to the Court's questioning, Defendant Mekaeil's attorney stated that the arrest was illegal because it was based on the information obtained from the officers' illegal search of room 150 or from information obtained from Black (whose veracity was not explained). "[A] warrantless arrest must be supported by probable cause." United States v. Dozal, 173 F.3d 787, 792 (10th Cir. 1999). Considering the totality of the circumstances, an officer has probable cause to arrest if he "learned of facts and circumstances through reasonably trustworthy information that would lead a reasonable person to believe that an offense has been or is being committed by the person arrested." Id. (quotation marks and citation omitted). Here, there was sufficient information from a reasonably trustworthy source to give the officers' [sic] probable cause to believe that an offense had been or was being committed by Defendants. Thus, to the extent that Defendants'

> [sic] challenge their arrest as illegal, the Court finds otherwise. Accordingly, the items included as information in the search warrant related to Defendants' arrest is proper.

ROA, Vol. 1 at 81 n. 17.

Thus, in sum, it is not entirely clear that Amador's counsel directly challenged the legality of his arrest in the district court. But it is undisputed that Amador joined in the motion to suppress filed by Mekaeil, the district court held a hearing on the joint motion, and the district court ultimately addressed the legality of both defendants' arrest in its memorandum and opinion. Consequently, we will treat the issue as properly preserved.

2) Standard of review for warrantless arrests

As part of his challenge to the district court's ruling, Amador argues that Tenth Circuit precedent setting forth the standard of review for warrantless arrests is erroneous because it directs courts to view the evidence in the light most favorable to the government. See Amador Opening Br. at 19 (citing United Sates v. Zamudio-Carrillo, 499 F.3d 1206, 1209 (10th Cir. 2007)). We conclude it is unnecessary to address this argument for two reasons. First, absent *en banc* reconsideration or an intervening Supreme Court decision, we are bound by Tenth Circuit precedent, such as Zamudio-Carrillo. See United States v. White, 782 F.3d 1118, 1126-27 (10th Cir. 2015). Second, and in any event, the "light most favorable" standard has no impact on the outcome of this appeal because the underlying facts are essentially undisputed.

3) Probable cause to arrest

Turning to the merits of Amador's challenge, it is well established that "a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152 (2004). "To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." Dist. of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (quotations omitted). "Because probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules." Id. (quotations and citations omitted). "It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Id. (quotations omitted).

Applying these principles to the case at hand, we readily agree with the district court that the officers had probable cause to conduct a warrantless arrest of Amador. Hines-Black's observations of drug paraphernalia and what appeared to be drugs in Room 150, combined with the officers' review of casino and hotel surveillance video showing that Amador occupied Room 150 with Mekaeil, provided the officers with probable cause to believe that Amador was connected to the drug paraphernalia and drugs and had committed one or more drug trafficking offenses.

B. The evidence seized from Room 150

The district court concluded, and the parties agree on appeal, that it was unlawful for the officers to enter Room 150 without a search warrant. But Amador and Mekaeil take issue with the district court's decision not to apply the exclusionary rule to the evidence that was ultimately seized during the execution of the search warrant for Room 150. More specifically, they approach the admissibility of this evidence from a different angle on appeal. They now argue that the only exception to the exclusionary rule that is potentially applicable here is the independent source doctrine, and they in turn argue that the district court failed to properly apply that doctrine in resolving their motion to suppress. For the reasons more fully discussed below, however, we reject defendants' arguments.

1) Standard of review

In addressing a challenge to a district court's denial of a motion to suppress, "we view the evidence in the light most favorable to the government, accept the district court's findings of fact unless they are clearly erroneous, and review de novo the ultimate question of reasonableness under the Fourth Amendment." United States v. Saulsberry, 878 F.3d 946, 949 (10th Cir. 2017) (quotation marks omitted).

2) The independent source doctrine

"[T]he exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search," as well "the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search." Murray v. United States, 487 U.S. 533, 536-37 (1988). "Almost simultaneously with [its]

development of the exclusionary rule," the Supreme Court "also announced what has come to be known as the 'independent source' doctrine." Id. at 537. The independent source doctrine is one of the exceptions to the exclusionary rule that "involve the causal relationship between the unconstitutional act and the discovery of evidence." Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016). It "allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." Id.

"The independent source doctrine" rests "upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied." Murray, 487 U.S. at 542. Thus, "[s]o long as a later, lawful seizure is genuinely independent of an earlier, tainted one . . . there is no reason why the independent source doctrine should not apply." Id. Indeed, "[w]hen the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." Nix v. Williams, 467 U.S. 431, 443 (1984).

In Murray, federal law enforcement agents illegally entered an unoccupied warehouse and "observed in plain view numerous burlap-wrapped bales that were later found to contain marijuana." Id. at 535. The agents "left without disturbing the bales, kept the warehouse under surveillance, and did not reenter it until they had a search warrant." Id. "In applying for the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry." Id. at 535-

36. The warrant was subsequently issued and executed and the agents "seized 270 bales of marijuana and notebooks listing customers for whom the bales were destined." Id. at 536.

The Supreme Court held, in determining whether the seized evidence should be excluded, that the "ultimate question" was "whether the search pursuant to warrant was in fact a genuinely independent source of the" seized evidence. Id. at 542. That would not be the case, the Court held, if "the agents' decision to seek the warrant was prompted by what they had seen during the initial entry" or "information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." Id. Mekaeil and Amador parse Murray into two separate prongs of analysis that ask whether the illegally observed evidence (1) prompted the officers to seek a warrant or (2) affected the magistrate's decision to grant the warrant. Below, we refer to that two-prong framework solely to resolve this appeal.

3) The invited error doctrine precludes review of defendants' assertion that the district court failed to consider and apply the first prong of the Murray test

The record in this case, as we shall proceed to describe, firmly establishes that the district court applied the precise analytical framework that defendants argued in their motion to suppress should be applied. More specifically, the district court, as the defendants urged it to do, considered only whether the application for the search warrant, omitting the information contained therein that was derived from the officers' illegal entries into Room 150, contained sufficient information to provide probable cause for issuance of the search warrant. In doing so, the district court

effectively considered only the second prong of the Murray test. In light of these circumstances, we conclude that the invited error doctrine precludes defendants from now arguing that the district court, in resolving their motion to suppress, failed to consider and apply the first prong of the test outlined in Murray.[4]

The invited error doctrine, we have noted, is "a species of waiver" that "precludes a party from arguing against a proposition the party willingly adopted" before the district court. United States v. Rodebaugh, 798 F.3d 1281, 1304 (10th Cir. 2015). In other words, "[h]aving induced the [district] court to rely on a particular erroneous proposition of law or fact, a party . . . may not at a later stage . . . use the error to set aside the immediate consequences of the error." United States v. DeBerry, 430 F.3d 1294, 1302 (10th Cir. 2005) (quotation marks omitted).

In this case, Mekaeil filed a timely motion to suppress and Amador was allowed by the district court to join in that motion. The suppression motion began by asserting that the law enforcement officers violated defendants' Fourth Amendment rights by entering Room 150 without a warrant. The motion in turn asserted that exclusion of the evidence seized from Room 150 was "a necessary remedial measure." ROA, Vol. I at 39. In support of this latter argument, the motion asserted, citing in part this court's decision in United States v. Sims, 428 F.3d 945 (10th Cir. 2005), that the application submitted in support of the search warrant for Room 150,

[4] Although the government has not expressly argued that we should apply the invited error doctrine, it has argued that defendants waived their argument regarding the first prong of the Murray test by failing to assert that argument below. And, in any event, we may *sua sponte* apply the invited error doctrine. United States v. Mancera-Perez, 505 F.3d 1054, 1057 n.3 (10th Cir. 2007).

setting aside the observations made by the law enforcement officers during their two illegal entries into Room 150, lacked sufficient information to provide probable cause for issuance of the warrant.[5] Id. at 40-41. Lastly, the motion asserted that "without the warrant," the government could not establish "that the evidence from the search of [R]oom 150 would have been inevitably discovered, or discovered through independent means, or that such evidence was so attenuated from the illegality as to dissipate the taint of the unlawful conduct." Id. at 43. At no point did the motion discuss in detail the independent source doctrine, cite to Murray, or argue that the law enforcement officers would not have sought a search warrant absent their illegal entries into Room 150. Thus, in sum, the defendants, consistent with our decision in Sims, asked the district court to resolve their suppression motion simply by examining the search warrant application and deciding whether, absent the observations made by the law enforcement officers in Room 150, it contained sufficient information to provide probable cause for issuance of the search warrant.

The government, in its written response to the defendants' motion to suppress, argued that exigent circumstances existed that justified the officers' warrantless entries into Room 150. Alternatively, the government argued, citing primarily Sims,

[5] In Sims, this court dealt with a situation where an arrest warrant and search warrants obtained to search the defendant's office, home computer, and computer disks seized from his luggage all relied in part on fruits from an earlier illegal warrantless search of the defendant's office. In addressing this situation, this court stated: "When a warrant is tainted by some unconstitutionally obtained information, we nonetheless uphold the warrant if there was probable cause absent that information." 428 F.3d at 954.

that setting aside the information observed by the officers during their warrantless entries into Room 150, the search warrant application still contained sufficient information to provide probable cause for the issuance of a search warrant. Lastly, the government argued that even if probable cause was lacking, "the search should be upheld under the good faith exception recognized in United States v. Leon, 468 U.S. 897 (1984)." ROA, Vol. I at 57.

Defendants filed no reply brief. At the suppression hearing, neither the parties nor the district court mentioned Murray or the independent source doctrine. Instead, the district court repeatedly mentioned the inevitable discovery doctrine.[6] Amador ROA, Vol. 3 at 114-15, 122-23, 129, 132-34.

When the district court issued its written decision denying the motion to suppress, it did not mention the independent source doctrine, cite to Murray, or consider whether the officers would have sought a search warrant absent their illegal entries into Room 150. Instead, citing Sims, the district court analyzed the search warrant application and concluded that, even setting aside the information that was derived from the officers' illegal entries into Room 150, the warrant contained sufficient information to provide probable cause for issuance of the search warrant. In short, the district court agreed with defendants that the officers illegally entered

[6] "The inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source." Strieff, 136 S. Ct. at 2061. Thus, the inevitable discovery doctrine requires a court to consider a hypothetical, i.e., would law enforcement officers have found the evidence at issue independently of the illegality.

Room 150, but it disagreed with defendants that, setting aside the observations made by the officers during their illegal entries, the search warrant application lacked sufficient information to provide probable cause of the issuance of a search warrant for Room 150.

In light of these circumstances, we conclude that defendants induced the district court to consider only the second prong of the Murray test, and thus the invited error doctrine precludes our review of defendants' argument that the district court failed to consider the first prong of the test outlined in Murray, i.e., whether the law enforcement agents' decision to seek the search warrant was prompted by what they had seen in Room 150 during their illegal entries.

III

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, *Plaintiff,* vs. JOSE AMADOR, and DIANA MEKAEIL, *Defendants.*	Case No. 16-10016-01-02-EFM

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant Diana Mekaeil's Motion to Suppress (Doc. 36). Co-defendant Jose Amador joins in the motion (Docs. 36, 39). Defendants seek suppression of all evidence seized by law enforcement from a rented hotel room arguing that the evidence was seized in violation of their Fourth Amendment right to privacy.

The Court finds that the officers' initial search was unconstitutional because law enforcement did not have consent to enter the room and exigent circumstances did not exist for a warrantless search. Nevertheless, the Court will not suppress the evidence found in the hotel room because the later obtained search warrant and subsequent search were based on probable cause absent the officers' illegal observations. Accordingly, the Court denies Defendants' motion to suppress.

I. Factual and Procedural Background[1]

On November 15, 2016, Defendant Diana Mekaeil rented a room from the Hampton Inn at the Kansas Star Casino in Mulvane, Kansas, for two days. Mekaeil and her boyfriend, Defendant Jose Amador, were given a key to room 150. Their expected departure date was November 17. On the afternoon of November 16, Brianna Hines-Black, who was a housekeeper for the Hampton Inn, entered room 150 to clean it. While Black was in the room, she saw several "crack" pipes, a scale, a flammable substance that she believed was lighter fluid,[2] and a plastic bag with a white substance that she thought was drugs. After observing these items, Black remained in the room for approximately ten minutes cleaning. She did not smell any fumes and did not see anything burning.

After exiting the room, Black reported her discovery. Somebody from the Hampton Inn ultimately contacted Agent Pentecost with the Kansas Race and Gaming Commission. Agent Pentecost then contacted Officer Bohannon of the Mulvane Police Department. Both Agent Pentecost and Officer Bohannon went to the Hampton Inn. Black spoke with both officers, although at separate times, and told them what she had observed in the room. Black later provided a written statement.

Agent Pentecost, Officer Bohannon, and General Manager Joe Shanks of the Hampton Inn went to room 150 and knocked on the door.[3] Nobody answered the door. The officers directed Shanks to open the door. Upon entry to the room, Officer Bohannon observed the same

[1] The following facts are based on the parties' written briefs and from testimony given at the suppression hearing held on June 13, 2016.

[2] During the hearing, Black testified that she used the term "lighter fluid" for the flammable liquid she observed. In the search warrant, it states that Black told officers that she saw "acetone" in room 150.

[3] They arrived at the room approximately forty minutes after Black left the room.

items as Black had observed. Officer Bohannon called his supervisor, Lieutenant O'Brien, to determine if there was any health hazard. Lt. O'Brien went to the room and entered the room. After being in the room for approximately three minutes, the officers left.

Officers obtained surveillance video of the two persons who previously left the room and departed the hotel grounds in a red Dodge Ram 1500. Officers waited in and near the hotel lobby for the two individuals to return. Mekaeil and Amador arrived at the hotel in a red Dodge Ram 1500 and matched the people on the earlier surveillance video who had left room 150. The two were then taken into custody. At the time of the arrest, Amador was carrying a black backpack. Inside the backpack, officers found a stolen .45 caliber loaded handgun, approximately 1/4 pound of cocaine, 1 1/2 pounds of methamphetamine, black tar heroin, and prescription pills. Both Mekaeil and Amador had a room key for room 150 on them at the time of their arrest.

Lt. O'Brien sought a search warrant for room 150 from a judge in Sumner County. In the search warrant, Lt. O'Brien stated that Black "observed in plain view on a table a scale, meth pipe, Ziploc, sandwich bags, acetone, and other items" while servicing the room. Lt. O'Brien further stated that Officer Bohannon went to the room and observed the above listed items, as well as plastic bags containing what appeared to be crystal meth and numerous lap tops, cell phones, jewelry, and other items. The affidavit also stated that the room was rented by Mekaeil and that surveillance video showed Mekaeil and Amador exiting the room earlier that day. Lt. O'Brien informed the judge that upon return to the Hampton Inn, Officer Bohannon arrested the two individuals and pursuant to the arrest found cocaine, meth, heroin, pills, and a stolen firearm in Amador's backpack. Lt. O'Brien also averred that Mekaeil had numerous arrests for possession while Amador had previous arrests for burglary and firearms possession.

At 7:47 p.m., Lt. O'Brien secured the judge's signature on the search warrant and returned to room 150 to perform a more intensive search. Items found in the room included butane torches, an acetone bottle, glass smoking pipes with white residue, digital scale, and multiple plastic bags containing methamphetamine.

On January 12, 2016, both Defendants were indicted. Amador was indicted on one count of conspiracy to distribute and possession with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine and two counts of being a felon in possession of a firearm. Mekaeil was indicted on one count of conspiracy to distribute and possession with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine. Mekaeil filed a Motion to Suppress in which Amador also joined. The Court held a hearing on June 13, 2016.

II. Analysis

Defendants argue that the Fourth Amendment requires suppression of the evidence found in room 150 because they did not consent to the search and there were no exigent circumstances allowing a warrantless entry into their hotel room. Furthermore, Defendants contend that the probable cause affidavit for the search warrant would not have contained sufficient evidence for the judge to issue the warrant absent information obtained from the officers' observations during the warrantless entry into the room. The government disagrees and argues that exigent circumstances, i.e., the safety of other hotel guests and officers, allowed the warrantless entry into room 150. In addition, the government argues that even if the Court determines that officers should not have entered the room without a search warrant, sufficient information remains in the search warrant affidavit to establish probable cause. Thus, the subsequent search

of the room after obtaining the warrant was constitutional and the items found in the hotel room should not be suppressed.

"Overnight guests and joint occupants of motel rooms possess reasonable expectations of privacy in the property on which they are staying."[4] A search and seizure inside a motel room without a warrant is presumptively unreasonable.[5] The Fourth Amendment, however, excuses a warrantless search if "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable."[6] Circumstances that "pose[] a significant risk to the safety of a police officer or a third party" represent one possible compelling exigency.[7] But a safety-based exigency will only excuse deviation from the warrant requirement if: "(1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable."[8] Courts discern the reasonableness of an officer's belief by reviewing "the realities of the situation" from the viewpoint of "prudent, cautious, and trained officers."[9] It is the government's burden to demonstrate that exigent circumstances existed.[10]

Here, the government argues that exigent circumstances existed because of the acetone bottle in the hotel room. Officer Bohannon asserts that he wanted to check the room to make sure that there was not an immediate danger to other hotel guests due to the potential explosive

[4] *United States v. Kimoana*, 383 F.3d 1215, 1221 (10th Cir. 2004) (citations omitted).

[5] *Id.*

[6] *Kentucky v. King*, 563 U.S. 452, 460 (2011) (citation and quotation marks omitted).

[7] *United States v. Najar*, 451 F.3d 710, 717 (10th Cir. 2006).

[8] *Id.* at 718.

[9] *United States v. Gordon*, 741 F.3d 64, 70 (10th Cir. 2014) (quotation marks omitted).

[10] *United States v. Anderson*, 154 F.3d 1225, 1234 (10th Cir. 1998).

nature of acetone. The realities of the situation, however, do not indicate an immediate need to protect the safety of others. Black testified that after she observed the items in the room, she continued cleaning the room and remained in the room for approximately ten minutes. She did not leave immediately nor feel that there was an immediate emergency. Black did not tell the officers that there was any indication of open flames, fumes, or strange smells. Nobody else reported that there were any strange smells coming from room 150 or the area around room 150. Quite simply, the evidence indicates that drug paraphernalia was present in the room, but the presence of drug paraphernalia does not indicate exigent circumstances requiring a warrantless entry.[11] Thus, the Court finds the initial search of the room unconstitutional.

The evidence found in the hotel room, however, will not be suppressed due to the later-obtained search warrant and subsequent search pursuant to that warrant. "When a warrant is tainted by some unconstitutionally obtained information, we nonetheless uphold the warrant if there was probable cause absent that information."[12] "An affidavit containing erroneous or unconstitutionally obtained information invalidates a warrant if that information was critical to establishing probable cause. If, however, the affidavit contained sufficient accurate or untainted evidence, the warrant is nevertheless valid."[13]

In this case, the information set forth in the affidavit states what the officers observed in plain view in the room. This information includes "two clear bags containing what appeared to be crystal methamphetamine" as well as numerous lap top computers, cell phones, jewelry, and

[11] The Court recognizes that at certain times drug paraphernalia and such items as acetone could pose an exigent circumstance requiring a warrantless search based on an officer's or the public's safety. This case is not one of those times.

[12] *United States v. Sims*, 428 F.3d 945, 954 (10th Cir. 2005).

[13] *Id.* (citation and quotation marks omitted).

other items. This information will be excised from the affidavit due to the illegality of the officers' warrantless search. The officers' observations, however, were not critical to establishing probable cause because absent this information, there was still probable cause for the search warrant to issue.

"Probable cause to issue a search warrant exists only when the supporting affidavit sets forth facts that would lead a prudent person to believe there is a fair probability that contraband or evidence of a crime will be found in a particular place."[14] In this case, there was plenty of other information, absent the officers' observations, for the issuing judge to find probable cause to grant the search warrant.

Such information includes a statement that Black observed a scale, meth pipe, ziplock sandwich bags, acetone, and other items in room 150 when she cleaned it. Defendant complains that the information from Black is suspect because there was insufficient information in the warrant regarding the veracity or reliability of Black. The Court disagrees. "When judging information provided by an informant as the foundation supporting probable cause for a search warrant, we consider the informant's veracity, reliability, and basis of knowledge as relevant factors to evaluate."[15] A named informant's explicit and detailed description of alleged wrongdoing, observed first-hand, entitles the informant's observation to greater weight.[16] Here, the affidavit states that Black was an employee of Hampton Inn and was servicing the room (her basis of knowledge) when she observed first-hand drug paraphernalia items. Her description was explicit and detailed.

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[14] *United States v. Basham*, 268 F.3d 1199, 1203 (10th Cir. 2001).

[15] *United States v. Mathis*, 357 F.3d 1200, 1205 (10th Cir. 2004).

[16] *See Illinois v. Gates*, 462 U.S. 213, 233-34 (1983).

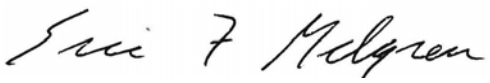
Furthermore, other information in the affidavit includes facts relating to the arrest of the two Defendants when they returned to the hotel. Upon return to the hotel, officers arrested Defendants and pursuant to the search incident to arrest, Officer Bohannon found 1/4 pound cocaine, 1 1/2 pounds meth, black tar heroin pills, "cotton candy" meth, and a stolen firearm in Defendant Amador's backpack.[17] In addition, the vehicle the two were driving was rented in another individual's name. Finally, the warrant application included information that Defendant Mekaeil had numerous arrests for possession of drugs and Defendant Amador had previous arrests for burglary and one for firearm possession. Accordingly, even if the illegal information is excised from the warrant (i.e., the officers' observations of the items in the room), the affidavit still contains probable cause for a search warrant to issue. Thus, the Court will not suppress the evidence found in room 150.

[17] In Defendants' briefing to the Court, they did not challenge the evidence seized from the search incident to arrest and did not assert that Defendants' arrests were illegal. The evidence seized from the arrest was included as information in the affidavit to obtain a search warrant for room 150. During the hearing, in response to the Court's questioning, Defendant Mekaeil's attorney stated that the arrest was illegal because it was based on the information obtained from the officers' illegal search of room 150 or from information obtained from Black (whose veracity was not explained). "[A] warrantless arrest must be supported by probable cause." *United States v. Dozal*, 173 F.3d 787, 792 (10th Cir. 1999). Considering the totality of the circumstances, an officer has probable cause to arrest if he "learned of facts and circumstances through reasonably trustworthy information that would lead a reasonable person to believe that an offense has been or is being committed by the person arrested." *Id*. (quotation marks and citation omitted). Here, there was sufficient information from a reasonably trustworthy source to give the officers' probable cause to believe that an offense had been or was being committed by Defendants. Thus, to the extent that Defendants' challenge their arrest as illegal, the Court finds otherwise. Accordingly, the items included as information in the search warrant related to Defendants' arrest is proper.

IT IS THEREFORE ORDERED that Defendants' Motion to Suppress (Doc. 36) is hereby **DENIED**.

IT IS SO ORDERED.

Dated this 30th day of June, 2016.



ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

October 26, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE AMADOR,

Defendant - Appellant.

No. 17-3018

ORDER

Before **BRISCOE**, **BALDOCK**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

FILED
United States Court of Appeals
Tenth Circuit

October 26, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DIANA MEKAEIL,

Defendant - Appellant.

No. 17-3135

ORDER

Before **BRISCOE**, **BALDOCK**, and **EID**, Circuit Judges.

Appellant's petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition is denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk