No. _____

In The
Supreme Court of the United States

DANIEL KENDRICKS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Donna Lee Elm
Federal Defender

Aliza Hochman Bloom
Counsel of Record for the Petitioner
Assistant Federal Defender
Federal Defender's Office
400 North Tampa Street
Suite 2700
Tampa, FL 33602
Telephone: (813) 228-2715
E-mail: aliza_bloom@fd.org

QUESTION PRESENTED

The Fourth Amendment permits law enforcement officers, already searching pursuant to a valid warrant, to search and seize readily apparent contraband found in plain view. The Fourth Amendment also permits officers executing a valid search warrant to take reasonable steps to secure their safety. Neither the "plain view" nor the "officer safety" exceptions to the Fourth Amendment's warrant requirement, however, apply to the conduct that the Petitioner challenges in this case.

The question presented is whether law enforcement, when searching a residence pursuant to an arrest warrant, can initiate a separate search into any firearm that it encounters, even when that firearm is unrelated to the subject of the warrant and shows no signs of illegality, without violating the Fourth Amendment.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Petition for a Writ of Certiorari 1

Opinion Below 1

Jurisdiction 1

Relevant Constitutional and Statutory Provisions 1

Statement of the Case 2

A. The October 2016 Search of Petitioner's Mother's Home 2

B. District Court Proceedings 4

C. Appellate Court Proceedings 5

Reasons for Granting the Writ 6

I. PETITIONER RAISES A CRITICAL AND RECURRING QUESTION REGARDING THE ABILITY OF LAW ENFORCEMENT TO SEARCH ANY FIREARM THEY ENCOUNTER DURING A SEARCH 6

A. The Eleventh Circuit Did Not Address Petitioner's Question 8

B. Neither The "Plain View" Nor "Exigent Circumstances" Warrant Exceptions Apply To Justify This Search 10

C. The Circuits Disagree On The Scope Of The Plain View Exception 13

D. Permitting Law Enforcement To Search And Investigate Any Firearm Undermines Community Police Interactions 16

Conclusion 18

TABLE OF CONTENTS
-Continued-

Appendices

United States v. Kendricks, No. 18-10590, _ Fed. Appx._, 2018 WL 6584243 (11th Cir. December 13, 2018) ..... Appendix A

United States v. Kendricks, Case No.: 8:17-cr-00041, 2017 WL 3877645 (M.D. Fla. September 5, 2017) ..... Appendix B

Order of the U.S. Court of Appeals Denying Rehearing ..... Appendix C

TABLE OF AUTHORITIES

Cases **Page(s)**

Arizona v. Hicks, 480 U.S. 321 (1987) 8, 9, 10

Boroian v. Mueller, 616 F.3d 60 (1st Cir. 2010) 9, 10

Coolidge v. New Hampshire, 403 U.S. 433 (1971) ..... *passim*

Eagle v. Morgan, 88 F.3d 620 (8th Cir. 1996) 9

Fish v. Brown, 838 F.3d 1153 (11th Cir. 2016) 13

Florida v. Jardines, 569 U.S. 1 (2013) 6

Horton v. California, 496 U.S. 128 (1990) 12, 14

Katz v. United States, 389 U.S. 347 (1967) 6

New York v. Quarles, 467 U.S. 649 (1984) 8

United States v. Ellison, 462 F.3d 557 (6th Cir. 2006) 9

United States v. Folk, 754 F.3d 905 (11th Cir. 2014) 13

United States v. Gray, 484 F.2d 352 (6th Cir. 1973) 15

United States v. Kendricks, No. 18-10590, __Fed. App'x. __, 2018 WL 6584243 1

United States v. Malachesen, 597 F.2d 1231 (8th Cir. 1979) 14, 15

United States v. Newsome, 475 F.3d 1221 (11th Cir. 2007) 7, 8, 11

United States v. Roberts, 612 F.3d 506 (5th Cir. 2010) 14

United States v. Smith, 459 F.3d 1273 (11th Cir. 2006) 5, 8, 12, 16

United States Constitution

U.S. Const. amend. IV ..... *passim*

Statutes

18 U.S.C. § 922 ..... 1, 4

18 U.S.C. § 924 ..... 4, 5, 17

TABLE OF AUTHORITIES

-Continued-

Statutes **Page(s)**

28 U.S.C. § 1254 1

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Daniel Kendricks, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion, *United States v. Kendricks*, No. 18-10590, __Fed. Appx.__, 2018 WL 6584243, is unpublished and is provided in the appendix.

JURISDICTION

The Eleventh Circuit issued its opinion on December 13, 2018. *See* Appendix A. A timely filed Petition for Rehearing was denied on January 8, 2019. *See* Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the U.S. 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 searched.

Section 922(g)(1) of Title 18 provides, as relevant here:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition.

STATEMENT OF THE CASE

The sole charge against Petitioner Daniel Kendricks results from the recovery of a firearm during a search for a murder suspect, D.G., in Mr. Kendricks's mother's home. The police officer's continued search and investigation into this firearm, after it was disassembled to ensure officer safety, violated Mr. Kendricks's Fourth Amendment rights, and accordingly, it should have been suppressed.

The Eleventh Circuit concluded that law enforcement's actions were justified by the "exigent circumstances" and "plain view" exceptions to the warrant requirement. App. A at 3-6. The opinion also determined, without applicable precedent, that the officer's inquiry into the serial number of a firearm that he knew was unrelated to his search warrant was not a "search" within the meaning of the Fourth Amendment. *Id.* at 6-8.

Petitioner argues that the act of calling in a valid serial number on a gun that shows no indication of illegality constitutes a "search" within the meaning of the Fourth Amendment, and requires a degree of articulable suspicion.

A. The October 2016 Search of Petitioner's Mother's Home[1]

In October of 2016, the Manatee County Sheriff's Office ("MCSO") was investigating a homicide suspect known as "D.G.". Doc. 86 at 2; *see* Doc. 47 at 7. Detective Jeffrey Bliss ("Bliss") determined that D.G. lived at 1904 2nd Avenue West in Palmetto, Florida ("Residence"). *Id.*[2]

---

[1] The district court made these findings of fact relating to the search at issue in its Order "based on the testimony of witnesses and exhibits offered into evidence." Doc. 86 at 2 n.2. Where conflicting evidence was presented, it "weighed the credibility of the witnesses." *Id.*

[2] The Residence is a three-bedroom house with an attached one-car garage. Doc. 82 at 2. The district court order describes the layout. Doc. 86 at 2-3.

On October 6, 2016, Bliss obtained an arrest warrant for D.G. for second degree murder, listing the Residence as his address, and the 10-day search warrant for the Residence expired on October 16, 2016. Doc. 86 at 2; *see* Doc. 47 at 10, 23. Bliss, with other detectives, went to the Residence on October 6, 2016, at which time the Petitioner, Emma Kendricks, and Louis Davis were present. *Id.* at 3. D.G. was not at the Residence and had not been there for a few days, but Emma Kendricks confirmed that he lived there. Doc. 47 at 18. After Bliss read the search warrant to the Residence's occupants and searched, Emma Kendricks and Mr. Kendricks directed Bliss to a box of D.G.'s personal items in the main living room, and told Bliss that D.G. slept there. Doc. 86 at 3; *see* Doc. 47 at 13.

Bliss had received tips from various sources that D.G. was at the Residence, Doc. 47 at 15-16, and on October 16, 2016, he asked Detective Sean Cappiello ("Cappiello") to search again for D.G. Doc. 86 at 4. On October 17, 2016, Cappiello arrived at the Residence around 5:30 a.m. with Deputies Eason and Wolfe. *Id.*; *see* Doc. 47 at 28, 30. Upon arrival, Cappiello walked to the front door, Eason waited at the garage door, and Wolfe went around to the back. Doc. 86 at 3; *see* 47 at 33-35. When Mr. Davis answered the door, Cappiello explained that he had an arrest warrant for D.G. and was looking for him. Doc. 86 at 3-4. Mr. Davis stated that he did not believe D.G. was there, but that the officers could enter. *Id.*; *see* Doc. 47 at 36. Cappiello and Eason entered, and Mr. Davis knocked on the door to the garage. Petitioner opened the door. Doc. 86 at 4; *see* Doc. 47 at 36. Petitioner repeated that he did not believe D.G. was there, but told the officers they could look for D.G. *See* Doc. 47 at 37.

Cappiello entered the garage, walked around the couch facing the garage door, and saw a firearm on the glass table. Doc. 86 at 4. He notified Eason about the gun, who turned to see it as well. *Id.*; *see* Doc. 47 at 70-71. Cappiello seized and disarmed the firearm. Doc. 47 at 40.

During this time, Petitioner was walking around with Cappiello and Eason. Doc. 86 at 4. Petitioner tried to sit on the couch, or possibly go outside, but Cappiello directed him to stay in the garage because Wolfe was outside with a canine. *Id.* When Cappiello called the central system (teletype) to see whether the firearm was stolen, Petitioner asked what he was doing. Cappiello told him he was calling in the gun, and Petitioner asked whether he was going to prison. Cappiello said that he would not, as long as he was not a felon, and Petitioner responded that he had been to prison. The district court concluded that Petitioner had made this statement prior to teletype confirming that he was a convicted felon. *Id.* at 4-5.

B. District Court Proceedings

On February 1, 2017, the Petitioner was charged with being a felon in possession of a firearm and ammunition in and affecting interstate commerce, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). Doc. 1. Prior to trial, he filed a motion to suppress, pursuant to the Fourth Amendment, to exclude evidence obtained through a warrantless search on October 17, 2016 ("Motion to Suppress"). Doc. 16. The government responded, and the district court held a hearing. Docs. 45; 47.

Following the hearing, the parties submitted supplemental briefing. Docs. 49; Doc. 54. Petitioner filed a motion to supplement the record with the U.S. Attorney's notes in order to impeach a witness, Doc. 55, to which the government responded, Doc. 57, and the district court held a second hearing. Docs. 67; 106. On September 5, 2017, the district court denied Petitioner's Motions to Suppress and Supplement. Doc. 86.

Following a stipulated bench trial, Petitioner was convicted of possession of a firearm by a convicted felon and sentenced to 180 months' imprisonment, enhanced pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Docs. 118, 122, 144.

C. Appellate Court Proceedings

Petitioner appealed to the Eleventh Circuit, arguing that the district court erred in denying his motion to suppress in violation of the Fourth Amendment. *See* Initial Br. at 28-41; Reply Br. at 1-19.[3] On appeal, he conceded that law enforcement was permitted to be in the garage and to disarm the firearm it encountered in plain view. However, Petitioner argued that because Cappiello knew that the firearm was not related to the search warrant, and because it lacked any "readily apparent" indications of illegality, Cappiello had no basis to further search that firearm, such as calling in the serial number to see if it was stolen. Initial Br. at 28-40; Reply Br. at 2-18; *see United States v. Smith*, 459 F.3d 1276, 1290 (11th Cir. 2006); *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

The Eleventh Circuit panel affirmed Petitioner's conviction and sentence, without the benefit of oral argument, in an unpublished opinion. App. A.

Critically, the Eleventh Circuit concluded that Cappiello's "subsequent inquiry into [the firearm's] serial number was not a 'search' under the Fourth Amendment." App. A at 6.

Even if Detective Cappiello's actions did constitute a Fourth Amendment search, the panel determined that it was justified by "safety concerns" of the situation. App. A at 6-7.

Mr. Kendricks filed a timely Petition for Panel Rehearing on December 20, 2018, which the Eleventh Circuit denied on January 8, 2019.

---

[3] Petitioner also challenged his ACCA sentence on various grounds, and the constitutionality of the felon in possession statute. *See* Initial Br. at 41-51. By filing a Petition for Certiorari on his Fourth Amendment issue, the Petitioner does not abandon his challenges to the ACCA enhancement, including those made primarily for appellate preservation.

REASONS FOR GRANTING THE WRIT

I. PETITIONER RAISES A CRITICAL AND RECURRING QUESTION REGARDING THE ABILITY OF LAW ENFORCEMENT TO SEARCH ANY FIREARM THEY ENCOUNTER DURING A SEARCH.

Petitioner raises a question of first impression, and it has critical implications for thousands of law enforcement searches conducted in the United States. Does calling in a valid serial number of a firearm encountered during a legal search, when the firearm is not the subject of that warrant, constitute a "search" within the meaning of the Fourth Amendment? And if calling in the serial number does constitute a search, as Petitioner argues, was Cappiello permitted to conduct this further search into an unrelated firearm that he knew was not associated with his active search warrant, and showed no signs of illegality?

Cappiello's continued possession of the firearm after it had been disassembled, including his calling it into Teletype and running Petitioner's criminal history, invaded Petitioner's "reasonable expectation of privacy" and constituted a "search" for the purposes of the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 353, 360 (1967) (concluding that the government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.). Indeed, that Cappiello learned what he eventually learned about the firearm and Petitioner's status by entering the Residence to search for D.G. is enough to conclude that a "search" occurred. *See Florida v. Jardines*, 569 U.S. 1, 11 (2013) (when law enforcement obtains information by physically intruding on an individual's home or effect, a "search" within the meaning of the Fourth Amendment has occurred).

Cappiello was in the garage of Petitioner's mother's home, pursuant to an arrest warrant for D.G. Doc. 86 at 14-15. When Cappiello saw the firearm on the coffee table in the garage, he was permitted to seize and disassemble it by taking out any ammunition. Doc. 86 at 18 ("Cappiello

was permitted to seize the firearm and make it safe by disarming it for purposes of officer safety."); *see United States v. Newsome*, 475 F.3d 1221 (11th Cir. 2007). However, as the district court indicated twice, any concern for officer safety was alleviated after Cappiello disassembled the firearm. *See* Doc. 86 at 18 ("Cappiello was permitted to seize the firearm and make it safe by disarming it for purposes of officer safety."); *id.* at 25.[4]

The record is unequivocal that Cappiello possessed and continued his investigation into the firearm: (1) after all concern for officer safety had been eliminated, and (2) after he knew D.G. was not present and the firearm was not related to the arrest warrant. Cappiello testified that by the time he entered the garage, or immediately before, he knew D.G. was not present in the home. Doc. 106 at 13; Doc. 47 at 46. He explained that he "made the firearm safe by taking the magazine out of the firearm," unloading it "just as a safety thing." Doc. 47 at 40; 63. Both Eason and Cappiello testified that the sole reason Cappiello seized the gun initially was to ensure officer safety. Doc. 47 at 71-72; Doc. 106 at 14-16.

To be sure, the district court dismissed the government's conjecture that Cappiello's continued possession of the unloaded gun was necessary for officer safety. *See* Doc. 106 at 23-24. The critical question was the timing of Cappiello's call to teletype relative to Petitioner's statements, which he sought to suppress. *Id.* at 10-11 (recognizing that the timing of Cappiello's call is "the heart of Defendant's argument with regard to whether there was probable cause for the arrest of this defendant for felon in possession of a firearm."). In its written order, the district court concluded that exigent circumstances only supported Cappiello's securing and disassembling of

[4] "The officers had reason to be concerned for their safety because Kendricks was unsecured within the garage with them. Cappiello was permitted to seize the weapon, make it safe, and maintain control of the weapon until the search was complete and no further safety threat existed." Doc. 86 at 25.

the firearm. Doc. 86 at 18-25 ("Cappiello was permitted to seize the weapon, make it safe, and maintain control of the weapon until the search was complete and no further safety threat existed.").

Cappiello's continued possession and investigation into the firearm constituted a search that was not justified by the need to ensure officer safety. *See Newsome* 475 F.3d at 1226; *New York v. Quarles*, 467 U.S. 649, 653 n. 3 (1984) (holding that the warrantless seizure of a gun is "objectively reasonable" under the Fourth Amendment when there is a real concern for the safety of the officers present or the public at large).

A. The Eleventh Circuit Did Not Address Petitioner's Question.

Upon resolving Petitioner's appeal of the denial of his Motion to Suppress, the Eleventh Circuit misunderstood his challenge. Petitioner concedes that law enforcement was permitted to be in the garage and disarm the firearm that it encountered in plain view. Petitioner argues, however, that because Cappiello knew the firearm was not related to the search warrant and because it lacked any "readily apparent" indications of illegality, Cappiello had no basis to further search that firearm, such as by calling in the serial number to see if it was stolen. Initial Br. at 28-40; Reply Br. at 2-18; *see Smith*, 459 F.3d at 1290; *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

The panel summarily concluded that Cappiello's "subsequent inquiry into [the firearm's] serial number was not a 'search' under the Fourth Amendment." App. A at 6. Citing no direct authority, the panel seemingly relied on *Arizona v. Hicks*, where a detective inspected serial numbers on a stereo he suspected was stolen during a lawful search of defendant's home. 480 U.S. 321, 323-35 (1987); *see* App. A at 6-7. In *Hicks*, this Court determined that by moving the defendant's stereo equipment, even a few inches to read the serial numbers, the officer engaged in

a separate search which required probable cause. 480 U.S. at 327-28. Here, however, because Petitioner concedes that Cappiello was permitted to temporarily seize and unload this firearm, *see* Reply at 2-6, the panel's reliance on *Hicks* is misplaced.

Petitioner's question is one of first impression: was Cappiello permitted to make further inquiry into a firearm that he knew was not associated with the search warrant? As to that question, *Hicks* actually supports Petitioner's position - any further investigation into a disassembled firearm unrelated to the operative search warrant constituted a new, unconstitutional search. *See* 480 U.S. at 325 ("But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstances that validated the entry."). This Court concluded that the officer's moving of defendant's stereo equipment, even a few inches to read the serial numbers, constituted a separate search for which the officer needed separate probable cause. *Id.* at 327-28. Here, Petitioner similarly argues Cappiello's decision to call in a firearm with no sign of illegality—that he knew was unrelated to the search warrant—constituted a new search for the purposes of the Fourth Amendment.

The cases that the government has relied upon do not address Petitioner's question. *See* Govt. Br. at 18-30 (citing *United States v. Ellison*, 462 F.3d 557 (6th Cir. 2006); *Boroian v. Mueller*, 616 F.3d 60, 67 (1st Cir. 2010); *Eagle v. Morgan,* 88 F.3d 620, 628 (8th Cir. 1996)). In *Ellison*, the Sixth Circuit determined that when an officer lawfully observes a defendant's license plate, that individual motorist lacks a reasonable expectation of privacy in the information on the license plate, largely because license plates are intended to provide identifying information to law enforcement carrying out its traffic enforcement duties. 462 F.3d at 562-63. It is axiomatic that an individual has lesser privacy expectation in the constantly-visible numbers of her license plate

than from the serial number in a legally-owned firearm in her own home. *Boroian* is also inapplicable to Petitioner's challenge. There, the First Circuit "narrowly hold[s] that once a qualified federal offender's profile has been lawfully created and entered into CODIS under the DNA Act, the FBI's retention and periodic matching of the profile against other profiles in CODIS for the purpose of identification is not an intrusion on the offender's legitimate expectation of privacy and thus does not constitute a separate Fourth Amendment search." 616 F.3d at 68. In other words, law enforcement can search databases of legally-obtained personal information of convicted felons. Here, of course, Cappiello was searching for the subject of an arrest warrant in the residence of that suspect's grandmother when he encounters a firearm that he knows to be unrelated to the warrant. At no time prior to Cappiello's unauthorized search into that firearm did any of the officers view Petitioner with any degree of suspicion. The Fourth Amendment does not authorize law enforcement to search any property that has been seized for officer safety separately for fruits of a crime. And the government provides no authority stating otherwise.

Indeed, Petitioner raises a unique question of whether Cappiello was permitted to make further inquiry into a firearm that he knew was not associated with the search warrant. This Court's analysis in *Hicks* supports Petitioner's position, that any further investigation into a disassembled firearm unrelated to the operative search warrant does constitute a new search. *See* 480 U.S. at 325. Cappiello's decision to call in a firearm with no sign of illegality that he knew was unrelated to the search warrant constituted a new "search" within the meaning of the Fourth Amendment.

B. Neither The "Plain View" Nor "Exigent Circumstances" Warrant Exceptions Apply To Justify This Search.

Having determined that law enforcement's inquiry, by calling in a valid serial number of an unrelated firearm in the Residence, constituted a search, this Court must determine if there was justification for that search. There was simply no exception to the Fourth Amendment warrant

requirement that justified Cappiello's continued search. *See* Initial Br. at 28-41; Reply Br. at 1-13.

The Eleventh Circuit stated that even if Cappiello's actions *did constitute a Fourth Amendment search*, this search was justified by "safety concerns" of the situation. App. A at 6-7. This conclusion is undermined by the record and legally incorrect. In *United States v. Newsome*, the Eleventh Circuit held that the warrantless seizure of a firearm is reasonable when there is a real concern for the officers' safety. 475 F.3d 1221, 1226 (11th Cir. 2007). The Eleventh Circuit's conclusion that "Kendricks' proximity to the firearm after it was disassembled raised safety concerns justifying its continued seizure" is contradicted by the record. App. A at 6.[5]

To the contrary, the district court clearly relied on the doctrine of exigent circumstances only to the extent that Cappiello was permitted to seize and unload ammunition from the firearm. Doc. 86 at 18, 22, and 25; *see* Reply Br. at 9-13. At the suppression hearing, the district court rejected the government's argument that after the firearm was unloaded, Mr. Kendricks, in a room with multiple officers whom he was assisting in their search for his nephew, posed any threat at all to their safety. *See* Doc. 106 at 24-25; *see* Reply Br. at 9-11.

Second, the "plain view" exception to the Fourth Amendment's warrant requirement is also inapplicable to this and similar cases. Under the plain view exception, the warrantless seizure of an item is permissible only where "(1) an officer is lawfully located in the place from which the seized object could be plainly viewed and must have a lawful right of access to the object itself;

---

[5] The district court specifically concluded that the purposes of officer safety justified Cappiello's seizure and disarming of the gun - nothing further. *See* Doc. 86 at 16 (citing *Newsome*, 475 F.3d at 1226). The district court made no finding that supports the panel's conclusion: "[o]n this record, *Kendricks' proximity to the firearm after it was disassembled raised safety concerns justifying its continued seizure*." App. A at 6 (emphasis added). The panel misstates the district court's conclusion when stating that "the district court did not err in holding that Cappiello's continued possession of the firearm after disassembly was justified by exigent circumstances." *Id.*

and (2) the incriminating character of the item is immediately apparent." *Smith,* 459 F.3d at 1290 (citing *Horton v. California*, 496 U.S. 128, 136 (1990)). When articulating the exception, this Court explained that what "the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). This Court clarified that "[o]f course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.'" *Id.*

In this case, the first prong is satisfied because the district court determined that Cappiello and Eason were lawfully present in the garage pursuant to the arrest warrant for D.G. when Cappiello saw the firearm. Doc. 86 at 14-15, 19. However, the second prong cannot be met because nothing "incriminating" about the firearm was readily apparent. *Smith,* 459 F.3d at 1290. Cappiello testified that upon seeing the firearm on the table, there was nothing indicating that it was illegally possessed. Doc. 47 at 59.[6] Second, both Cappiello and Eason testified that they never thought this was the weapon D.G. had used in the murder they were investigating. *See* Doc. 47 at 24-46; 47-66; *see* Doc. 106. There is no question, then, that without Petitioner's statements, the incriminating nature of the gun was not "immediately apparent," *Smit*h, 459 F.3d at 1290, and the gun was not "a piece of evidence incriminating the accused." *Coolidge*, 403 U.S. at 466. The district court emphasized the timing of Mr. Kendricks's statements, recognizing that the gun was

[6] Indeed, the government never claimed that illegal nature of the gun was apparent, only that Mr. Kendricks' statements occurred prior to Cappiello's investigation and provided the needed probable cause. *See* Doc. 24 at 5-13; Doc. 57 at 4-20.

not readily apparent contraband.[7] Under the circumstances of this case, the plain view exception simply does not apply to justify any further search after the firearm was disassembled. Because this argument was preserved at each level, Petitioner's case is a good vehicle for this Court to address the question of first impression.

C. The Circuits Disagree On The Scope Of The Plain View Exception.

In the absence of guidance from this Court on whether further search into a lawful firearm is a search for the purposes of the Fourth Amendment, the circuits seem to extend the "plain view" exception to cover searches this Court did not intend.

Understandably, the Eleventh Circuit has concluded that where law enforcement has prior knowledge of an individual's criminal statute or prohibition from owning firearms, the illegal nature of a firearm can be "readily apparent." *See Fish v. Brown*, 838 F.3d 1153, 1166-67 (11th Cir. 2016) (where officers entering defendant's home knew that he was the subject of a domestic violence injunction that prohibited the possession of firearms, the incriminating nature of the weapons in Fish's bedroom was immediately apparent); *see United States v. Folk*, 754 F.3d 905, 908-912 (11th Cir. 2014) (where the officer entering defendant's home knew that he was a convicted felon based on officer's own work with defendant's gang "the second prong of the plain view doctrine was satisfied."). In those cases, that law enforcement knew the owner of a residence

---

[7] *See* Doc. 47 at 102-03; Doc. 106 at 8 (recognizing that if Cappiello did not know Mr. Kendricks was a felon, there was no basis for Cappiello to call teletype about the weapon or his criminal history); *id.* at 10-11 (calling the timing of Cappiello's phone call "the heart of Defendant's argument with regard to whether there was probable cause for the arrest of this defendant for felon in possession of a firearm.") In its order, the district court relies on exigent circumstances to justify Cappiello's initial seizure and disassembly of the gun, and then concludes that "[w]hile lawfully in possession of the firearm, the illegal nature of the firearm became apparent." Doc. 86 at 25. Thus, by the district court's own findings, the illegal nature of the gun was not immediately apparent.

was unable to own a firearm prior to entering the home made the search and seizure of any weapons justified because their criminal nature was "readily apparent." *Horton*, 496 U.S. at 136. In Petitioner's case, to the contrary, law enforcement repeatedly entered the Residence searching for Petitioner's nephew, he helped them, and they had no reason to suspect of him of any illegal activity.[8]

Cases from sister circuits on the scope of the plain view exception similarly lack guidance. *See United States v. Roberts*, 612 F.3d 306 (5th Cir. 2010), and *United States v. Malachesen,* 597 F.2d 1232, 1233 (8th Cir. 1979). In *Roberts*, the police received a tip that some residents of an apartment had stolen guns, and they found outstanding arrest warrants related to the truck that the tipsters associated with the apartment's owner. 612 F.3d at 308. When Mr. Roberts opened the door to the apartment, officers immediately saw several other people in a dark room, and a pistol magazine and several large rounds of ammunition in plain view. *Id.* at 309. On appeal, Mr. Roberts argued for the first time that the incriminating nature of the seized weapons was not immediately apparent. The Fifth Circuit reasoned that under these particular circumstances, where "the danger posed to the officers by the firearms did not fully dissipate" in light of how many people were in the apartment, the officers acted reasonably by completing their investigation. In *Roberts*, the officers already suspected Mr. Roberts of gun violations prior to knocking on the apartment door, and had arrest warrants associated with what they believed was his vehicle. *Id.* at 312-14.

Similarly, the officers in *Malachesen* were searching for "a 1973 Polaris snowmobile and Colombian marijuana" in the home of Mr. Malachesen. 597 F.2d at 1233. When they encountered

[8] Indeed, during the previous ten days, Petitioner had helped law enforcement, answering questions about his nephew D.G., and the officers had never run his criminal history or felt compelled to search further. *See* Doc. 47 at 16, 46; Doc. 86 at 3.

a loaded revolver during the course of executing this warrant, the Eighth Circuit found that the officers were justified in temporarily seizing it, and that they realized while searching the premises that Mr. Malachesen was a felon and the gun was contraband. *Id.* at 1234-35. Notably, both of the defendants in these cases were the subject of a valid search warrant, whereas Petitioner was a bystander to the search for D.G. (his nephew), and he repeatedly assisted law enforcement with their search.

When presented with situations quite similar to the one Petitioner presents, the Sixth Circuit explained why rifles found in a defendant's home when officers were there searching for alcohol did not satisfy the plain view exception. *United States v. Gray*, 484 F.2d 352, 355 (6th Cir. 1973). In *Gray*, as here, the officer had a prior justification for the intrusion, acting pursuant to a legitimate search warrant directing the seizure of alcoholic beverages in the defendant's property. 484 F. 2d at 355. When the officer "inadvertently discovered the rifles in the upstairs clothes closet," "it was not 'immediately apparent' that the rifles were 'evidence incriminating the accused.'" *Id.* (citing *Coolidge*, 403 U.S. at 466). Indeed, as the firearm here, the "rifles were not contraband; there was no nexus between the rifles and the crimes [that were subject to the valid warrant]." *Gray*, 484 F.3d at 355.

Accordingly, the Sixth Circuit rejected application of the plain view exception because the rifles, encountered by accident during an otherwise valid search, were not contraband and had nothing to do with the relevant search. *See id.* ("It was only after Trooper Brodt had seized the weapons, copied down the serial numbers, left the defendant's premises, and then run the information taken off the rifles through the National Crime Information Center that he learned that they were stolen and hence incriminating. This can hardly be characterized as being 'immediately apparent.' To allow the police to seize objects that are not incriminating at the time of seizure,

would not in our view comport with the plain view doctrine.").

The plain view exception did not apply to these complicated factual circumstances where the record has been clear that the incriminating nature of the firearm was not immediately apparent to law enforcement. *Smith*, 459 F.3d at 1290; *see Coolidge*, 403 U.S. at 466 ("the 'plain view doctrine' may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.").

D. Permitting Law Enforcement To Search And Investigate Any Firearm Undermines Community Police Interactions

Petitioner's case illustrates one deeply problematic implication of permitting law enforcement searches to expand beyond their authorizing warrants: detriment to the willingness of family, friends and bystanders to assist law enforcement in addressing criminal activity.

Here, Petitioner helped law enforcement multiple times over a ten-day period in their search for his own nephew, D.G., the suspect of a serious crime. He repeatedly let police officers into his mother's home, showed them his nephew's room and belongings, and assisted them in their efforts to find D.G. *See* Doc. 86 at 2-5; Doc. 47 at 13, 37, 72. On the last day of their search warrant for Petitioner's nephew, law enforcement decided to call in a firearm to teletype that was not connected to the crime they were investigating and showed no other signs of illegality. Doc. 47 at 24-46; 47-66; Doc. 106. Regardless of law enforcement's intention when calling into teletype the serial number of this unrelated firearm in the Residence, this continued search caused Petitioner to get nervous and make statements that he would never have otherwise made about having been to jail. Subsequently, even though Petitioner had been repeatedly helpful to the police in their search for his nephew, never showing a single sign of resistance, they learned of his criminal history and arrested him under the theory of constructive possession for being a felon in possession

of a firearm. Because he was sentenced under the ACCA, Petitioner will be serving 180 months in federal prison, as a direct result of his help to law enforcement in their search for his nephew.

Entering a private residence and searching items found within that residence, even by calling in firearms to check whether or not they are legally owned, constitutes a search from which citizens were meant to be protected. As a result of the lower courts' expansive reading of Fourth Amendment warrant exceptions to cover the search that occurred here, Petitioner will lose fifteen years of his life. On a broader level, the case illustrates the negative impact to communities' interaction with law enforcement when exceptions to the Fourth Amendment are interpreted to engulf the constitutional protection. This case shows a detrimental effect for community police relationships.

The goal of community policing is for law enforcement to foster relationships with a community through interactions with local agencies and members of the public, creating partnerships and strategies for reducing crime and disorder. However, when courts permit the erosion of the Fourth Amendment protection from search and seizure, and exceptions to be read broadly to cover situations where they were not intended, as occurred here, the community police relationship will further suffer. Accordingly, Petitioner asks this Court to grant certiorari and help limit the circumstances in which police can search all firearms found in homes that show no sign of illegality and are unrelated to the purpose of their valid warrants.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender

Aliza Hochman Bloom
Counsel of Record for the Petitioner
Assistant Federal Defender
Federal Defender's Office
400 North Tampa Street
Suite 2700
Tampa, FL 33602
Telephone: (813) 228-2715
E-mail: aliza_bloom@fd.org

Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10590
Non-Argument Calendar

D.C. Docket No. 8:17-cr-00041-CEH-TGW-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL R. KENDRICKS,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(December 13, 2018)

Before MARCUS, WILLIAM PRYOR, and NEWSOM, Circuit Judges.

PER CURIAM:

Daniel Kendricks appeals his conviction for being a felon in possession of a firearm and ammunition, as well as his 180-month sentence. On appeal, he argues that: (1) the district court erred by denying his motion to suppress; (2) the district

court erred in holding that his prior convictions under Florida's aggravated assault and aggravated battery statutes qualified as "violent felonies" under the Armed Career Criminal Act ("ACCA"); (3) his sentence violates the Fifth and Sixth Amendments because his prior convictions were not charged in the indictment or proven beyond a reasonable doubt; and (4) 18 U.S.C. § 922(g)(1) is facially unconstitutional. After thorough review, we affirm.

We review a district court's denial of a motion to suppress under a mixed standard of review, reviewing findings of fact for clear error and legal conclusions de novo. United States v. Pierre, 825 F.3d 1183, 1191 (11th Cir. 2016). For clear error to exist, we "must be left with a definite and firm conviction that a mistake has been committed." Id. (quotation omitted). Substantial deference is given to a district court's credibility determinations. United States v. McPhee, 336 F.3d 1269, 1275 (11th Cir. 2003). The facts are construed in the light most favorable to the prevailing party. United States v. Newsome, 475 F.3d 1221, 1223-24 (11th Cir. 2007). Whether probable cause exists is a legal question we review de novo. United States v. Franklin, 694 F.3d 1, 7 (11th Cir. 2012).

Similarly, we review de novo whether a prior conviction is a violent felony within the meaning of the ACCA. United States v. Howard, 742 F.3d 1334, 1341 (11th Cir. 2014). We also review de novo challenges to the constitutionality of a defendant's sentence. United States v. Ghertler, 605 F.3d 1256, 1268 (11th Cir.

2010). However, constitutional challenges raised for the first time on appeal are reviewed only for plain error. United States v. Candelario, 240 F.3d 1300, 1306 (11th Cir. 2001). To establish plain error, a defendant must show (1) an error, (2) that is plain, and (3) that affected his substantial rights. United States v. Turner, 474 F.3d 1265, 1276 (11th Cir. 2007). If the defendant satisfies these conditions, we may exercise our discretion to recognize the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id. Under the prior panel precedent rule, we are bound by prior published decisions that have not been overruled by the Supreme Court or us sitting en banc. United States v. Romo-Villalobos, 674 F.3d 1246, 1251 (11th Cir. 2012).

First, we are unpersuaded by Kendricks' claim that the district court erred in denying his motion to suppress. The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). A "seizure" occurs when an individual's possessory interest in certain property is meaningfully interfered with. Id. The Supreme Court has emphasized that the touchstone of the Fourth Amendment is reasonableness, "measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39 (1996).

A warrantless search or seizure is presumptively unreasonable, unless an exception to the warrant requirement applies. United States v. Berrong, 712 F.2d 1370, 1372 (11th Cir. 1983). Under the exigent-circumstances exception, the warrantless seizure of a firearm has been deemed reasonable where there is a real concern for the officers' safety. Newsome, 475 F.3d at 1226.

Under the plain-view doctrine, an object may be seized without a warrant if (1) an officer is lawfully located in a place from which the object can be plainly viewed, (2) the officer has a lawful right to access the object, and (3) the object's incriminating nature is immediately apparent. United States v. Folk, 754 F.3d 905, 911 (11th Cir. 2014). An object's incriminating character is immediately apparent when police have probable cause to believe the object in plain view is contraband or evidence of a crime. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993). Probable cause exists if, based on the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir. 1991) (en banc) (quotation omitted).

The Supreme Court has said that inspecting an object in plain view and recording its serial number does not constitute a "search" or "seizure." Arizona v. Hicks, 480 U.S. 321, 324 (1987). In Hicks, officers entered the defendant's apartment without a warrant after a bullet was fired through his floor and injured

someone to search for the shooter, other victims, and weapons. Id. at 323. During the search, they came across stereo equipment that they suspected was stolen, recorded their serial numbers, and, in doing so, moved some of the components. Id. Based on the serial numbers, they later discovered that the equipment was stolen. Id. The Supreme Court held that inspecting parts of the equipment that came into view during the lawful search was not a separate search because it would have produced no additional invasion of the defendant's privacy interests. Id. at 324-25. However, the Court added that "taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion" of the defendant's privacy that were not justified by exigent circumstances. Id. at 325.

Here, Kendrick argues that the district court erred in denying his motion to suppress a firearm seized during the execution of an arrest warrant. We disagree. The incident began when officers arrived at a residence with a warrant looking for a shooting suspect, met Kendricks (who was not the suspect), and walked into the garage on Kendricks's suggestion. In the garage, Detective Cappiello, not knowing if the suspect was in there, saw a gun on a table, seized it, and disarmed it by removing the magazine and a live round from the gun's chamber. At the time of the seizure of the gun, Kendricks was standing unsecured between Cappiello and another officer. Even after unloading the gun, Detective Cappiello believed it

could still be a threat, and held onto it for a few minutes. While Cappiello was unloading the gun, its serial number was exposed to view, and he called into the police system to determine whether the gun had been stolen. At the same time he began the call -- either just before or just after the start of the call -- Kendricks engaged in a conversation with the detective and told him he had been to prison.

On this record, Kendricks's proximity to the firearm after it was disassembled raised safety concerns justifying its continued seizure. Kendricks does not dispute the district court's determination that exigent circumstances existed when Detective Cappiello found the firearm -- police were still searching for the suspect and Kendricks was unsecured in the garage -- making the initial seizure and disassembly of the firearm lawful. These safety concerns did not dissipate after disassembly of the firearm because, even if Kendricks had moved toward a door of the garage, he was still considered in close proximity to the detective and the firearm. See Newsome, 475 F.3d at 1224. Thus, the district court did not err in holding that Cappiello's continued possession of the firearm after disassembly was justified by exigent circumstances. See id. at 1226.

Moreover, because the detective's possession of the firearm was lawful, his subsequent inquiry into its serial number was not a "search" under the Fourth Amendment. As in Hicks, the detective came across a firearm while conducting a lawful search of Kendricks's garage. See 480 U.S. at 323-25. However, unlike in

Hicks, Detective Cappiello did not take any unauthorized action that brought into view any concealed portion of the firearm, since, as we've already explained, the seizure was authorized. See id. at 325. As a result, Cappiello's subsequent call to run the serial number did not result in any additional invasion into Kendricks' privacy interests and was not an independent search. See id.

Finally, the ultimate seizure of the firearm was lawful under the plain-view doctrine. As for the first two prongs of the test, Kendricks concedes that Cappiello was lawfully present in the garage and the firearm was in plain view and, as we've held, Cappiello had a lawful right to access the firearm. See Folk, 754 F.3d at 911. As for the third prong -- that the firearm's incriminating nature was immediately apparent -- Cappiello was in lawful possession of the firearm when Kendricks informed Cappiello that he had been to prison, giving Cappiello probable cause to believe that the firearm was evidence of a crime, like felon-in-possession. See Minnesota, 508 U.S. at 375. We add that the district court did not clearly err in finding credible Cappiello's testimony about Kendricks' disclosure of his criminal history or his testimony in general. Even if the detective's testimony slightly varied at the two suppression hearings about whether Kendricks disclosed his criminal history before or during the call about the firearm, it was not materially so inconsistent as to undermine the detective's credibility. See McPhee, 336 F.3d at 1275. The district court did not err in denying the motion to suppress.

We also find no merit to Kendricks' claim that his prior convictions under Florida's aggravated assault and aggravated battery statutes do not qualify as "violent felonies" under the ACCA. The ACCA imposes heightened prison sentences for certain defendants with three prior convictions for either violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes" and, finally, the third prong contains what is commonly called the "residual clause." United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012). To determine whether a prior conviction qualifies under the elements clause, we employ a "categorical approach." United States v. Davis, 875 F.3d 592, 597 (11th Cir. 2017). If the statute necessarily requires the government to prove as an element of the offense the use, attempted use, or threatened use of physical force, then the offense categorically qualifies as a violent felony. Id.

When a statute lists multiple alternative elements, rather than different means, by which it may be violated, the statute is divisible and the modified categorical approach is applied. Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). Applying the modified categorical approach, the sentencing court may look to certain "Shepard documents" -- including a defendant's charging documents -- to determine which divisible subsection of the statute of conviction was applied to the defendant. Id.; Shepard v. United States, 544 U.S. 13, 16 (2005). The court will then compare the subsection the defendant was convicted under using the categorical approach to determine if it is a categorical match. Mathis, 136 S. Ct. at 2249; Descamps v. United States, 570 U.S. 254, 257 (2013).

Florida's aggravated assault statute provides that an aggravated assault is an assault "[w]ith a deadly weapon without intent to kill" or "[w]ith an intent to commit a felony." Fla. Stat. § 784.021(1)(a)-(b). Florida's simple assault statute defines an assault as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Fla. Stat. § 784.011(1).

Florida's aggravated battery statute provides that a person commits an aggravated battery when, in committing a battery, he: (1) intentionally or knowingly causes great bodily harm, permanent disability, or permanent

disfigurement; (2) uses a deadly weapon; or (3) caused a battery upon a pregnant woman and he knew or should have known that the victim was pregnant. Fla. Stat. § 784.045(1)(a)-(b). A battery is committed where the person "[a]ctually and intentionally touches or strikes another person against the will of the other" or "[i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a).

In Turner v. Warden Coleman FCI (Medium), we held that a prior conviction for aggravated assault under Fla. Stat. § 784.021 and an aggravated battery under § 784.045 both qualified as violent felonies under the ACCA. 709 F.3d 1328, 1338, 1341 (11th Cir. 2013), abrogated on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015).[1] There, the defendant was convicted of aggravated assault for firing shots at a man standing outside his home and aggravated battery for stabbing a man in the chest. Id. at 1331. As for the former, we said that an aggravated assault conviction would always include the use of physical force against the person of another, thus categorically qualifying as an ACCA predicate violent felony. Id. at 1338. As for the latter, we employed the modified categorical approach and, looking to the facts underlying the conviction, determined that, because the victim was male, we could rule out that the third

[1] In United States v. Hill, 799 F.3d 1318, 1321 n.1 (11th Cir. 2015), a panel of this Court noted that it was no longer bound by its determination in Turner that battery on a law enforcement officer was a violent felony under the residual clause after Johnson. Hill, 799 F.3d at 1321 n.1. However, Johnson did not undermine the portion of Turner that relied on the elements clause to determine that aggravated assault and aggravated battery qualify as violent felonies. See Johnson, 135 S. Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.").

prong of the aggravated battery statute was the basis for his conviction. Id. at 1341. We then held that an aggravated battery conviction for either intentionally causing great bodily harm or using a deadly weapon categorically qualified as predicate ACCA violent felonies because they had as an element the use, attempted use, or threatened use of physical force. Id.

Here, the district court did not err in determining that Kendricks's aggravated assault and aggravated battery convictions qualified as ACCA predicate violent felonies. First, Kendricks' argument that Fla. Stat. § 784.021 is not a predicate violent felony is foreclosed by our holding in Turner, 709 F.3d at 1338. While Kendricks argues that Turner was wrongly decided, our decision remains binding unless and until it is overruled by this Court en banc or the Supreme Court. See Romo-Villalobos, 674 F.3d at 1251.

As for Kendricks' aggravated battery conviction under Fla. Stat. § 784.045, we look to underlying facts of the conviction to determine under which subsection of the statute he was convicted, as we did in Turner. The charging information indicates that, in committing the aggravated battery, Kendricks intentionally or knowingly caused great bodily harm, permanent disability, or permanent disfigurement, which mirrors the language of aggravated battery under prong one of the statute. Fla. Stat. § 784.045(1)(a)(1). This means that Kendricks was not convicted for battery upon a pregnant woman. See Mathis, 136 S. Ct. at 2249;

Shepard, 544 U.S. at 16. It also means that, under Turner, Kendricks' aggravated battery conviction could not be construed as being committed by a mere touching. See Turner, 709 F.3d at 1341. Thus, Kendricks' aggravated battery conviction falls under prong one of the Florida statute, and constitutes an ACCA predicate violent felony. See id. Because Kendricks has the requisite three convictions -- for aggravated assault, aggravated battery, and sale of cocaine (which he does not challenge here) -- that qualify as predicate violent felonies or serious drug offenses under the ACCA, we need not address Kendricks's challenges to his aggravated-battery-without-a-firearm convictions. See 18 U.S.C. § 924(e)(1).

Next, we reject Kendricks' argument that his sentence violates the Fifth and Sixth Amendments because his prior convictions were not charged in the indictment or proven beyond a reasonable doubt. In Almendarez-Torres v. United States, 523 U.S. 224 (1998), the Supreme Court determined that prior convictions need not be alleged in the indictment or proven to a jury beyond a reasonable doubt. Id. at 239-47. Kendricks' Fifth and Sixth Amendment challenge to his sentence is, therefore, foreclosed by binding Supreme Court precedent.

Similarly, we find no merit to Kendricks' claim that 18 U.S.C. § 922(g)(1) is facially unconstitutional because it exceeds Congress's authority under the Commerce Clause. We've previously held that § 922(g)(1) is constitutional and does not violate the Commerce Clause. United States v. McAllister, 77 F.3d 387,

389 (11th Cir. 1996). Accordingly, Kendricks' challenge to the constitutionality of § 922(g)(1) is foreclosed by our binding precedent.

AFFIRMED.

Appendix B

2017 WL 3877645
United States District Court, M.D. Florida,
Tampa Division.

UNITED STATES of America
v.
Daniel R. KENDRICKS

Case No.: 8:17-cr-41-T-36TGW
|
Signed 09/05/2017

Attorneys and Law Firms

Callan Albritton, US Attorney's Office, Tampa, FL, for United States of America.

ORDER

Charlene Edwards Honeywell, United States District Judge

***1** This matter comes before the Court upon Defendant Daniel Kendricks' Motion to Suppress Fruits of Illegal Search of Home and Request for Evidentiary Hearing (Doc. 16), Kendricks' Memorandum of Law in Support of Motion to Suppress Fruits of Illegal Search of Home (Doc. 49), and Kendricks' Motion to Supplement the Record or in the Alternative Grant the Motion to Suppress due to a Giglio Violation (Doc. 55). The Government responded in opposition to both motions and the memorandum of law. Docs. 24, 54, 57. An evidentiary hearing was held on June 6, 2017, and continued on July 26, 2017. During the hearing on June 6, 2017, Detective Jeffrey Bliss, Deputy Sean Cappiello, and Deputy Timothy Eason testified on behalf of the Government, and Emma Kendricks testified on behalf of Kendricks. Doc. 47. During the July 26, 2017 hearing, Kendricks conducted a supplemental cross-examination of Cappiello. [1] The Court, having considered the motions and being fully advised in the premises, will deny Kendricks' motion to suppress and motion to supplement.

I. BACKGROUND AND FACTS [2]

In October 2016, the Manatee County Sheriff's Office was investigating an individual referred to as D.G. for homicide based on reports that he was seen walking with the homicide victim just prior to the victim being shot and killed. Tr. 7:1-23. Two days after the homicide, Detective Jeffrey Bliss spoke with D.G. at Palmetto High School, and D.G. indicated that he lived at 1904 2nd Avenue West, Palmetto, Florida (the "residence"), which was owned by D.G.'s grandmother, Emma Kendricks. Tr. 8:2-11, 12:18-19, 23:18-20. Based on the facts learned during his investigation, Bliss authored and obtained an arrest warrant for D.G. for the crime of second degree murder, which listed his address as the residence. Tr. 10:1-6, 11:22, 12:6-7; Gov't Ex. 1. Bliss also authored and obtained a ten-day search warrant for the residence, which expired on October 16, 2016. Tr. 10:1-6, 23:21-23.

The residence is a three bedroom, two bathroom home with a one car garage. Tr. 19:15-17. At the front of the home is a gated chain-link fence. Gov't Ex. 2-3. The gate opens to a driveway leading to the garage. Gov't Ex. 3. Connected to the left of the driveway is a sidewalk that leads to a patio area and the residence's front door. *Id.* To the right of the garage is additional driveway and parking space. *Id.* The front door opens to a living area, which has a doorway to the garage. Tr. 36:7-9, 13-16. Upon entering the garage from the residence, there is one couch facing the garage door, and another couch positioned against the wall, perpendicular to the first, so that the couches form a backwards L when facing the garage door. Def. Ex. 1. There is some space between where the couches would otherwise meet, and additional space between the second couch and the garage door. *Id.* These spaces cannot be clearly viewed from the doorway into the residence. Def. Ex. 2. In the middle of the garage, there is a glass table. Def. Ex. 1-3.

***2** Bliss, together with a team of detectives, went to the residence the day the warrants were obtained, October 6, 2016, at which time Emma Kendricks, Kendricks, and Louis Davis, a family friend, were present. Tr. 12:13-21, 18:13-16. D.G. was not present, and had not been to the residence for a day or two, but Emma Kendricks confirmed that D.G. resided there. Tr. 18:3-8. Bliss read the search warrant to the occupants and the detectives searched the residence. Tr. 13:7-10. Kendricks and Emma Kendricks directed Bliss to a box of D.G.'s personal items on the floor of the main living room, and Bliss was told that D.G. slept on the couch of the living room. Tr. 13:11-18.

Bliss continued to search for D.G. after the search warrant was executed. Tr. 13:20-16:14. He received various tips, including that D.G. remained in the area and was receiving assistance from family. Tr. 16:1-10. Based on these reports, on the evening of October 16, 2016, Bliss asked Detective Sean Cappiello, who worked in the warrants unit, to search for D.G. at the residence. Tr. 16:3-20, 25:15-17.

Cappiello arrived at the residence around 5:30 or 5:45 on the morning of October 17, 2016, accompanied by Deputy Timothy Eason, Cappiello's partner in the warrants unit, and Canine Deputy Jared Wolfe. Tr:28:6-10, 30:7-16. When the officers arrived at the residence, the gate to the driveway was open. Tr. 31:9-11. Cappiello walked to the front door, while Eason waited at the garage door, and Wolfe went around the right side to the back of the residence. Tr. 33:5-9, 34:12-20, 35:2-9. Cappiello knocked on the door and, eventually, Davis answered. Tr. 35:14-20. Cappiello explained that he had an arrest warrant for D.G. and that the officers were there to look for him. Tr. 35:24-36:2. Davis responded that he did not believe D.G. was inside the residence, but advised that the officers could enter the residence. Tr. 36:4-6.

Cappiello and Eason entered the residence, and Davis knocked on the door leading into the garage. Kendricks, who had been laying on one of the couches in the garage, opened the door. Tr. 36:7-21. Cappiello explained again that he was there to execute the warrant for D.G., and, although Kendricks did not believe D.G. was there, he told the officers they could look for D.G. Tr. 37:3-6. The officers searched the entire residence, except the garage, and Cappiello asked Kendricks where D.G. would be if he was there. Tr. 37:8-17. Kendricks responded that D.G. would be in the garage. Tr. 37:17-18.

Cappiello entered the garage, followed by Kendricks, then Eason. Tr. 38:10-14. After Cappiello walked around the couch facing the garage door, he saw a firearm on the glass table. Tr. 38:16-39:1. Cappiello advised Eason of the gun's presence, and Eason immediately turned and observed the firearm on the table. Tr. 70:23-71:6. Although other items were on the glass table, none obscured Cappiello's or Eason's view of the firearm, and Cappiello did not move any objects in order to see the firearm. Tr. 39:3-12, 71:4-89. Cappiello seized the firearm and disarmed it to make it safe. Tr. 40:21-25.

At the time of the seizure, Kendricks was unsecured and standing between the officers. He sought to sit on the couch, or go outside to smoke a cigarette, but Cappiello directed that Kendricks should remain in the garage because of Wolfe's presence with the canine outside. Cappiello called teletype to determine whether the firearm was stolen, and Kendricks asked Cappiello what he was doing. Cappiello responded that he was calling in the gun, and Kendricks inquired whether he was going to prison. Cappiello responded that Kendricks would not, as long as he was not a convicted felon, and Kendricks responded that he had been to prison. After this statement was made, teletype confirmed that Kendricks was a convicted felon. Subsequently, the officers learned that the firearm was stolen.

II. DISCUSSION

*3 The Fourth Amendment guarantees "[t]he right of the people ... against unreasonable searches and seizures" in the absence of a warrant based on probable cause "supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.' " *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L.Ed. 2d 495 (2013) (quoting *United States v. Jones*, 565 U.S. 400, 406 n.3, 132 S. Ct. 945, 950-51 n.3, 181 L.Ed. 2d 911 (2012)) (internal citation omitted). To deter lawless police conduct, evidence seized in violation of the Fourth Amendment must be excluded. *See Terry v. Ohio*, 392 U.S. 1, 12 (1968). A warrantless search is *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quotation marks and citation omitted).

A. Supplementing the Record with the Assistant United States Attorney's Notes

"Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." Fed. R. Evid. 613(b). "In order to introduce a prior inconsistent statement, 'the court must be persuaded that the statements are indeed inconsistent.' " *United States v.*

Simpkins, 240 Fed.Appx. 334, 342 (11th Cir. 2007) (quoting *United States v. Hale*, 442 U.S. 171, 176, 95 S. Ct. 2133, 45 L.Ed. 2d 99 (1975)); *see also United States v. Jones*, 913 F.2d 1552, 1564-65 (11th Cir. 1990) (holding that the district court did not abuse its discretion in prohibiting impeachment of a witness with prior deposition testimony because the deposition testimony was not inconsistent with the trial testimony and "[e]xclusion of prior consistent testimony is proper under Fed. R. Evid. 613."). Additionally, "a witness may not be impeached with a third party's characterization or interpretation of a prior oral statement unless the witness has subscribed to or otherwise adopted the statement as his own." *United States v. Saget*, 991 F.2d 702, 710 (11th Cir. 1993); *see also United States v. Carter*, 776 F.3d 1309, 1328-29 (11th Cir. 2015).

Indeed, courts have previously declined to allow witnesses to be impeached by an attorney's interview notes. In *United States v. Almonte*, 956 F.2d 27, 28 (2d Cir. 1992), an attorney took notes of interviews with Drug Enforcement Agency ("DEA") agents, and the defense sought to discredit the agents during trial by introducing the Assistant United States Attorney's ("AUSA") notes. The Government objected to use of the notes because they were not a verbatim transcript, but instead a shorthand summary of the statements. *Id.* at 29. The appellate court affirmed the district court's conclusion that the notes could not be attributed to the witnesses. *Id.* at 30.

Here, following the first hearing, the AUSA disclosed to Kendricks notes of the AUSA's interview with Cappiello because of potential discrepancies with the testimony during the first hearing. During the first hearing, Cappiello testified that "well, we had a conversation, myself and Mr. Kendricks, because he asked if he was going to get arrested and I told him if he was a convicted felon, he told me, yes, I went to prison so there right then is when I made the decision to call to confirm that." Tr. 56:1-6. Cappiello further testified that Kendricks "told [Cappiello] at first—he asked if he was going to go to jail, and [Cappiello] said, well, if you're a convicted felon, yeah, you were lying right next to [the firearm]..... [A]nd then [Kendricks] said, well, I've been to prison. That's when [Cappiello] called Teletype." Tr. 57:10-16. The AUSA's notes contain the following bullet points:

*4 • Goes in [to the garage] and makes it [the firearm] safe

• Kendricks sat down where he was laying down and went to smoke a cig[arette]

• Trying to go outside to ... smoke

• Don't do it b/c Wolfe is out there w/the dog

• Called in to make sure he's a felon from the garage 10-15 mins

• What are you doing? What's going on

• Making sure you're not a felon

• He says ... just got out of prison

• While he was on phone, got word back. Just got the felon status back. Told [Cappiello] he had 18 [felonies]

• Immediately arrest him

* * *

• Take him out and put him in the car and lady [Emma Kendricks] shows up

* * *

• Runs the gun, comes back stolen. Wolfe or Eason, are [illegible] says to Kendricks that the gun is stolen

Doc. 55 p. 22-24. At the July 26th hearing conducted following the notes' disclosure, Cappiello testified that he was calling teletype to determine whether the firearm was stolen and, at the same time, Kendricks asked whether he was going to jail. Thus, at the second hearing, Cappiello testified that Kendricks revealed his prior incarceration after the call to teletype had been initiated. Kendricks did not attempt to impeach Cappiello during the second hearing with the AUSA's notes.

The Court finds that Cappiello's testimony at both hearings is consistent with the information contained in the AUSA's notes. The testimony and notes both suggest that Kendricks' statement that he previously had been to prison occurred either contemporaneously with, or immediately following the initiation of the telephone call to teletype. Indeed, the notes are vague as to the chronology, and it appears that although the telephone call may have lasted 10-15 minutes, Kendricks' question occurred early in this time period. This is also consistent

with the report Cappiello authored following the arrest, which states that the call to teletype confirmed Kendricks' status as a convicted felon. Any minute difference as to the timing does not present any inconsistency, and does not alter the analysis of whether the initial and continued seizure of the firearm was permissible under the Fourth Amendment. Accordingly, the notes are not proper impeachment material on this issue.

Kendricks also seeks to undermine Cappiello's testimony based on several other purported inconsistencies. First, during the June 6th hearing, Cappiello testified that he "assumed" Wolfe was outside while Cappiello and Eason were in the garage. In the AUSA's notes, it states that after Cappiello made the firearm safe, Kendricks sat on a couch to smoke a cigarette, and was trying to go outside to smoke, but Cappiello stated not to because Wolfe was outside with the canine. Doc. 55 p. 22. There is no inconsistency between these statements. Cappiello last saw Wolfe outside, and assumed he remained there. Indeed, during the first hearing, Cappiello later affirmatively testified that Wolfe was outside. Tr. 56:7-8. Cappiello's prior testimony that this was an assumption is not inconsistent with the AUSA's notes that Wolfe was outside.

Kendricks further argues that Cappiello's testimony that he "d[id]n't think" he would have told Wolfe to stop Kendricks if he left is inconsistent with the notes' statement that Cappiello told Kendricks not to go outside because Wolfe was outside with the canine. Tr. 57:2-5; Doc. 55 p. 30. These statements, too, are not inconsistent. During the testimony, Cappiello testified as to whether he would provide an instruction to Wolfe, whereas the notes record what Cappiello instructed Kendricks to do—or not do—for his safety. Indeed, during the second hearing, Cappiello clarified that his instruction to Kendricks not to go outside was based on the fact that he did not want Kendricks to be bitten by the canine.

***5** Kendricks also claims that the notes are inconsistent with Cappiello's testimony that "[t]he first thing [he] saw was the gun" after walking into the garage and, after making the firearm safe, he "held it for a minute or two" or "for a few minutes," and then "might have put it down on the table" when he made the call to teletype. Tr. 51:25; 53:14-18. It is not clear what in the notes Kendricks alleges to be inconsistent, but he characterizes the notes as stating that while Kendricks was sitting and smoking the cigarette, Cappiello calls in to determine whether Kendricks is a felon, and the call takes ten to fifteen minutes. Doc. 55 p. 6. Nothing in Cappiello's testimony pertains to Kendricks' location or activities when the call is initiated, or the duration of the telephone call. Accordingly, there is no inconsistency.

Kendricks additionally takes issue with Cappiello's testimony that after making the firearm safe, he followed the normal practice of running the serial number of the firearm by calling teletype, who "confirmed that it was stolen," and running Cappiello's criminal history. Tr. 40:21-41:4. Cappiello later testified that he stayed in the garage while he called teletype. Tr. 54:10. In the notes, it states that the officers do not learn that the firearm is stolen until they are outside standing at the police vehicle. Doc. 55 p. 24. Again, there is no inconsistency between the notes and the testimony. The notes provide only the time when teletype learned and advised the officers that the firearm was stolen, whereas the testimony reflects that at some point after Cappiello called teletype from the garage, teletype confirmed the firearm was stolen. Indeed, Cappiello stated during his testimony that the common procedure is to take a firearm to the police vehicle to make sure that it is not stolen. Tr. 76:9-11. Moreover, upon being questioned more specifically during the second hearing, Cappiello testified that while in the garage, the decision to run the firearm's serial number and Kendricks' criminal history occurred at the same time, because as he was calling in the serial number, Kendricks revealed that he had previously been incarcerated. While Kendricks, Cappiello, and Eason remained in the garage, teletype confirmed Kendricks' status as a convicted felon, and the telephone call was ended. After Kendricks was arrested and the group relocated outside, teletype called the officers back to confirm that the firearm was stolen. Accordingly, Cappiello's testimony is entirely consistent with the notes.

Further, Kendricks asserts that Cappiello's testimony that (1) Davis told the officers they could enter the residence and look for D.G., Tr. 44:3-9; and (2) Kendricks advised that D.G. would be in the garage if D.G. were present, Tr. 37:16-18, are inconsistent with the notes. However, the notes state on the first page, without identifying the speaker, that the following exchange occurred: "Hey we're here to see if [D.G.] is here," with the response, "I don't know if he's here, come in & look." Doc. 55 p. 21. Thus, as to the first point, Kendricks is incorrect. Also, although the notes also state "Louis Davis says he sleep[s] in the

garage," on the following page there is also a notation of "Garage b/c [D.G] sleeps there." *Id.* p. 21-22. The notes further indicate that Kendricks led the officers through the house, and was, therefore, present throughout the search, making it entirely reasonable that both Davis and Kendricks provided information as to where Kendricks slept. Moreover, Kendricks did not question Cappiello regarding any purported discrepancy during the second hearing. Accordingly, there is no inconsistency between the notes and Cappiello's testimony on these points.

Kendricks also contends there is an inconsistency between the testimony and the notes regarding whether Cappiello spoke with Emma Kendricks when he entered the house. In the testimony, Cappiello testified that Davis and Emma Kendricks were in the living room, and that he did not speak to Emma Kendricks. Tr. 45:6-12. In the notes, it states that Cappiello spoke with Emma Kendricks outside, after Kendricks' arrest. Doc. 55 p. 24. These statements are not inconsistent. Instead, Cappiello's testimony clearly pertained to whether he spoke with Emma Kendricks upon entering the house, and was not related to whether Cappiello had ever, at any point, spoken to Emma Kendricks. Additionally, Kendricks did not inquire as to any purported discrepancy between Cappiello's testimony and the notes during the second hearing.

***6** Finally, Kendricks asserts that an inconsistency exists regarding where Kendricks was located at the time of the firearm's seizure, as well as the time immediately following the seizure. During the first hearing, when asked where Eason was the "whole time," Cappiello responded that Eason was "[r]ight next to Mr. Kendricks, I guess you could call it, the left corner of the—when you walk in to the left and the corner." Tr. 59:7-10. In the notes, it states that Kendricks sat on the couch after the firearm was seized. Doc. 55 p. 22. Cappiello's testimony is not inconsistent with the notes. During the hearing, Cappiello had not clearly testified as to where Kendricks was during the search of the garage and seizure of the firearm, except to state that when Cappiello first saw the firearm, Kendricks was behind Cappiello. Tr. 52:22-24. Cappiello was not asked, and did not offer, any explanation as to whether Kendricks moved around in the garage after that point. The question directed to where Eason was the "whole time" does not shed light on whether Kendricks was standing in the same place for the duration of the events in the garage. Moreover, during the second evidentiary hearing, Cappiello explained that Kendricks did at one point sit on the couch, but stood up because Cappiello requested he move further away from the firearm, and because Kendricks began smoking the cigarette. After being told that he should not go outside because of the presence of the canine, Kendricks stood near Eason. Accordingly, there is no inconsistency. Instead, the notes simply lack detail regarding Kendricks' movements during the events.

The issues presented in this case are whether the approach and search of the residence, and whether the initial and continued seizure of the firearm conformed to the Fourth Amendment. Cappiello's testimony on these points is entirely consistent with what is contained in the AUSA's notes. Kendricks attempts to impeach Cappiello by alleging ambiguities in the testimony and notes on entirely collateral matters. However, when asked more specifically regarding these matters, Cappiello's testimony proved to be consistent. Because no inconsistencies exist, there is no basis to supplement the record with the AUSA's notes. Moreover, because the notes are no more than the AUSA's shorthand summary, they may not be used as impeachment evidence against Cappiello. *Carter*, 776 F.3d 1309, 1328-29.

B. Recusal of the United States Attorney's Office for the Middle District of Florida

A substantial burden is placed on defendants seeking recusal or disqualification of an entire United States Attorney's office "because of serious separation of powers implications and broad concerns about the efficient administration of justice." *United States v. Goff*, No. 2:07cr322-MHT, 2009 WL 223369, at *2 (N.D. Ala. Jan .29, 2009) (citing *United States v. Bolden*, 353 F.3d 870, 875-76 (10th Cir. 2003) (remarking that "we can only rarely—if ever—imagine a scenario in which a district court could properly disqualify an entire United States Attorney's office" and "disqualifying an entire United States Attorney's office is almost always reversible error")). To be allowed to call a prosecutor as a witness, a defendant ordinarily must show a compelling need, or that the testimony is vital to the defense and cannot be obtained from any other source. 110 A.L.R. Fed. 523, § 2 (1992) (citing *United States v. La Rouche Campaign*, 695 F. Supp. 1292 (D. Mass. 1988); *United States v. Troutman*, 814 F.2d 1428 (10th Cir. 1987); *United States v. Perlmutter*, 637 F. Supp. 1134 (S.D.N.Y. 1986)).

Kendricks requested that in the event the suppression hearing was reopened to allow him to continue his cross-examination of Cappiello, the United States Attorney's Office for the Middle District of Florida be recused pursuant to Rule 4-3.7 of the Rules Regulating the Florida Bar, which states:

> **(a) When Lawyer May Testify.** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (4) disqualification of the lawyer would work substantial hardship on the client.
>
> **(b) Other Members of Law Firm as Witnesses.** A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 4-1.7 or 4-1.9 [governing conflicts of interest with current or former clients].

*7 This rule is in place because "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." Rule Regulating Fla. Bar 4-.37 cmt. Additionally, "[t]he trier of fact may be confused or misled by a lawyer serving as both advocate and witness." *Id.*

Kendricks, without explanation, states that re-opening the suppression hearing renders the AUSA a witness and implicates Kendricks' right to confront and impeach witnesses. Notably, Kendricks proceeded with the continuation of the suppression hearing without raising this point or seeking to call the AUSA as a witness. The AUSA's notes, which are not inconsistent with Cappiello's testimony, are not proper impeachment evidence, and no need exists for the AUSA to be called as a witness to testify as to inconsistencies between the notes and Cappiello's testimony. Moreover, Kendricks may not use the notes for the truth of the matter asserted, because they are hearsay. Fed. R. Evid. 801-802. Therefore, Kendricks has not shown that he has a reason to call the AUSA as a witness, and certainly has not shown a compelling need or that such testimony is necessary to a defense theory.

C. The Search of the Residence

Here, the United States justifies the search of the residence on two bases: (1) the arrest warrant for D.G., and (2) consent. The interaction began when the officers approached the residence through the open gate. Police officers—even when not armed with a warrant—"may approach a home and knock, precisely because that is 'no more than any private citizen might do.' " *Jardines*, 133 S. Ct. at 1416 (quoting *Kentucky v. King*, 563 U.S. 452, 469, 131 S. Ct. 1849, 1862, 179 L.Ed. 2d 865 (2011)). Accordingly, Cappiello's and Eason's initial approach of the residence did not constitute an illegal search.

1. Arrest Warrant

The officers were then permitted to enter the house on the basis of the arrest warrant. "[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *U.S. v. Bervaldi*, 226 F.3d 1256, 1263 (11th Cir. 2000) (quoting *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 1388, 63 L.Ed. 2d 639 (1980)). "[F]or law enforcement officials to enter a residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry." *Id.* (quoting *United States v. Magluta*, 443 F.3d 1530, 1536 (11th Cir. 1995)).

Although Kendricks makes general assertions that D.G. "had not lived in nor been present in the residence for some time," Doc. 16 p. 2, Kendricks presents no argument that the officers did not have a reasonable belief that the residence was D.G.'s dwelling or that he was inside. Indeed, D.G. informed law enforcement that he lived at the residence, and when law enforcement executed the search warrant, D.G.'s personal items were at the residence, and law enforcement was informed that D.G.

slept on the couch in the residence's living room. Tr. 8:3-8, 13:11-18. Based on this, the officers had a reasonable belief that the residence was D.G.'s dwelling.

***8** The officers also had a reasonable belief that D.G. would be present at the house. In the absence of evidence to the contrary, it is reasonable to believe that a person will be home at certain times of the day, such as at 6 a.m. *Bervaldi*, 226 F.3d at 1256. The officers here arrived around 5:30 or 5:45 in the morning. Additionally, after initially failing to locate D.G. at the residence, Bliss followed up on reports that D.G. may have fled to Indiana or Texas, but D.G. could not be found at these other locations. Tr. 13:20-15:5. More reports were received that D.G. had not fled, but was receiving assistance from family. Tr. 16:1-10. Based on this, the officers could reasonably believe that D.G. was in the residence, where family lived.

Once permissibly within the residence pursuant to an arrest warrant—as the officers were here—law enforcement may search for an arrestee anywhere in the house where he or she may be found. *Maryland v. Buie*, 494 U.S. 325, 330 110 S. Ct. 1093, 1096, 108 L.Ed. 2d 276 (1990) (stating that "[i]t is not disputed that until the point of [the defendant's] arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that [the defendant] might have been found...."). Prior to entering the garage, the officers had done no more than glance into the space. Tr. 45:23-25: Given the presence of the couches, it would not be possible to discern whether D.G. was hiding in the garage, rendering Kendricks' argument that the officers "re-entered" the garage after ascertaining that D.G. was not present unfounded. Doc. 16 p.3, 10; Tr. 47:9-16; Def. Ex. 1-2. Accordingly, the officers' search of the garage was permissible pursuant to the arrest warrant.

2. Consent

The officers were additionally entitled to enter the residence on the basis of consent. An individual may give consent to a search, but the search is limited to the scope of the consent given. *United States v. Strickland*, 902 F.2d 937, 941 (11th Cir. 1990). A general consent to search is "constrained by the bounds of reasonableness...." *Id.*; *see also United States v. Street*, 472 F.3d 1298, 1308 (11th Cir. 2006). Here, the officers obtained consent from Davis and Kendricks, and did not exceed the scope of that consent. After answering the door, Davis invited the officers into the residence, and stated they could look for D.G. Tr. 36:4-6, 4:3-6. Kendricks then invited the officers to look for D.G. and, ultimately, directed the officers to the garage. Tr. 37:3-18, 46:20-47:3. Indeed, Kendricks concedes that in the event consent was given, the scope of such consent "was to search for a person within the residence." Doc. 16 p.9. D.G. could have been in the garage, hidden on the floor in front of the couch facing the garage door, or on the opposite side of the couch closest to the garage door. Def. Ex. 1-2. Accordingly, the scope of the consent would extend to entering the garage to look in these places. In doing so, the table where the firearm was located would be within Cappiello's plain view. *Id.*

Kendricks relies on *Jardines* to argue that the simple fact that a canine was brought onto the property rendered the search unconstitutional. In *Jardines*, the police received an unverified tip that marijuana was being grown at the defendant's residence, and subsequently sent a joint surveillance team with the DEA to the defendant's home with a trained canine handler and his drug-sniffing dog. 133 S. Ct. 1413. The handler approached the home, giving the dog as much leeway as possible, and the dog alerted on the front porch of the home, detecting the strongest scent at the base of the front door. *Id.* The handler applied for and received a search warrant on the basis of the dog's alert. *Id.* The subsequent search of the defendant's home revealed marijuana, resulting in the defendant being charged with trafficking in cannabis. *Id.* The defendant moved to suppress the marijuana plants, arguing "that the canine investigation was an unreasonable search." *Id.*

***9** The Supreme Court held that the warrantless canine search in *Jardines* was unreasonable. *Id.* at 1417-18. In reaching this conclusion, the Court recognized that "the home is first among equals" "when it comes to the Fourth Amendment," and that the curtilage—which included the front porch—is part of the home for purposes of the Fourth Amendment. *Id.* at 1414-15. The Court explained that although " a police officer not armed with a warrant may approach a home and knock" in the absence of a warrant, police were not permitted to "introduce[e] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence...." *Id.* at 1416. The fact that "the officers learned what they learned only by physically intruding on [the defendant's] property

to gather evidence [wa]s enough to establish that a search occurred." *Id.* at 1417.

Jardines is plainly inapplicable to whether the seizure of the firearm in this case was permitted under the Fourth Amendment. Although a canine was present both here and in *Jardines*, the similarities end there. The canine in this case was not used to search the property, but was present for apprehension purposes due to the severity of the crime for which D.G. was suspected, and should D.G. have decided to flee. Tr. 30:19-23. Nothing suggests that the canine was present for purposes of gathering evidence, nor that any drug-sniff was conducted, and no evidence was obtained from the canine or Wolfe. Indeed, their presence was entirely inconsequential and extraneous to the events leading to and the discovery of the firearm.

D. The Seizure of the Firearm

Two exceptions to the warrant requirement are relevant to the seizure of the firearm. One exception to the warrant requirement is where the " 'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)). The exigent circumstances exception permits officers to seize a weapon that poses a threat to themselves or the public in the absence of a warrant. *United States v. Newsome*, 457 F.3d 1221 (11th Cir. 2007) (concluding that a gun seized during the arrest of a man who had shot his wife was admissible under the exigent circumstances exception). Accordingly, Cappiello was permitted to seize the firearm and make it safe by disarming it for purposes of officer safety.

An additional relevant exception to the Fourth Amendment's warrant requirement is the "plain-view" doctrine. *Horton v. California*, 496 U.S. 128, 133 (1990). As its name suggests, under this doctrine, where law enforcement has prior justification for an intrusion, and "c[o]me[s] inadvertently across a piece of evidence incriminating the accused," and the evidence's incriminating nature is "immediately apparent," then there is no violation of the Fourth Amendment. *Id.* at 135-36. The Supreme Court has explained that for the plain view doctrine to apply, the item must be in plain view, its incriminating character must be immediately apparent, the officer must be lawfully located in the place from which he observes the evidence, and the officer must have a lawful right of access to the evidence. *Id.* at 136-37. Regarding the requirement that an item's criminal nature be immediately apparent, "[t]his prong 'merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband.' " *United States v. Folk*, 954 F.3d 905, 911 (11th Cir. 2014) (quoting *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 1543, 75 L.Ed. 2d 502 (1983)).

Kendricks contends that (1) the firearm was not in plain view because the table had other items on it, (2) the officers were not lawfully in the garage because the search for D.G. had concluded, and the officers' continued presence and seizure of the firearm to confer with teletype violated the Fourth Amendment, and (3) the incriminating character of the firearm was not immediately apparent because it is not necessarily illegal to possess a firearm, but instead further investigation was required to discover the contraband nature of the firearm. Doc. 49 p. 2-3.

***10** As an initial matter, the firearm was in Cappiello's and Eason's plain view. Both officers testified that nothing on the table obscured their view of the firearm. Kendricks presented the testimony of his mother, Emma Kendricks, to contradict this. Emma Kendricks testified that she was in the garage the evening before the officers searched the residence, the table was messy, and had paper, plates, beer bottles, mail, lunch, cups, and two bottles of whiskey on it, and she did not clean the table until after Kendricks' arrest. Tr. 84:1-16. Additionally, while she was in the garage the evening before, Emma Kendricks did not see the gun. Tr. 85:13-17. She was not, however, in the garage when the officers located the firearm. Tr. 87:16-19. Accordingly, her testimony is not persuasive in contradicting the officers' testimony that the firearm was plainly visible on the table.

With respect to the requirement that the incriminating nature of an item seized under the plain view doctrine be immediately apparent, Kendricks concedes that there are some instances in which firearms meet this requirement. For example, in *Fish v. Brown*, 838 F.3d 1153, 1159-60, 1166 (11th Cir. 2016), before going to the defendant's house, law enforcement was aware that the defendant was the subject of a domestic violence injunction that prohibited possession of firearms. After gaining lawful entry to the house, officers observed a large revolver hanging from its holder from a bedpost. *Id.* The Eleventh Circuit held that seizure of the firearm was lawful

under the plain view doctrine because the officer knew the injunction against defendant prohibited possession of firearms, rendering its illegal character immediately apparent.[3] *Id.* at 1167.

Similarly, in *Folk*, an officer knew that the defendant was a convicted felon based on the officer's prior work investigating a gang of which the defendant was a member. 754 F.3d at 908-09. The officer obtained a search warrant for the defendant's residence based on undercover drug deals the officer had engaged in with another inhabitant of the residence. *Id.* at 909. While executing the warrant, the officer observed two firearms in the defendant's closet and seized the weapons based on his prior knowledge that the defendant was a convicted felon. *Id.* The defendant moved to suppress the weapons, arguing that the warrant did not authorize seizure of weapons, and the government argued that the seizure was permissible under the plain view doctrine. *Id.* at 910. The Eleventh Circuit held that the plain view doctrine applied because the officer lawfully entered the closet during the search for narcotics and knew that the defendant was a convicted felon, rendering the incriminating nature of the firearms immediately apparent. *Id.* at 912.

Kendricks contends, however, that these cases are inapplicable because the officers did not know Kendricks was a convicted felon when they entered the residence. Doc. 49 p.7. He argues that his case is analogous to that of *United States v. Szymkowiak*, 727 F.2d 95 (6th Cir. 1984), in which the United States Court of Appeals for the Sixth Circuit held that a firearm was seized in violation of the Fourth Amendment because the plain view doctrine did not apply. In *Szymkowiak*, law enforcement obtained a warrant to search the defendant's apartment for jewelry and a television set and, while executing the warrant, discovered and seized two firearms, whose legality or illegality they could not immediately ascertain. *Id.* at 96. The officers requested that an agent with the Bureau of Alcohol, Tobacco and Firearms ("ATF") join them at the defendant's apartment to assist in determining the legality of the weapons, which he did. *Id.* The ATF agent advised that federal law did not prohibit possession of the weapons, but that Ohio law "probably" did, and the officers seized the firearms on the agent's recommendation. *Id.*

***11** In deciding whether the plain view doctrine applied, the Sixth Circuit reviewed its prior decision of *United States v. Gray*, 484 F.2d 352 (6th Cir. 1973). In *Gray*, officers executed a search warrant for intoxicating liquors, and while the defendant remained downstairs with one officer, a second officer located firearms in the closet of the second floor. 484 F.2d at 353-54. The officer brought the firearms downstairs and recorded their serial numbers before finishing the search, then left the property with the defendant. *Id.* The officers later ran the serial numbers through a national crime database and learned the weapons were stolen. *Id.* at 354. The Sixth Circuit determined that the incriminating nature of the weapons was not immediately apparent because they were not contraband, they had no nexus to the items that were the subject of the warrant, and the officers had no knowledge that the firearms were evidence of other crimes. *Id.* 355. Subsequently, based on its prior holding in *Gray*, the Sixth Circuit in *Szymkowiak* determined that the plain view doctrine did not apply because the intrinsic nature of the weapons was not incriminating, even to the ATF expert, based on the facts available to law enforcement. 727 F.2d 99.

Kendricks also seeks to liken his case to *Arizona v. Hicks*, 480 U.S. 321, 323, 107 S. Ct. 1149, 1152, 94 L.Ed. 2d 347 (1987), in which an officer, while investigating a shooting, became suspicious of expensive stereo equipment in the defendant's apartment, and moved some of the equipment to read the serial numbers. The officer called the serial numbers in and was informed that the equipment was stolen. *Id.* The Court held that the recording of the serial numbers did not constitute a seizure because it did not meaningfully interfere with the defendant's possessory interest. *Id.* at 324. Moving the equipment, however, to be able to read the serial numbers, did constitute a search because it required "taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of the [defendant's] privacy unjustified by the exigent circumstances that validated the entry." *Id.* at 325. Thus, probable cause that the equipment was contraband was required for the plain view doctrine to apply. *Id.* at 327.

None of the cases relied on by Kendricks are applicable here. The initial seizure of the firearm was permissible for purposes of officer safety. The officers were still in the process of searching for D.G. pursuant to the arrest warrant and Kendricks' and Davis' consent upon seeing the firearm. At that point, Kendricks was

unsecured and in the garage with the officers. Under these circumstances, Cappiello acted within the bounds of the Fourth Amendment by seizing the weapon and disarming it for purposes of safety. While doing so, Cappeillo was also permitted to observe the serial number of the firearm, which was lawfully exposed to his view.

Additionally, Cappiello's testimony, which the Court finds to be credible, demonstrates that no information was obtained from teletype before the illegal nature of the firearm became apparent. Instead, the evidence demonstrates that Kendricks' statement regarding his prior incarceration was either just prior to, or contemporaneous with Cappiello calling teletype, and that Cappiello obtained probable cause regarding the incriminating nature of the firearm before receiving any information from teletype. The seizure was not impermissibly extended to obtain external information. Accordingly, this is not like *Szymkowiak*, in which the officers were unsure of the legality of the weapons even after calling an expert, or *Gray*, in which officers were not acting for purposes of safety. Nor is *Hicks* applicable. Unlike the movement of the stereo equipment to expose the serial numbers, Cappiello's movement of the firearm for officer safety was permitted.

Instead, a case more analogous to the one at hand is *United States v. Roberts*, 612 F.3d 306 (5th Cir. 2010). There, law enforcement received a tip that a man, who they later determined to be Brian Michael David Roberts, was in possession of stolen items and guns. *Id.* at 308. After identifying Roberts, officers determined that he had several outstanding arrest warrants for traffic offenses, and three officers proceeded to Roberts' apartment. *Id.* Roberts answered the door and the officers advised that they were there to execute the arrest warrants. *Id.* After Roberts identified himself, officers requested that he produce identification as verification, prompting Roberts to move back into the apartment, where other individuals were also present. *Id.* As Roberts turned to retrieve his wallet from an entertainment center, the officers observed a pistol magazine and loose rounds of ammunition on the entertainment center within easy reach of other occupants of the apartment. *Id.* at 309. The officers secured the occupants of the apartment and retrieved the magazine. *Id.* The officers additionally seized a gun that Roberts informed them was under the couch, and, while performing a protective sweep, a shotgun that was in another room. *Id.* While lawfully inside the apartment, "the officers discovered that Roberts was an unlawful user of a controlled substance and that [a second defendant] had a prior felony conviction...." *Id.* at 314.

***12** Although Roberts filed a motion to suppress in the district court, the motion was not based on an argument that the firearm's illegal nature was not immediately apparent, as is required by the plain view doctrine. *Id.* at 313. He did, however, raise this argument on appeal, limiting the Court's review of this issue to whether there was plain error. *Id.* On this review, the Fifth Circuit held that "the police were justified in temporarily seizing the weapons under the circumstances." *Id.* The Court explained that the individuals in the apartment who were not handcuffed could have accessed the unsecured weapons, making it reasonable for the officers to "seiz[e] the weapons for the safety of themselves and the apartment's occupants." *Id.* at 314. The Court further concluded that "[t]he officers were entitled to maintain control over the weapons while they completed their investigation of the individuals inside the apartment." *Id.* Additionally, because the officers learned that it was illegal for Roberts to possess the weapon while completing their investigation, "the illegality of the firearms became apparent such that permanent seizure was warranted." *Id.*

Also analogous is *United States v. Malachesen*, 597 F.2d 1232, 1233 (8th Cir. 1979), in which, while executing a search warrant for a snowmobile and marijuana, the police located a cocked and loaded revolver under a mattress, which they secured and unloaded. After discovering the firearm, but before completing the search, officers learned that a resident of the house had a prior felony conviction, leading to his indictment for unlawful possession of a firearm. *Id.* at 1234. The Eighth Circuit held that no Fourth Amendment violation occurred because the firearm was accidentally discovered during an authorized search, was permissibly secured for safety reasons, and, although the illegality of the firearm was not immediately apparent when it was discovered, its illegality became apparent while it was validly temporarily seized. *Id.* at 1234-35.

In *Malachesen*, the Eighth Circuit distinguished its prior decision in *United States v. Clark*, 531 F.2d 928 (8th Cir. 1976). There, officers executed a search warrant for controlled substances, as well as an arrest warrant for the defendant for unauthorized distribution of controlled substances. *Id.* at 930. During the search, the defendant

was handcuffed and officers asked him whether he had any firearms. *Id.* The defendant responded that he did, advising officers of the firearms' locations and that the firearms were loaded. *Id.* After locating the weapons, an officer recorded the serial number of a pistol. *Id.* The serial numbers of other items in the residence, such as a stereo system, were also recorded by officers. *Id.* A month later, a special agent investigated the firearm based on its serial number, which resulted in seizure of the weapon and the defendant's indictment on illegal interstate transportation of a firearm. *Id.* at 930-31. The defendant moved to suppress the firearm, arguing that the officers exceeded the scope of the search warrant by inventorying his possessions and that officers lacked sufficient cause to be concerned about their safety. *Id.* at 931.

The Eighth Circuit in *Clark* held that the officers exceeded the scope of the search warrant for controlled substances by "inventory[ing] a significant quantity of [the defendant's] personal and business property," and methodically recording serial numbers from a variety of property, including motorcycles, tools, shop equipment, stereo equipment, and personal effects." *Id.* Additionally, the officers could not satisfy the requirement under the plain view doctrine that the incriminating nature of the pistol was immediately apparent. *Id.* at 932. As a result, the Court concluded that "[u]nder these circumstances, we regard the actions of the police officers, which resulted in a wholesale examination of appellee's property unrelated to the authorized search for controlled substances, as inconsistent with the thrust of the plain view doctrine." *Id.*

Here, the facts more closely resemble those of *Roberts* and *Malachesen*. The officers had reason to be concerned for their safety because Kendricks was unsecured within the garage with them. Cappiello was permitted to seize the weapon, make it safe, and maintain control of the weapon until the search was complete and no further safety threat existed. While lawfully in possession of the firearm, the illegal nature of the firearm became apparent.

***13** Accordingly, it is hereby

ORDERED:

1. The Motion to Suppress Fruits of Illegal Search of Home (Doc. 16) is **DENIED**.

2. The Motion to Supplement Record or in the Alternative Grant the Motion to Suppress Due to a Giglio Violation (Doc 55) is **DENIED**.

DONE AND ORDERED in Tampa, Florida on September 5, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 3877645, 104 Fed. R. Evid. Serv. 463

Footnotes

1 Kendricks conceded during the supplemental hearing that because he was permitted to cross-examine Cappiello regarding the information disclosed subsequent to the first hearing, any potential violation under *Giglio v. United States*, 405 U.S. 150 (1972) was cured, and there was no basis to pursue this argument. Additionally, although the motion to suppress posits that Kendricks made statements that were the fruit of an unconstitutional search, he later advised the Court that the case law does not support suppression on the basis of any *Miranda v. Arizona*, 384 U.S. 436 (1966) violation.

2 The Court has determined the facts based on the testimony of witnesses and exhibits offered into evidence at the hearings held on June 6, 2017 and July 26, 2017. Where conflicting evidence was presented, the Court weighed the credibility of the witnesses.

3 The Court in *Fish* was evaluating the constitutionality of the search and seizure to determine whether the officers were entitled to qualified immunity in the defendant's 42 U.S.C. § 1983 claim against them.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10590-GG

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DANIEL R. KENDRICKS,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: MARCUS, WILLIAM PRYOR, and NEWSOM, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41