No. -

SUPREME COURT OF THE UNITED STATES

DUSTIN MOSS

Petitioner

v.

UNITED STATES

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a search warrant particularly described a package to be searched, was the search of a completely different package illegal where that package was solely referenced by its tracking number in the warrant's caption but was not otherwise described?

PARTIES TO THE PROCEEDING

Petitioner Dustin Moss was defendant-appellee before the United States Court of Appeals for the First Circuit.

The United States, through Assistant United States Attorney Jonathan S. Davis, was plaintiff-appellee before the United States Court of Appeals for the First Circuit.

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CASES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Dustin Moss respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals appears at Appendix B to this petition. That court's opinion is published at 936 F.3d 52 (1st Cir. 2019).

JURISDICTION

The First Circuit Court of Appeals ("First Circuit") issued its decision on August 26, 2019. A copy is attached at Appendix B. That court denied rehearing on September 24, 2019. A copy of that order is attached as Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV:

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

STATEMENT OF THE CASE

Petitioner was indicted for, *inter alia*, conspiracy to distribute a controlled drug (methamphetamine) and possession of a firearm in furtherance of a drug trafficking crime in the United States District Court for the District of New Hampshire.

Petitioner was arrested by postal inspectors following the interception and search of a package containing a large amount of methamphetamine addressed to a person who had agreed to receive it in the mail on behalf of Petitioner. Petitioner sought to suppress this package (the "730 Package") on the basis that the warrant described and authorized the search and seizure of a completely different package unrelated to the investigation of Petitioner. Specifically, the government had attached the wrong Attachment A to the search warrant signed by the magistrate judge, which described a different package to be seized and searched. A copy of the search warrant with attachments is attached as Appendix E.

On April 13, 2018, a hearing was held on Petitioner's motion to suppress the contents of the 730 Package and a second package. The motion was denied by the district court orally at the conclusion of the hearing and in a subsequent written order. A copy of the District Court's Order is attached as Appendix A.

On April 25, 2018, pursuant to a plea agreement, Petitioner plead guilty to the offenses of attempt to possess with intent to distribute controlled substances (methamphetamine) in violation of 21 U.S.C. §§846 and 841(b)(1)(A)(viii) and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. §924(c). The district court sentenced Petitioner to a total of 300 months in prison, stand committed, plus 5 years of supervised release, consistent with a plea agreement that permitted Petitioner to appeal the suppression ruling.

On August 26, 2019, Petitioner's appeal was denied by the First Circuit Court of Appeals. See Appendix B and C. That court held that, despite the presence of conflicting descriptions in the search warrant, the 730 Package was described with sufficient particularity to render it valid. While the Attachment A attached to the warrant described a different package to be searched, the correct tracking number was displayed in the search warrant's caption and, thus, the First Circuit concluded this warrant "was not totally devoid of an accurate description of the 730 Package." United States v. Moss, 936 F.3d 52, 60 (1st Cir. 2019). The court also concluded that the warrant's description was sufficient to enable the executing officer to locate and identify the object to be searched with reasonable effort, based on that inspector having drafted the warrant, segregated the package, and his knowledge of its tracking number displayed in the warrant's caption. Id.

On September 24, 2019, the First Circuit denied Petitioner's motion for rehearing. See Appendix D.

Petitioner now seeks a writ of certiorari from this Court on the important question of whether the lower court misapplied this Court's holding in Groh v. Ramirez, 540 U.S. 551 (2004).

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE FIRST CIRCUIT APPROPRIATELY APPLIED THIS COURT'S HOLDING IN *GROH V. RAMIREZ*, 540 U.S. 551 (2004)

"The Fourth Amendment states unambiguously that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Groh v. Ramirez, 540 U.S. at 557. In Groh, this Court found a search warrant to be invalid due to the complete failure to describe the property that was actually searched. See Groh, 540 U.S. at 554 (warrant was "plainly invalid" where the affidavit adequately and particularly described a stockpile of firearms to be seized, but the warrant itself described the place of the search, a two-story blue house).

The facts of this case are similar to those in Groh, meriting this Court's review and reversal of the First Circuit's Opinion. The 730 Package was described in the affiant's affidavit as a 26 lb., 11-ounce package with a Las Vegas, Nevada return address. While the warrant referenced the 730 Package's tracking number solely in its caption, in the body of the document, it did not describe that package as "the property to be searched" along with its location. The only property specifically described to be searched in the warrant materials was a white

envelope weighing approximately 5 ounces with a California return address, which was unrelated to the investigation of Petitioner. This fact was apparent to anyone who took a moment to read the warrant materials, but investigators failed to recognize this serious error with the warrant at any time prior to, during, or after their search of the 730 Package.

Other than its tracking number appearing in the warrant's caption, the 730 Package was not particularly described anywhere in the warrant as the property to be searched. The First Circuit thus misapplied the law and facts in concluding the 730 Package search warrant was facially valid.

No legal precedent was cited for the First Circuit's conclusion that a mere reference to the 730 Package's tracking number in the caption of the warrant saved it from invalidity, where the warrant's terms solely authorized search of a completely different package. These facts are more analogous to this Court's Groh holding than the Bonner and Vega-Figueroa cases relied upon by the First Circuit in its Opinion. The First Circuit also placed undue emphasis on the executing inspector's involvement in and familiarity with the investigation to uphold the search while excusing the warrant's facial infirmity.

I. ARGUMENT

A. A mere reference to the 730 Package's tracking number in its caption, without the search warrant otherwise authorizing the search of that package, rendered it facially invalid.

In its Opinion, the First Circuit noted that Petitioner "concedes as much" with respect to the warrant being "not totally devoid of an accurate description of the 730 Package." Groh at 60. The court also stated that Petitioner "concedes as much" with respect to "the tracking number's unique combination of 13 digits (providing) a description with a high degree of particularity." Id.

Petitioner clarified that, while he conceded the warrant displayed the 730 Package's tracking number solely in its heading, he did not concede this solitary reference to that package elevated the warrant to legal sufficiency. This is because a plain reading of the warrant shows it did not authorize the search of the 730 Package. Rather, it merely referenced the 730 Package in its caption but, by its terms, permitted search of a completely different package described in its Attachment A.

Neither the First Circuit nor the government cited precedent for the proposition that a mere reference to an item in a warrant's caption authorizes that property to be searched where the

warrant's plain terms solely permit the search of a different, particularly described item. On these facts, the First Circuit should have concluded the warrant was facially invalid.

The First Circuit cited United States v. Qazah, 810 F.3d 879, 886 (4th Cir. 2015) in support of its conclusion that the warrant authorizing the 730 Package's search suffered from "a mere technical error." United States v. Moss at 60. Qazah, however, does not support a finding that a reference to an inaccurate warrant attachment – as here – will pass constitutional scrutiny. In Qazah, law enforcement searched the defendant's house in connection with a search warrant that mistakenly incorporated an affidavit describing items to be seized from a co-defendant's residence. Id. at 882. On appeal, the Fourth Circuit did not hold the search warrant with the incorrect attachment was facially valid. Rather, the Qazah court upheld seizure of evidence from the defendant's house as admissible under the good-faith exception to the exclusionary rule. Id. at 887.

It is doubtful the First Circuit would have upheld this warrant on the grounds of "mere technical error" if, for instance, no Attachment A was affixed to the warrant at all. It is more egregious here where an Attachment A was affixed, and it described a completely different package to be searched.

Contrary to the Opinion, this case is more analogous to this Court's holding in Groh than the First Circuit's holdings in United States v. Bonner, 808 F.2d 864 (1st Cir. 1986) and United States v. Vega-Figueroa, 234 F.3d 744 (1st Cir. 2000). The Bonner court found a search warrant that correctly described the premises to be searched, but omitted the address, to suffer only from a "minor, technical omission" which did not invalidate it. Bonner, 808 F.2d at 866-67. Likewise, the Vega-Figueroa court concluded that a mistake in the naming of the apartment to be searched (building 44 instead of building 45) did not invalidate the warrant as the residence otherwise was particularly described in the warrant. Vega-Figueroa, 234 F.3d at 756.

In contrast, this warrant did not particularly describe as the "property to be searched" the 730 Package's specific characteristics, such as its size, dimensions, weight, and purported sender and recipient listed on the package. Thus, this case is distinguishable from Bonner (address omitted) and Vega-Figueroa (apartment number misidentified) where the property to be searched was otherwise sufficiently detailed in the warrant. Rather, similar to Groh, this warrant failed to sufficiently describe the 730 Package. See Groh, 540 U.S. at 554 (warrant was "plainly invalid" where it described the place of the search, a two-story blue house, but failed to particularly describe the stockpile of weapons to be seized).

B. The First Circuit placed undue reliance upon facts unconnected with the search warrant's terms, including the executing inspector's involvement in the 730 Package investigation.

The First Circuit examined the adequacy of the warrant's description of the 730 Package based on whether it is "sufficient to enable the executing officer to locate and identify" the object to be searched with reasonable effort. United States v. Moss at 60 (citing Bonner, 808 F.2d at 866) (emphasis in the Opinion). In doing so, that court cited factors entirely unconnected to the warrant's terms, such as the 730 Package having been segregated in a postal inspection room and the executing officer's familiarity with the package and the underlying investigation. Id.

This approach inappropriately relied upon extraneous and fortuitous factors divorced from the search warrant's actual terms. As the dissent in Bonner (*Carter*, Dist. J., dissenting in part and concurring in part) noted, "[t]he sufficiency of a warrant is to be judged from the warrant and its attachments." Id. at 869 (citing e.g. In re Lafayette Academy, Inc., 610 F.2d 1, 4-5 (1st Cir. 1979)); United States v. Klein, 565 F.2s 183 n.3 (1st Cir. 1977)).

Analysis, as here, that overlooks an insufficient warrant simply "because the officers who executed it possessed in their minds information particular to the (property) intended to be searched"

does not adequately protect the rights of the property owner. See id. (dissenting opinion). The subjective knowledge and case involvement of the law enforcement officer executing the warrant "is not in logic or law an adequate substitute for the safeguard of a facially sufficient warrant. In pragmatic terms, such assumptions before or after the fact of the execution of the warrant are lame and ineffective safeguards." Id. (where the dissent was "convinced that this court should continue to abjure a doctrine that is so unwise, unfounded, and ineffective.").

As advocated by the Bonner dissent, the First Circuit appropriately should have confined its analysis to the warrant's four corners, which objectively authorized the search of a different package - as described in Attachment A - than the one actually searched and used in the prosecution of Petitioner. See Appendix E. This analysis is consistent with this Court's guidance in Groh. The contents of the 730 Package, accordingly, should have been suppressed and all fruits from its search likewise suppressed.

The petition for a writ of certiorari should be granted in the interests of justice.

Dated: December 20, 2019

Respectfully submitted,

DUSTIN MOSS

By his attorneys,

PRETI FLAHERTY PLLP

/s/*Simon R. Brown*
Simon R. Brown

Counsel of Record

Attorney for Petitioner

APPENDIX

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APPENDIX A

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

United States of America

v. Civil No. 17-cr-79-JL
Opinion No. 2018 DNH 158

Dustin Moss

MEMORANDUM ORDER

In advance of a trial on a series of charges related to, among other things, drug trafficking, money laundering, and witness tampering, defendant Dustin Moss moved to suppress approximately 20 pounds of methamphetamine discovered in two Priority Express Mail packages, and any evidence resulting from the searches of those two packages. This motion turns on whether Moss had a reasonable expectation of privacy in the packages, neither of which was addressed to him; whether the warrant to search one of the packages sufficiently described the property to be searched; and whether the warrantless search of the second

package fell under the consent and private search exceptions to the warrant requirement.

After an evidentiary hearing and permitting Moss to supplement his arguments, the court denied Moss's motion.[1] Moss then pleaded guilty to one count of attempting to possess with intent to distribute 500 grams or more of a mixture containing methamphetamine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(viii) and one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c).[2] Though he waived his right to appeal several aspects of his plea, Moss, with the government's consent, "expressly reserve[d] the right to appeal the denial of his Motion to Suppress."[3] See Fed. R. Crim. P. 11(a)(2).

This order sets forth the bases for the court's denial of Moss's motion in greater detail. See, e.g., United States v. Joubert, 980 F. Supp. 2d 53, 55 n.1 (D.N.H. 2014), aff'd, 778 F.3d 247 (1st Cir. 2015)

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[1] See Order of April 20, 2018.

[2] Plea Agreement (doc. no. 63) at 1.

[3] Id. at 13.

(citing In re Mosley, 494 F.3d 1320, 1328 (11th Cir. 2007)) (noting a district court's authority to later reduce its prior oral findings and rulings to writing). First, the court addresses whether Moss had a privacy interest in the two packages, neither of which was addressed to him, sufficient to confer on him standing to challenge the searches of those packages. It then concludes that, even assuming that he has standing, neither search violated the warrant requirements of the Fourth Amendment so as to require suppression of the evidence obtained through them.

I. Background

The court makes the following findings of fact based on the testimony and other evidence received at the suppression hearings.

A. The 730 package

A package bearing the tracking number EL810533730US (the "730 package") was mailed from Las Vegas, Nevada, on April 18, 2017. Weighing a little over 26 pounds, it was addressed to a recipient named O'Rourke at 3 Blackberry Way,

apt. 108, in Manchester, New Hampshire. It bore a return address of "Tom fairbanks, 328 Florrie Ave." in Las Vegas.

1. Search of the 730 package

On the evening of April 18, United States Postal Inspector Bruce Sweet reviewed a list of packages scheduled to arrive in New Hampshire from Las Vegas, Nevada. Based on his participation in an investigation into Moss and his co-defendant, Katrina Jones, between October 2016 and April 2017, Inspector Sweet was aware of a drug conspiracy wherein packages from Las Vegas containing methamphetamine arrived in New Hampshire, and packages containing cash were sent from New Hampshire to Las Vegas. Some of those packages had "Florrie Ave." as a return address. Accordingly, while the package was still in Las Vegas, Inspector Sweet noticed the 730 package as originating from that street and identified it as suspicious based on his knowledge of that investigation, the origin and destination, and its weight.

When the package arrived in Manchester the next morning, he collected the 730 package and placed it into a package lineup for a drug-sniffing dog. After the dog alerted on the 730 package, Inspector Sweet secured it in the United States Postal Inspection Service's offices.

Working with Assistant United States Attorney William Morse, Sweet applied for a warrant to search the package. His affidavit attached to the warrant application correctly and accurately described the 730 package in "Attachment A" as a "black 'Kicker Speaker' cardboard box," with its dimensions and address.[4]

Having reviewed those materials, the magistrate judge issued a search warrant that same morning. The warrant's caption correctly identified the package, reading: "In the Matter of the Search of USPS Priority Express Package Bearing Tracking

[4] Mot. To Supp. Ex. A (doc. no. 52-2) at 7.

Number EL810533730US."[5] In its body, the warrant described the area to be searched as "See Attachment A, as attached hereto and incorporated herein." But, due to a clerical error in the United States Attorney's Office, "Attachment A" to the issued warrant identified the property to be searched as a completely different package.[6] Inspector Sweet did not review the warrant or its attachments after it issued or notice the erroneous "Attachment A" when he executed the warrant, ultimately served it on O'Rourke, or returned it.

An hour or so after the warrant issued, Sweet searched the 730 package. Inside the box he found a

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[5] Mot. To Supp. Ex. B (doc. no. 52-3).

[6] Id. at 3. The package described in the warrant's Attachment A is a USPS Priority Mail Express package of a different color (white), size (envelope), and weight (5 ounces), addressed to a different recipient (Mr. Golden) in a different city (Laconia, New Hampshire) from a different sender (Sequoia High School) in a different state (California), and, of course, bears a different tracking number (EL57617538US). Inspector Sweet testified that the package actually described in the warrant's Attachment A related to a package he searched in November 2016.

large speaker and, inside the speaker, 12 zip-top bags, each containing almost exactly one pound of a white crystalline substance that tests later identified as methamphetamine. Having replaced the narcotics with miscellaneous items to bring the box to its original weight, he repackaged the speaker, resealed the package, and delivered it to the post office.

2. Delivery of the 730 package

Sabrina Moss, the defendant's sister and O'Rourke's dealer, had asked O'Rourke earlier in April to receive a package on behalf of her brother. In exchange, she offered him three-and-a-half grams of crack cocaine, which O'Rourke testified he would value at approximately $300. O'Rourke agreed. Sabrina did not tell him when the package would arrive or to expect more than one package. Neither Sabrina nor Moss instructed him either to open or not to open the package.

After Inspector Sweet concluded his search of the package, a postal inspector dressed as a letter carrier delivered a notice to O'Rourke's mailbox that the package had arrived at the post office. Several

hours later, Moss met O'Rourke at O'Rourke's apartment, where Sabrina and her boyfriend joined them. They waited several hours at O'Rourke's apartment, on the assumption that the package might yet be delivered there, before decamping. O'Rourke then drove to the post office while Moss, who left the apartment at the same time, drove to a nearby shopping center and parked behind a furniture store.

Inspector Sweet, who was behind the counter at the post office, delivered the 730 package to O'Rourke after O'Rourke presented his license and the notice left in his mailbox. Leaving the post office, O'Rourke met Moss behind the furniture store and placed the package in the back seat of Moss's vehicle. Moss and O'Rourke were both arrested on the spot. O'Rourke was subsequently released on bond.

B. The 962 package

Though he was not expecting one,[7] on April 22, a second parcel addressed to O'Rourke arrived in his apartment's mailbox at 3 Blackberry Way. This package, also from Las Vegas, bore the tracking number EL652259962US (the "962 package"). A key in his own mailbox indicated a larger package in a bigger mailbox but O'Rourke, wanting nothing to do with it, left both key and package alone.

Brenda Krimtler, a friend of O'Rourke's, retrieved his mail the next day. She brought the box into the kitchen, opened it, and observed white powder inside. When she informed O'Rourke of its contents, he instructed her to reseal the 962 package and return it to the mailbox, which she did. O'Rourke informed his attorney about the package who, with O'Rourke's agreement, in turn relayed that information to Inspector Sweet. O'Rourke's attorney

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[7] Moss testified that he asked his sister, Sabrina, to find someone who could receive several packages for him, but there is no evidence that Sabrina told O'Rourke to expect more than one package.

also informed Inspector Sweet that the 962 package had been opened, that O'Rourke believed it contained narcotics, that O'Rourke no longer wanted it, and that Inspector Sweet could search the package.

With O'Rourke's attorney's permission, Inspector Sweet called O'Rourke directly later that evening. O'Rourke, likewise, informed Inspector Sweet that his friend had opened the package, that it appeared to contain narcotics, and that he consented to the package being seized and searched.

Armed with permission to search the package from O'Rourke, the addressee, Inspector Sweet did not obtain a warrant. He instead contacted another postal inspector who lived closer to O'Rourke, Inspector Steve Riggins, who retrieved the 962 package. With Inspector Sweet on the phone, Inspector Riggins opened it in his car. Like the 730 package, the 962 package contained eight zip-top bags containing a white substance that later proved to be methamphetamine. Like Krimtler, Inspector Riggins was able to view the bags of white powder

after having opened the 962 package, without opening any other container within the 962 package.

II. Analysis

Moss challenges the searches of both packages -- the 730 package on grounds that the warrant was defective and the 962 package on grounds that the search was warrantless. To succeed in such challenges, of course, Moss must demonstrate standing -- that is, that he had a reasonable expectation of privacy in the packages, which were addressed to O'Rourke, not Moss. Even assuming he had such an expectation, neither of Moss's challenges to the searches succeeds.

A. Standing

An individual has a right "to be secure in [his] . . . papers [ ] and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A search within the meaning of the Fourth Amendment "occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." United States v. D'Andrea, 648 F.3d 1, 5-6 (1st Cir. 2011) (quoting Kyllo v. United States,

533 U.S. 27, 33 (2001)). "Fourth Amendment rights generally cannot be vicariously asserted." United States v. Bates, 100 F. Supp. 3d 77, 83 (D. Mass. 2015) (Saris, J.) (citing Alderman v. United States, 394 U.S. 165, 174 (1969)). The defendant therefore must carry the burden of demonstrating that his "reasonable expectation of privacy in the area searched and in relation to the items seized . . . at the time of the pretrial hearing and on the record compiled at that hearing." United States v. Aguirre, 839 F.2d 854, 856 (1st Cir. 1988) (internal citations omitted). "Unless and until the 'standing' threshold is crossed, the bona fides of the search and seizure are not put legitimately into issue." Id.

"Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable." United States v. Jacobsen, 466 U.S. 109, 114 (1984). Sealed packages in the mail are thus "free from inspection by postal authorities, except in a manner provided by the Fourth

Amendment." United States v. Van Leeuwen, 397 U.S. 249, 250 (1970). Despite this general rule, "the Fourth Amendment does not protect items that a defendant 'knowingly exposes to the public' Consequently, if a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery." United States v. Dunning, 312 F.3d 528, 531 (1st Cir. 2002) (quoting United States v. Miller, 425, U.S. 435, 442 (1976)).

Whether a defendant has a privacy interest sufficient to challenge a search of a particular location depends on that defendant's:

> Ownership, possession and/or control; historical use of the property searched or the thing seized; ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case.

United States v. Stokes, 829 F.3d 47, 53 (1st Cir. 2016) (quoting Aguirre, 839 F.2d at 856-57). Invoking these factors, some courts in this Circuit have concluded that a defendant who is neither the sender nor addressee of a package (like the defendant here) nevertheless has a privacy interest when the recipient acts as a bailee for the defendant. In Bates, for example, the defendant (1) caused the package to be sent, (2) meticulously tracked them, and (3) specifically and directly ordered the addressee not to open them, but instead to deliver them to the defendant the moment they arrived. Bates, 100 F. Supp. 3d at 84. Similarly, a non-addressee defendant may have a reasonable expectation of privacy when he or she asserted an ownership interest in the package itself, the addressee disclaimed any interest, and no one with any ownership or possessory interest participated in the search. United States v. Allen, 741 F. Supp. 15, 17 (D. Me. 1990) (Hornby, J.).

By contrast, in United States v. LeClair, the defendant had no expectation of privacy when he was

neither the sender nor addressee and made no showing that "he at any time exerted ownership, possession, control, or historical use of the package or its contents." No. 11-CR-39-GZS, 2011 WL 6341088, at *3 (D. Me. Dec. 19, 2011) (Signal, J.). And in United States v. Colon-Solis, the defendant lacked any expectation of privacy in a box of cash that he packaged and shipped from New Jersey because he addressed it to a friend in Puerto Rico at her home and asked her to hold it until he arrived. 508 F. Supp. 2d 186, 192 (D.P.R. 2007) (Pérez-Giménez, J.).

The Court of Appeals for the First Circuit has not definitively addressed this issue. It has noted that "many of the federal courts of appeals have been reluctant to find that a defendant holds a reasonable expectation of privacy in mail where he is listed as neither the sender nor the recipient, at least absent some showing by the defendant of a connection . . . ." Stokes, 829 F.3d at 52 (citing decisions of the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals). In Stokes, the Court of Appeals concluded that a defendant lacked an expectation of

privacy in the outsides (i.e., addresses and writing on the envelopes) of letters that were addressed to others but placed into his Post Office box. But it declined to "decide whether a defendant ever could have a reasonable privacy interest in mail where he is not listed as addressee or addressor," id. at 52-53, leaving the possibility open. Ans, though it acknowledged the decisions in Bates and Allen, it specifically avoided "address[ing] the question of whether a defendant in these situations could assert a reasonable expectation of privacy in the searched mail." Stokes, 829 F.3d at 55 n.8. In light of that guidance, the court declines to conclude that Moss lacked a reasonable expectation of privacy in either package solely because they were addressed to O'Rourke instead of Moss, and addresses the question on a package-by-package basis.

1. The 730 package.

Though there is no evidence that either Moss or Sabrina ever told O'Rourke not to open the 730 package, see Bates, 100 F. Supp. 3d at 84, Moss exerted a certain amount of "ownership, possession,

[and] control" over the package, LeClair, 2011 WL 6341088, at *3, possibly creating a bailment relationship with O'Rourke. For example, upon discovering that the package arrived in Manchester, Moss drove to O'Rourke's apartment and waited for O'Rourke to return home from work, retrieve the package, and deliver it to him. And Moss drove with O'Rourke to the post office to retrieve it once O'Rourke received the notice for it, and then waited in a nearby shopping center so that O'Rourke could deliver the package to him directly.

O'Rourke's actions further indicate his understanding that he received the 730 package on Moss's behalf. Specifically, he agreed to receive it at his home in exchange for drugs from Sabrina. When notified of its arrival at the post office, he picked it up and delivered it straight to Moss.

Apart from the potential bailment relationship, Moss may also have had an expectation of privacy in the package at the time that it was searched -- that is, while it remained in the mail stream. Cf. Dunning, 312 F.3d at 531 (sender has

reasonable expectation of privacy in letters until they reach recipient). As the one who ordered the package, Moss may have had an expectation of privacy in the package before it reached O'Rourke, and therefore before O'Rourke, as the addressee, had an opportunity to open it, destroying the expectation. See Bates 100 F. Supp. 3d at 84 (package searched before they reached bailee).

2. The 962 package.

The evidence of Moss's privacy interest in the 962 package is somewhat less compelling. Again, there is no evidence that either Sabrina or Moss asked O'Rourke to receive a second package or informed him that a second package would arrive. Thus, there is no evidence that O'Rourke held the 962 package as Moss's bailee. Furthermore, the 962 package was not only delivered to O'Rourke but also opened by a third party, Krimtler, before the USPIS seized and searched it. Under these circumstances, any expectation of privacy Moss held in the 962 package likely ceased once it was delivered to O'Rourke. Cf. id.

The court need not definitively resolve the question of Moss's privacy interests in either package, however. Even assuming that he had such an interest sufficient to confer standing to challenge the searches, neither of his challenges to those searches succeeds.

B. Moss's warrant-based challenges

The Fourth Amendment shields individuals from "unreasonable searches and seizures." U.S. Const. amend. IV. Accordingly, a search of private property is generally unconstitutional unless conducted pursuant to a valid search warrant. Katz v. United States, 389 U.S. 347, 357 (1967). Absent a warrant, the prosecution must establish that the search "came within a recognized exception to the Fourth Amendment warrant requirement." United States v. Doward, 41 F.3d 789, 791 (1st Cir. 1994).

Moss seeks the suppression of evidence from both packages, arguing that neither search complied with the warrant requirements of the Fourth Amendment. First, he challenges that validity of the warrant obtained before searching the 730 package

because, he contends, it failed to describe the place to be searched with the requisite particularity because of the defective Attachment A. He challenges the admittedly warrantless search of the 962 package as failing to fall within any of the recognized exceptions to the warrant requirement.

Neither challenge warrants suppression of the evidence. Though the attachment to the warrant to search the 730 package described the wrong package, the face of the warrant listed the correct tracking number and, under the circumstances, the probability that Inspector Sweet – who had already secured the 730 package -- would execute the warrant by searching an incorrect package was exceedingly low. And both the addressee's consent and the private search doctrine justified the warrantless search of the 962 package.

1. 730 package

Under the Fourth Amendment's particularity requirement, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,

and the persons or things to be seized." U.S. Const. amend. IV. "The manifest purpose of [this requirement] is to prevent wide-ranging general searches by the police." United States v. Bonner, 808 F.2d 864, 866 (1st Cir. 1986). (quoting United States v. Leon, 468 U.S. 897, 963 (1984)). A warrant is therefore facially invalid if it fails to describe with particularity the place to be searched. Groh v. Ramirez, 540 U.S. 551, 557 (2004). When it so fails, "[t]he fact that the application adequately described the 'things to be seized' does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." Id.

"The test for determining the adequacy of the description of the location to be searched is whether the description is sufficient 'to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.'" Bonner, 808 F.2d at 866. Here, despite the facially incorrect Attachment A, the

evidence suggests that there was no reasonable probability that any other package than the 730 package -- including the one actually described in Attachment A – would mistakenly be searched.

First, the warrant did contain the 730 package's unique tracking number: it appeared in the caption of warrant. Second, even before the warrant issued, Inspector Sweet had identified the particular package to be searched by its description (a black "Kicker speaker" box weighing approximately 26 pounds) and, furthermore, had secured it in the USPIS office at the postal facility in Manchester. Finally, Inspector Sweet himself executed the warrant on the box so described, which contained the correct tracking number, and which he had personally secured in the USPIS office. He testified that although he did not read the warrant after it issued, because the magistrate judge made no corrections, he assumed the warrant covered the package that he correctly described in the attachments that he had drafted -- specifically, the

730 package. And that is the package that he searched.

Though perhaps troubling that no one noticed the incorrect Attachment A on the warrant, and while it may have caused ambiguity had the warrant been executed by another inspector, under the totality of the circumstances present in this case, there was little, if any, "reasonable probability that another [package] might be mistakenly searched." Bonner, 808 F.2d at 866. The warrant was not, therefore, facially invalid. See United States v. Vega-Figueroa, 234 F.3d 744, 756 (1st Cir. 2000) (warrant that listed the wrong address not invalid where agent who made observations on which basis the warrant issued also executed it and searched the correct apartment). Accordingly, the evidence discovered during the search of the 730 package need not be suppressed.

2. 962 package

The parties agree that the USPIS obtained no warrant to search the 962 package. Accordingly, the prosecution bears the burden of establishing that the

search of that package "came within a recognized exception to the Fourth Amendment warrant requirement." Doward, 41 F.3d 791. The United States Attorney here argues that the search of the 962 package fell within two such exceptions: that it was justified by O'Rourke's consent and by the private search doctrine. The evidence supports both exceptions.

Consent. Both O'Rourke and Inspector Sweet testified that he verbally consented to the seizure and search of the 962 package. That O'Rourke twice affirmatively consented to the search and requested that the USPIS seize the package -- first through his attorney and then directly – establishes the fact of his consent.[8]

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[8] "For consent to a search to be valid, the government must prove by a preponderance of the evidence that the consent was uncoerced." United States v. Bey, 825 F.3d 75, 80 (1st Cir. 2016). Moss does not argue that O'Rourke's consent in this case was in any sense coerced. And the fact that O'Rourke, through counsel, affirmatively contacted the USPIS about the package after it arrived strongly suggests that it was not.

The fact that O'Rourke received the package on Moss's behalf does not vitiate that consent. First, as the addressee and actual recipient of the package, O'Rourke likely had the actual authority to consent to the search. His consent, as "one who possesses common authority over premises or effect" is thus "valid as against the absent, nonconsenting person with whom that authority is shared," such as Moss. United States v. Matlock, 415 U.S. 164, 170 (1974).

Even were he a mere bailee of the 962 package – contrary to the weight of the evidence, as discussed supra Part III.A.2 -- that status would not invalidate the search. "A search is valid if, at the time, officers reasonably believe a person who has consented to a search has apparent authority to consent, even if the person in fact lacked that authority." United States v. Gonzalez, 609 F.3d 13, 18 (1st Cir. 2020). The Postal Service's Administrative Support Manual authorizes "a postal employee acting with the consent of the addressee or sender" to inspect packages otherwise sealed against inspection. Accordingly, at the time of the search, Inspectors

Sweet and Riggins reasonably believed that O'Rourke, as the addressee of the 962 package, had the authority to consent to its search. The search therefore falls within the consent exception to the warrant requirement.

Private search. The search of the 962 package was also justified by the private search doctrine. The Fourth Amendment protects against warrantless searches by the government, not by private parties. Jacobsen, 466 U.S. at 115. "The private search doctrine provides that, if a private actor . . . searches evidence in which an individual has a reasonable expectation of privacy, and then provides that evidence to law enforcement or its agent . . . '[t]he additional invasions of [the individual's] privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search.'" United States v. Powell, No. 17-1683, slip op. at 8 (1st Cir. July 16, 2018) (quoting Jacobsen, 466 U.S. at 115 (1984)). This is because "when an individual reveals private information to another, he

assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information." Jacobsen, 466 U.S. at 117.

Under the private search doctrine, "there is no Fourth Amendment violation if the search by law enforcement or its agent is coextensive with the scope of the private actor's private search and there is 'a virtual certainty that nothing else of significance' could be revealed by the governmental search." Powell, slip op. at 8 (quoting Jacobsen, 466 U.S. at 115). "But if, instead, that search 'exceed[s] the scope of the private search,' then the government must have 'the right to make an independent search' under the Fourth Amendment in order for that search to comport with the Constitution." Id. (quoting Jacobsen, 466 U.S. at 116).

Here, O'Rourke's friend, Krimtler, conducted a private search before the USPIS inspected the package.[9] Specifically, she opened the package, saw that it contained powder, and informed O'Rourke of

[9] The defendant does not challenge Krimtler's conduct.

the fact -- an act that prompted O'Rourke, through his attorney, to contact the USPIS. And the USPIS's subsequent search of the package was coextensive with Krimtler's private search. Inspector Riggins, after seizing the package, opened it and was, likewise, able to view the white powder contained in clear zip-top baggies. Accordingly, the private search exception to the warrant requirement applies.

III. Conclusion

Finding that, even assuming that Moss has standing to challenge the searches of the 730 and 962 packages, those searches did not violate the Fourth Amendment, the court DENIED his motion[10] to suppress the evidence discovered during those searches and resulting therefrom, and his motion for reconsideration of the same.[11]

SO ORDERED.

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[10] Document no. 52.

[11] Document no. 60.

s/ Joseph N. Laplante
Joseph N. Laplante
United States District Judge

Dated: August 2, 2018,

cc: John R. Davis, AUSA
Shane Kelbley, AUSA
Simon R. Brown, Esq.

APPENDIX B

UNITED STATES of America,

Appellee,

v.

Dustin MOSS, Defendant, Appellant

No. 18-1793

United States Court of Appeals,

First Circuit

August 26, 2019

Background: Defendant moved to suppress methamphetamine that postal inspector discovered in United States Postal Service (USPS) packages. The United States District Court for the District of New Hampshire, Joseph N. Laplante, J., denied motion. Defendant appealed.

Holdings: The Court of Appeals, Torruella, Circuit Judge, held that:

(1) search warrant that included conflicting descriptions of package to be seized was not invalid, and

(2) warrantless search of package was justified by addressee's consent.

Affirmed.

1. Searches and Seizures 🗝 162

While courts typically treat the question of whether a defendant has a reasonable expectation of privacy as a threshold issue, sometimes referring to it as an issue of standing, this analysis is more properly placed within the purview of substantive Fourth Amendment law than within that of standing. U.S. Const. Amend. 4.

2. Searches and Seizures 🗝 162

Whether a defendant has a reasonable expectation of privacy is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim. U.S. Const. Amend. 4.

3. Criminal Law 🗝 1139, 1158.12

Appellate court reviews the district court's denial of a motion to suppress scrutinizing its factual findings for clear error and its legal conclusions, including its ultimate constitutional determinations, de novo.

4. Criminal Law 🗝 1134.60

Appellate court may affirm suppression rulings on any basis apparent in the record.

5. Searches and Seizures 🗝 13.1

"Search" within the meaning of the Fourth Amendment occurs whenever the government intrudes upon any place and in relation to any item in which a person has a reasonable expectation of privacy. U.S. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

6. Searches and Seizures 🗝 192.1

To advance claims for protection under the Fourth Amendment, defendant carries the burden of showing that he has a reasonable expectation of privacy in the area searched and in relation to the items seized. U.S. Const. Amend. 4.

7. Criminal Law 🗝 1134.49(4)

Searches and Seizures 🗝 162

Because whether a defendant has a reasonable expectation of privacy is not jurisdictional, it is within an appellate court's discretion to forgo the question and proceed directly to the constitutionality of the challenged searches. U.S. Const. Amend. 4.

8. Searches and Seizures 🗝 126

Test for determining the adequacy of the description in a warrant of the location to be searched is whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched. U.S. Const. Amend. 4.

9. Criminal Law 🗝 1134.4

When carrying out inquiry of whether warrant adequately described place to be searched and items to be seized, appellate court does not strictly limit its analysis to the four corners of the warrant but also considers the circumstances of the warrant's

issuance and execution; notwithstanding, the content of the warrant application is outside the scope of court's analysis, and it cannot save the actual warrant from its failure to provide an adequate description. U.S. Const. Amend. 4.

10. Searches and Seizures 🗝 124

Fact that a warrant application adequately describes the things to be seized does not save a warrant from its facial invalidity; the Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. U.S. Const. Amend. 4.

11. Searches and Seizures 🗝 124

Search warrant affidavit may be referred to for purposes of providing particularity if the affidavit accompanies the warrant, and the warrant uses suitable words of reference which incorporate the affidavit. U.S. Const. Amend. 4.

12. Searches and Seizures 🗝 126

Search warrant that included conflicting descriptions of United States Postal Service (USPS) package to be seized was not invalid, although

warrant incorporated by reference attachment that described totally distinct package; warrant provided description of correct package in form of its exclusive tracking number, warrant suffered from mere technical error, and fact that postal inspector isolated package in parcel inspection room following positive dog sniff but prior to issuance of search warrant, coupled with his familiarity with package's physical characteristics effaced any reasonable probability of him mistakenly searching another package. U.S. Const. Amend. 4.

13. Searches and Seizures 🗝 181

Warrantless search of United States Postal Service (USPS) package was justified by addressee's consent; addressee verbally consented to search of package twice, first through his attorney and then directly to postal inspector, and as package's addressee and recipient, he had actual authority over package and therefore capacity to consent to its search. U.S. Const. Amend. 4.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE (Hon. Joseph N. Laplante, U.S. District Judge)

Simon R. Brown, with whom Preti Flaherty PLLP, Concord, NH, was on brief, for appellant.

John S. Davis, Assistant United States Attorney, with whom Scott W. Murray, United States Attorney, was on brief, for appellee.

Before TORRUELLA, LYNCH, and KAYATTA, Circuit Judges.

TORRUELLA, Circuit Judge.

Dustin Moss ("Moss") appeals from the district court's denial of his motion to suppress approximately twenty pounds of methamphetamine that a postal inspector discovered in two United States Postal Service Priority Mail Express packages, as well as any evidence resulting from the searches of those packages. After careful review, we affirm.

I. BACKGROUND

A. Factual Background

1. The 730 Package

On April 18, 2017, U.S. Postal Inspector Bruce Sweet ("Sweet") singled out from a list of incoming mail a package scheduled to arrive from Las Vegas, Nevada, to Manchester, New Hampshire. Since October 2016, Sweet had been participating in the investigation of a drug conspiracy in which packages containing methamphetamine were sent from Las Vegas to New Hampshire and, in return, packages containing money were sent from New Hampshire to Las Vegas. According to postal databases, the singled-out package weighed twenty-six pounds; was addressed to Brian O'Rourke at 3 Blackberry Way, Apt. 108, Manchester, New Hampshire; and bore the tracking number EL810533730US (the "730 Package"). More importantly, it had "328 Florrie Ave."[1] in Las Vegas as the return address, which matched the "Florrie Ave." return address used in other packages identified throughout the drug conspiracy investigation. Based on these

[1] Sweet later determined that the "328 Florrie Ave." address in Las Vegas did not exist.

characteristics and his knowledge of the investigation, Sweet deemed the 730 package suspicious.

Accordingly, the night before the package's arrival, Sweet drafted an affidavit in support of a warrant to search the 730 Package and e-mailed it to Assistant United States Attorney William Morse ("AUSA Morse"). Sweet's affidavit included an attachment labelled "Attachment A," which accurately described the 730 Package as a "black 'Kicker Speaker' cardboard box," and detailed the package's weight and dimensions. The attachment also identified the 730 Package's addressee, O'Rourke, as well as the package's final destination.

Sweet collected the 730 Package and placed it in a canine drug-sniff lineup shortly after the package arrived in Manchester on the morning of August 19, 2017. After the drug-sniffing dog alerted on the 730 Package, Sweet secured the package in the United States Postal Inspection Service's parcel inspection

room.[2] Sweet effectively separated the 730 Package from all other mail held in the postal facility given that there were no other packages in the parcel inspection room at this point.

AUSA Morse proceeded to e-mail Sweet's affidavit to court personnel that same morning. AUSA Morse's e-mail indicated that his office was still working on the associated paperwork. Within an hour of the e-mail's delivery, AUSA Morse and Sweet arrived at the magistrate judge's chambers with a complete search warrant packet consisting of: (1) the search warrant application; (2) Sweet's affidavit and its two accompanying attachments; and (3) the proposed search warrant. In the space provided for a description of the property to be searched, the warrant application stated: "See Attachment A to Affidavit of U.S. Postal Inspector Bruce A. Sweet which is incorporated herein by reference.". As mentioned above, Attachment A of Sweet's affidavit provided an accurate and detailed description of the

[2] Access to the parcel inspection room is limited to Postal Inspection Service employees.

730 Package. After reviewing the search warrant application and Sweet's affidavit, the magistrate judge issued the search warrant.[3]

However, due to a clerical error in the U.S. Attorney's Office, the document identified as "Attachment A" that was appended to the search warrant was different from the one attached to Sweet's affidavit and reviewed by the magistrate judge. The issued warrant's Attachment A did not describe the 730 Package, a twenty-six pound cardboard box, but rather a five-ounce envelope Sweet had searched during the course of an unrelated investigation from November 2016.[4] The

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[3] Similar to the search warrant application, the actual search warrant stated "See Attachment A, as attached hereto and incorporated herein" in the space provided for the description of the property to be searched.

[4] Apart from being of a different type and weight than the 730 Package, the package described in the issued warrant's Attachment A was addressed to a different recipient, Mr. Golden; destined to a different city, Laconia, New Hampshire; had a different sender, Sequoia High School in California; and,

warrant, nevertheless, still included information reflecting its relation to the 730 Package. Specifically, its caption correctly read:

> In the Matter of the Search of
> (*Briefly describe the property to be searched . . .*)
> USPS Priority Mail Express Package Bearing Tracking
> Number EL 810533730US.

In other words, the issued warrant included the 730 Package's exclusive tracking number, despite the description of another package in its Attachment A.

Unaware of the mistakenly appended attachment, Sweet proceeded to search the 730 Package. Inside the package, he found a large speaker and, inside the speaker, twelve zip-top bags, each containing almost exactly one pound of a white crystalline substance later identified as methamphetamine. Sweet then replaced the narcotics with miscellaneous items to bring the box to its original weight, repackaged the speaker, resealed the package, and delivered it to the

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of course, was identified with a different tracking number, EL576175385US.

post office for the next stage of the government's operation -- apprehension of the 730 Package's addressee, Brian O'Rourke.

O'Rourke was a crack cocaine addict. His supplier was Sabrina Moss ("Sabrina"), defendant-appellant Moss's sister. O'Rourke, Sabrina, and Moss had all been in the same hotel room with other drug users about a week prior to the arrival of the 730 Package. O'Rourke and Moss did not know each other and did not speak to each other in that hotel room. Their interaction was limited to what can be described as a mutual acknowledgement of each other's presence: they waved at each other after Sabrina pointed out Moss to O'Rourke. Sabrina then asked O'Rourke if he was willing to receive a package at his apartment on Moss's behalf in exchange for three-and-a-half grams of crack cocaine.[5] O'Rourke agreed.

But the terms of this agreement were never fleshed out any further. O'Rourke left the hotel room

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[5] According to O'Rourke, this amount of crack cocaine had a street value of around $300.

without Sabrina telling him when to expect the package to arrive or the number of packages he would receive. Nonetheless, from their conversation's reference to "a package," O'Rourke understood that their arrangement was limited to the receipt of a single piece of mail. O'Rourke believed everything would transpire in a simple, quick manner: The package would arrive at his apartment, Moss would pick it up, and he would receive his illicit compensation. To O'Rourke's dismay, not even his first assumption materialized.

The same day the 730 Package arrived in Manchester, a postal inspector dressed as a letter carrier delivered a notice to O'Rourke's mailbox informing him that the package was ready for pickup at the post office. Moss met with O'Rourke at the latter's apartment, where, instead of going directly to the post office, they waited, believing that the 730 Package might yet be delivered there. Several hours later, Sabrina and her boyfriend arrived at O'Rourke's apartment and joined the waiting game. Once they realized the 730 Package would not be

delivered directly to O'Rourke's apartment, the four individuals decided to decamp. O'Rourke and Moss left the apartment at the same time. O'Rourke drove directly to the post office, while Moss drove to a shopping center located approximately a quarter mile away from the post office and parked behind a furniture store.

Sweet, who was behind the counter at the post office, handed the 730 Package to O'Rourke. O'Rourke then met with Moss behind the furniture store and placed the 730 Package in the back seat of Moss's vehicle. Shortly thereafter, law enforcement intervened and arrested Moss and O'Rourke on the spot. O'Rourke was subsequently released on bond, while Moss remained in custody.

2. The 962 Package

Three days later, on April 22, 2017, a second package from Las Vegas, bearing the EL652259962US tracking number (the "962 Package"), was delivered to O'Rourke's address. Because it was a box too large to fit in the mailbox,

the 962 Package was placed in the building's parcel lockbox. O'Rourke noticed a key in his mailbox, which served to notify residents that they had a larger package ready for pickup. Because he was not expecting a package and wanted "nothing to do with it." He opted to ignore they key and wait until he had spoken with his lawyer before taking any action. The following day, however, O'Rourke's friend, Brenda Krimtler ("Krimtler") -- who was helping O'Rourke get his affairs in order before he entered a drug rehabilitation program -- picked up his mail and used the key to retrieve the 962 Package from the building's parcel lockbox.

Krimtler then brought the 962 Package to O'Rourke's kitchen, opened it, and noticed it was full of white powder. She reacted to this surprise by telling O'Rourke, who was in another room, about the package's contents. O'Rourke responded by instructing Krimtler to reseal the package and return it to the parcel lockbox, which she did without O'Rourke ever setting his eyes on it.

O'Rourke then called his attorney and told her about the package. With O'Rourke's agreement, the attorney called Sweet and explained the situation. She informed Sweet about the 962 Package, told him that the 962 Package had been opened, that O'Rourke believed it contained narcotics, that O'Rourke did not want it, and that Sweet could search it.

With permission from O'Rourke's attorney, Sweet called O'Rourke later that evening. O'Rourke confirmed the information that had been previously conveyed by his attorney. He told Sweet that his friend had opened the package, that it appeared to contain narcotics, and that he consented to the package being seized and searched. Because O'Rourke expressly granted him permission to search the package, Sweet did not seek a warrant. Instead, he contacted another postal inspector who lived closer to O'Rourke, Steve Riggins, who proceeded to retrieve the 962 Package from the parcel lockbox.[6]

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[6] Given that the parcel lockboxes are designed to lock in the key and remain opened once a resident gains access, the lockbox

Riggins took the 962 Package to his car and, with Sweet on the phone, opened it. Inside the package he found a freezer bag. After unfurling the top of the freezer bag,[7] he noticed that it contained zip-top bags with white powder. Riggins then took the 962 Package to the Manchester postal facility, where he and Sweet thoroughly searched it and found that it contained a total of eight zip-top bags with approximately one pound of methamphetamine each.

B. Procedural History

[**1, 2**] On May 17, 2017, a grand jury indicted Moss for conspiracy to distribute a controlled substance (50 grams or more of methamphetamine), in violation of 21 U.S.C. § 846 (Count 1), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count 2). Moss moved to suppress the 730 Package

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with the 962 Package was open when Riggins arrived to retrieve the package.

[7] The top of the freezer bag was not sealed but rather furled to one side, which allowed the bag to fit within the 962 Package.

and the 962 Package, as well as any fruits obtained from their searches. The government opposed Moss's motion to suppress, contending, among other things, that Moss lacked a reasonable expectation of privacy in the packages.[8]

On April 13, 2018, the district court held an evidentiary hearing on the motion to suppress. After

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[8] While courts typically treat the question of whether a defendant has a reasonable expectation of privacy as a threshold issue, sometimes "refer[ing] to it as an issue of 'standing,'" United States v. Lipscomb, 539 F.3d 32, 36 (1st Cir. 2008) (citation omitted), this analysis is "more properly placed within the purview of substantive Fourth Amendment law than within that of standing." Minnesota v. Carter, 525 U.S. 83, 88, 119 S. Ct. 469, 142 L.Ed.2d 373 (1998) quoting Rakas v. Illinois, 439 U.S. 128, 140, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)). As the Supreme Court recently explained, whether a defendant has a reasonable expectation of privacy "is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim." Byrd v. United States, ___ U.S. ___, 138 S.Ct. 1518, 1530, 200 L.Ed.2d 805 (2018). Accordingly, we do not use the term "standing" to describe the question. See United States v. Bouffard, 917 F.2d 673, 675 (1st Cir. 1990).

listening to the testimony of Sweet, O'Rourke, Riggins, and Moss, the district court denied Moss's motion to suppress from the bench. In doing so, however, the court opted to assume Moss had a reasonable expectation of privacy in the packages and denied his motion to suppress because neither search was unconstitutional.

On April 25, 2018, Moss pleaded guilty to both counts. Under the plea agreement, however, Moss explicitly reserved the right to appeal the district court's denial of his motion to suppress. On August 2, 2018, the district court issued a written decision explaining the basis for the ruling on the motion to suppress, and sentence Moss to a total of 300 months' imprisonment: 240 months for Count 1 and 60 months for Count 2, to be served consecutively.

In its written decision, as it had done in its ruling from the bench, the district court again assumed arguendo that Moss held a reasonable expectation of privacy in the searched packages and concluded that neither search was unconstitutional.

The district court found that the warrant authorizing the search of the 730 Package was not facially invalid despite the government's attachment of the incorrect Attachment A. The court reasoned that, although the attachment "described the wrong package, the face of the warrant listed the correct tracking number and, under the circumstances, the probability that Inspector Sweet – who had already secured the 730 Package – would execute the warrant by searching an incorrect package was exceedingly low."

As to the 962 Package, the court held that Riggins's warrantless search was justified by both the private search doctrine and O'Rourke's consent. Specifically, it found that the private search doctrine applied because Riggins's search did not exceed the scope of Krimtler's private search, and that O'Rourke had both apparent and actual authority to provide consent given that he was both the addressee and recipient of the package. The current appeal ensued.

II. ANALYSIS

[**3, 4**] We review the district court's denial of a motion to suppress scrutinizing its factual findings for clear error and its legal conclusions, including its ultimate constitutional determinations, de novo. See United States v. Owens, 917 F.3d 26, 34 (1st Cir. 2019). We "may affirm . . . suppression rulings on any basis apparent in the record." United States v. Ackies, 918 F.3d 190, 197 (1st Cir. 2019) (quoting United States v. Arnott, 758 F.3d 40, 43 (1st Cir. 2014)).

[**5, 6**] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A search within the meaning of the Fourth Amendment occurs whenever the government intrudes upon any place and in relation to any item which a person has a reasonable expectation of privacy. See United States v. Bain, 874 F.3d 1, 12 (1st Cir. 2017) (quoting Katz v. United States, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring));

United States v. Stokes, 829 F.3d 47, 51 (1st Cir. 2016). To advance claims for protection under the Fourth Amendment, the defendant carries the burden of "showing that he has 'a reasonable expectation of privacy in the area searched and in relation to the items seized.'" Stokes, 829 F.3d at 51 (quoting United States v. Aguirre, 839 F.2d 854, 856 (1st Cir. 1988)).

[**7**] Because whether a defendant has a reasonable expectation of privacy is not jurisdictional, it is within an appellate court's discretion to forgo the question and proceed directly to the constitutionality of the challenged searches. See Byrd v. United States, ___ U.S. ___, 138 S.Ct. 1518, 1530-31, 200 L.Ed.2d 805 (2018). We opt to exercise this discretion here and, without deciding whether Moss had a reasonable expectation of privacy, address the constitutionality of the searches of the 730 and 962 Packages in turn.

A. Sweet's Search of the 730 Package

Moss contends that the district court erred in denying his motion to suppress the 730 Package and

the fruits of its search. Because the warrant incorporated by reference an attachment that described a totally distinct package, Moss argues that it failed to particularly describe the 730 Package and was thus facially invalid for failure to comport with the Fourth Amendment's particularity requirement. While we do not condone the government oversight in assembling the 730 Packages search warrant, this argument fails.

[**8-11**] The Fourth Amendment unambiguously requires that warrants "particularly describe[e] the place to be searched, and the persons or things to be seized." Groh v. Ramírez, 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (quoting U.S. Const. amend. IV) (emphasis omitted). The manifest purpose of this constitutional rule, known as the particularity requirement, "is to prevent wide-ranging general searches by the police." United States v. Bonner, 808 F.2d 864, 866 (1st Cir. 1986). "The test for determining the adequacy of the description [in a warrant] of the location to be searched is whether the description is sufficient to

enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched." Id. (internal quotation marks omitted). When carrying out our inquiry, we do not strictly limit our analysis to the four corners of the warrant but also "consider[ ] the circumstances of [the warrant's] issuance and execution." Id. Notwithstanding, the content of the warrant application is outside the scope of our analysis – it cannot save the actual warrant from its failure to provide an adequate description. See Groh, 540 U.S. at 557, 124 S.Ct. 1284. "The fact that [a warrant] application adequately describe[s] the 'things to be seized' does not save [a] warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." Id. (emphasis omitted).[9]

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[9] Notwithstanding, "[a]n affidavit may be referred to for purposes of providing particularity if the affidavit accompanies he warrant, and the warrant uses suitable words of reference which incorporate the affidavit." United States v. Roche, 614

Supreme Court precedent provides useful guidance. In Groh, the Supreme Court held that a warrant that "did not describe the items to be seized at all" was facially invalid under the Fourth Amendment because it did not meet the particularity requirement. Id. at 558, 124 S.Ct. 1284. While the warrant application stated that law enforcement sought to seize "automatic firearms . . . grenades, grenade launchers, [and] rocket launchers," among other things, the warrant itself simply referenced the place to be searched – a "single dwelling residence . . . blue in color" – in the space provided for the description of the items to be seized. Id. at 554, 558, 124 S.Ct. 1284. In reaching its conclusion that the warrant did not meet the particularity requirement,

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F.2d 6, 8 (1st Cir. 1980) (citation omitted); accord Groh v. Ramírez, 540 U.S. 551, 557-58, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) ("We do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents. Indeed, most Court of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.").

the Supreme Court stressed that the "obviously deficient" warrant "did not simply omit a few items from a list of many to be seized, or misdescribe a few of several items. Nor did it make what fairly could be characterized as a mere technical mistake or typographical error." Id. at 558 124 S.Ct. 1284.

Our decision in Bonner is similarly helpful here. There, the defendants challenged a warrant authorizing the search of their residence, claiming that it was defective because it omitted the residence's exact address. 808 F.2d at 865-66. In upholding the validity of the search warrant, we concluded that, despite the "technical omission" of the address, the "[defendants'] residence was described with sufficient particularity," given that a detailed physical description of the residence was included in the warrant. Id. at 866-67. We also found that "[t]here was no risk that federal agents would be confused and stumble into the wrong house, or would take advantage of their unforeseeable windfall and search houses indiscriminately." Id. at 866-67. In support of this conclusion, we emphasized

that "[t]he agents, having previously conducted the surveillance [of the residence], knew exactly which house they wanted to search . . . and searched only that house." Id. at 867.

We faced a similar situation in United States v. Vega-Figueroa, 234 F.3d 744 (1st Cir. 2000), and again denied the defendant's challenge to the district court's denial of his motion to suppress. In that case, the defendant claimed that a warrant to search his residence failed to comply with the particularity requirement because it "mistakenly described the apartment to be searched as building 44, apartment 446," when "[his] address was in fact building 45, apartment 446." 234 F.3d at 756. Noting that the defendant's apartment was the only residence eventually searched and that the same officer who "made the observations that were the basis for issuing the warrant" was also the warrant's executing officer, as well as a member of the search team, we concluded that there was no risk of the wrong house being searched. Id. Therefore, we ruled

that the warrant was properly issued and executed. Id.

[**12**] Here, the district court did not err in denying Moss's motion to suppress. The present case is distinguishable from Groh and more analogous to Bonner and Vega-Figueroa. In Groh, the issued warrant did not describe the items to be seized at all. 540 U.S. at 558, 124 S.Ct. 1284. In turn, the warrant at issue in this appeal provides a description of the 730 Package in for form of its exclusive tracking number, which was included in the issued warrant's caption. In other words, the warrant was not totally devoid of an accurate description of the 730 Package. And Moss concedes as much.

Our inquiry, however, does not end here. Because the 730 Package's warrant includes two conflicting descriptions – on one hand, the correct tracking number in its caption and, on the other, the inaccurate description in the appended attachment – we must look further to ensure it meets the particularity requirement. Thus, we employ the

rubric set out in Bonner to ascertain the adequacy of the warrant's description.

Under the test established in Bonner, we first examine the adequacy of a warrant's description based on whether it is "sufficient to enable the executing officer to locate and identify" the object to be searched with reasonable effort. 808 F.2d at 866 (emphasis added). Because Sweet had segregated the 730 Package in the parcel inspection room prior to the issuance of the search warrant, there was no real risk here of him having to expend an unreasonable effort to locate and identify it. Moreover, Sweet's familiarity with the 730 Package, which will be discussed in detail below, meant that, in any case, he did not require a description beyond the exclusive tracking number to properly execute the arrest warrant. See id. at 867 (holding that a detailed description of a residence, albeit one without a specific address, was sufficient to meet the particularity requirement given that the agents executing the warrant because had previously surveilled it). While definitely not as detailed as the

description that Sweet and Moss intended to incorporate by reference into the warrant, the tracking number's unique combination of thirteen digits provided a description with a high degree of particularity. Again, Moss concedes as much. Thus, we conclude that, within the circumstances of this case, inclusion of the 730 Package's tracking number in the warrant would have been sufficient for the executing officer, Sweet, to locate and identify it without expending an unreasonable effort even if he had not isolated it in the parcel inspection room prior to the issuance of the warrant.

Considering the circumstances of its issuance and execution, the warrant authorizing the 730 Package's search suffered from a mere technical error. See id. at 866; see also United States v. Qazah, 810 F.3d 879, 886 (4th Cir. 2015) (classifying the inclusion of an incorrect attachment in a search warrant as a "technical one"). The fact that Sweet isolated the 730 Package in the parcel inspection room following the positive dog sniff but prior to the issuance of the search warrant couple with his familiarity with the

package's physical characteristics (e.g., size, weight, etc.) effaced any reasonable probability of him mistakenly searching another package. Apart from being the warrant's executing officer, Sweet participated in every stage leading up to the search of the 730 Package. He conducted the investigation that led to the 730 Package being singled out even before its arrival in Manchester; was present during the canine's dog sniff; drafted the search warrant application's affidavit; sought issuance of the warrant from the magistrate judge; and, of course, executed the search. Cf. Bonner, 808 F.2d at 866-67; Vega-Figueroa, 234 F.3d at 756. Furthermore, Sweet knew that the package described in the search warrant's Attachment A was related to a separate 2016 investigation in which he had participated.[10]

In sum, we find that, despite the presence of conflicting descriptions in the warrant, the 730

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[10] Furthermore, the property described in the issued warrant's Attachment A and the 730 Package had significantly different physical characteristics; while the first was a five-ounce envelope, the second was a twenty-six-pound box.

Package was described with sufficient particularity for Sweet to identify it and there was no reasonable probability of Sweet searching another package; therefore, the warrant was valid.

B. Warrantless Search of 962 Package

[**13**] The warrantless search of the 962 Package was justified by O'Rourke's consent. O'Rourke verbally consented to the search of the 962 Package twice – first through his attorney and then directly to Sweet. As the package's addressee and recipient, O'Rourke had actual authority over the 962 Package and therefore capacity to consent to its search. See United States v. Matlock, 415 U.S. 164, 171 n.7, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974) (recognizing control as a factor to be considered when determining whether a person has authority over property); see also Eagle Tr. Fund v. United States Postal Serv., 365 F. Supp. 3d 57, 60-61 (D.D.C. 2019) ("[T]he Domestic Mail Manual, which sets out the procedures for mail delivery by the Postal Service, provides that an addressee controls the delivery of its mail."), appeal on other grounds docketed, No. 19-5090 (D.C. Cir.

Apr. 8, 2019); 39 C.F.R. § 211.2(a)(2) (stating that the Domestic Mail Manual forms part of the Postal Service's regulations). Notwithstanding, even if he lacked authority, as Moss contends, the search was valid because, being the package's address, it was reasonable for Sweet and Riggings to believe that O'Rourke had apparent authority to consent to its search. See United States v. González, 609 F.3d 13, 18 (1st Cir. 2010) ("A search is valid if, at the time, officers reasonably believe a person who has consented to a search has apparent authority to consent, even if the person in fact lacked that authority.").

We therefore hold that the warrantless search of the 962 Package did not infringe on Moss's Fourth Amendment rights.[11]

III. CONCLUSION

[11] Because O'Rourke's consent justified the warrantless search of the 962 Package, we need not address the district court's alternate, private search doctrine basis for the denial of the package's suppression. See United States v. Ackies, 918 F.3d 190, 197 (1st Cir. 2019).

Based on the foregoing, we affirm the district court's denial of Moss's motion for suppression of evidence.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 18-1793

UNITED STATES OF AMERICA,

Appellee,

v.

DUSTIN MOSS,

Defendant, Appellant.

JUDGMENT

Entered: August 26, 2019

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The

district court's denial of Dustin Moss' motion to suppress is affirmed.

By the Court:
Maria R. Hamilton, Clerk

cc:
Simon R. Brown
Dustin Moss
John Staige Davis
William Edwsrd Morse
Seth R. Aframe
Shane B. Kelbley

APPENDIX D

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 18-1793

UNITED STATES OF AMERICA,

Appellee,

v.

DUSTIN MOSS,

Defendant, Appellant.

Before

Torruella, Lynch,

And Kayatta,

Circuit Judges.

ORDER OF COURT

Entered: September 24, 2019

Appellant Dustin Moss' Petition for Rehearing is denied.

By the Court:
Maria R. Hamilton, Clerk

cc:
Simon R. Brown
Dustin Moss
John Staige Davis
William Edwsrd Morse
Seth R. Aframe

APPENDIX E

UNITED STATES DISTRICT COURT

for the

District of New Hampshire

In the Matter of the Search of (*Briefly describe the property to be searched or identify the person by name and address*) USPS Priority Mail Express Package Bearing Tracking Number EL810533730US	)))))))))))	Case No. 17-mj-35-01-AJ

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests

the search of the following person or property located in the _____ District of New Hampshire
(*identify the person or describe the property to be searched and give its location*)

See Attachment A, as attached hereto and incorporated herein.

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal (*identify the person or describe the property to be seized*):

Property that constitutes evidence, fruits, and/or other instrumentalities of violations of 21 U.S.C. 841(a)(1), 843(b), and 846 as set forth in Attachment B, as attached hereto and incorporated herein.

YOU ARE COMMANDED to execute this warrant on or before May 3, 2017 (*not to exceed 14 days*)

☑ in the daytime 6:00 a.m. to 10:00 p.m.

☐ at any time in the day or night because good cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to

Andrea K. Johnstone, U.S. Magistrate Judge .

(*United States Magistrate Judge*)

☐ Pursuant to 18 U.S.C. § 3103a(b), I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial),

and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized (*check the appropriate box*)

☐ for ____ days (*not to exceed 30*)

☐ until, the facts justifying, the later specific date of _____.

Date and time issued: 4/19/2017; 9:49 am

/s/ Andrea K. Johnston

(*Judge's signature*)

City and state: Concord, NH

Andrea K. Johnstone, U.S. Magistrate Judge

(*printed name and title*)

Return		
Case No: 17-mj-35-01-AJ	Date and Time Warrant Executed: 4/19/17 10:45 AM	Copy of warrant and inventory left with: O'Rourke
Inventory made in the presence of: Sweet + Evans Postal Inspectors		
Inventory of the property taken and any person(s) seized: 1 "Kicker Speaker" Box w/ gray wooden speaker w/ black plastic grill Label # EL810533730US 12 1 lb. clear Ziplock Bags w/ clear crystal materials; FTP for Meth		
Certification		
I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.		

Date: 5/13/17	/s/ Bruce Sweet *Executing Officer's signature* Bruce Sweet Postal Inspector *Printed name and title*

ATTACHMENT A

(Description of Property to be Searched)

SUBJECT PACKAGE: A USPS Priority Mail Express package bearing tracking number EL576175385US. The package is a white USPS Priority Mail Express cardboard envelope measuring approximately 12.5 inches long, 9.5 inches wide, and 2 inches thick, and weighing approximately 5 ounces. The package bears a handwritten mailing label and is addressed to "Mr. Golden 322 Union Ave #6 Laconia, NH 03246" with a return address of "Sequoia High School 300 El Camino RWC CA 94062." The package is currently in the possession of the United States Postal Inspection Service, located at 955 Goffs Falls Rd., Manchester, NH 03103.

ATTACHMENT B

Items, documents, records, files and other information that constitutes evidence, fruits, and/or other instrumentalities of violations of Title 21, United States Code, Sections 841(a)(1), 843(b), and 846, including controlled substances, money, records relating to controlled substances and/or money, and/or records relating to the identity of the individual who shipped the package or the intended recipient of the package.