No._____

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IN THE SUPREME COURT OF THE UNITED STATES

---

GREGORY OWENS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

---

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

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## Question Presented

Does the Fourth Amendment protect a person's property from a search without a warrant?

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Petitioner, Gregory Owens, respectfully requests that a writ of certiorari issue for a full review of the decision of the United States Court of Appeals for the First Circuit filed on February 26,

2019, for which rehearing was denied on March 27, 2019.

## Opinion Below

The United States Court of Appeals for the First Circuit issued an opinion below which was published on February 26, 2019 and is attached in Appendix A. *See United States v. Owens*, 917 F.3d 26 (1st Cir. 2019). The Court of Appeals reviewed a decision of the United States District Court for the District of Maine. *See* Appendix B. The Petitioner moved for reconsideration of that opinion on March 12, 2019 which was denied was denied on March 27, 2019. Appendix C.

## Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The judgement sought to be reviewed was entered on March 27, 2019 by the United States Court of Appeal for the First Circuit after a Motion for Rehearing and Rehearing En Banc was denied.

## Constitutional Provisions and Statutes Involved

The United States Constitution, Amendment 4 provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…" U.S. Const. amend IV.

Petitioner was charged by indictment with Interstate Domestic Violence, in violation of 18 U.S.C. §2261(a)(1) and (b)(2) and Discharge of a

Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. §924(c)(1)(A)(iii).

## Statement of the Facts

On December 18, 2014 a masked intruder entered the home of Steve and Carol Chabot in Saco, Maine. This intruder, armed with a handgun, proceeded through the Chabot's residence and up the stairs to the second floor of the home. Carol Chabot had heard a noise and got up out of bed to investigate. Mrs. Chabot left her bedroom and walked toward the top of the stairs. When she was near the top of the stairs she heard the sound of breaking glass. Mrs. Chabot checked on Rachel Owen, a house guest and friend who was staying the night. Mrs. Chabot came from the guest bedroom and back toward the top of the landing to see a look of horror on her husband, Steve Chabot's face. .

Mrs. Chabot was terrified and ran into a spare bedroom/office nearby. Mrs. Chabot slammed and locked the door behind her and hid under a desk in the room. As Mrs. Chabot slammed the door closed the intruder tried to bash it open. The intruder tried to bash through the door to the room where Mrs. Chabot was 3 or 4 times. Mrs. Chabot then locked the door and hid under a desk inside the room. Mrs. Chabot never saw the intruder.

Steve Chabot came out of the master bedroom and saw an intruder near the top of the stairs. The intruder was pouncing up the stairs and had a gun in his hand. The intruder was wearing a mask and had dark clothing on. Mr. Chabot could only see the intruder's eyes and noted that the person had glasses on. The intruder was wearing gloves and holding the gun in his right hand.

Unable to open the spare bedroom/office door where Mrs. Chabot was hiding the intruder proceeded to the room directly to the left of the spare bedroom where Rachel Owens was sleeping and shot Rachel Owens while she was lying in bed. Mrs. Owens was interviewed and described her attacker as having a Jamaican look. The intruder came out of Rachel Owens' room to see Steve Chabot standing near the partially open door of the master bedroom. Steve Chabot slammed the master bedroom door closed. The intruder tried to kick in the master bedroom door and when they were unable to do so fired several rounds from the handgun through the door. Three of the rounds struck Steve Chabot.

Steve Chabot made his way around the bed, grabbed the telephone and called 911 while hiding in his bedroom closet. The 911 call came in at 2:47 am. Law enforcement arrived at the Chabot's

residence. The first officer to arrive, Sergeant Kyle Moody, saw a vehicle, a Nissan Pathfinder, leaving the Chabots' neighborhood. Mr. Owens was known to drive a Hyundai. Law enforcement gathers video recordings from local businesses to review and see if Mr. Owens vehicle would be spotted. After review of said videos law enforcement did not see a vehicle matching the description of Mr. Owens vehicle. Steve Chabot exited the residence through the front door at the direction of the 911 operator. Mrs. Chabot came out of the residence after Mr. Chabot was taken to an ambulance waiting nearby. Law enforcement entered the residence and located Rachel Owens gravely injured in the other bedroom. The intruder was nowhere to be found and was not confronted by law enforcement as they made their way to the Chabot's' residence.

Rachel and Gregory Owens resided in Londonderry, New Hampshire. Rachel Owens and Carol Chabot had been friends growing up and Mrs. Owens had been spending a few days visiting Carol Chabot at her home in Saco, Maine when this incident occurred. Law enforcement, immediately, suspected and began investigating Gregory Owens as a suspect. At approximately 4:20 am the Saco Police Department contact their counter parts in Londonderry, NH in order to determine Mr. Owens whereabouts.

Officers from the Londonderry, New Hampshire police department drove to Mr. Owens neighborhood at approximately 5:20 am and parked their car in a turnabout at the end of the street and under the cover of darkness made their way down the street to Mr. Owens residence. The officers were

under instruction not to make their presence known to Mr. Owens should he be home at the residence. The officer approached Mr. Owens home, went up the driveway to the garage door and placed their hand on the hood of Mr. Owens vehicle and felt that the hood of the vehicle was warm. The officers also saw light turn on inside the residence indicating that someone was present inside and retreated down the street to their vehicle..

Mr. Owens home was located at the end of a dead end street. The property is bordered on one side by the road, on one side by small trees and shrubs and on the other two sides by forest. This home is not located in an area where the general public passes by on a regular basis. The area was remote enough that law enforcement was concerned about their presence being detected and thus the decision was made for them to abandon their

unmarked vehicle down the street and approach on foot. The vehicle that was search was no more than 10 feet from the house when the search occurred. Law enforcement approached Mr. Owens driveway from the lawn of his property. As a result the police officers travelled across a portion of the lawn and took a path that was different from that a normal invitee would traverse to access Mr. Owens' front door.

Shortly after the officers felt the hood of Mr. Owens' vehicle and retreated up the street Mr. Owens exited his residence, got into his vehicle and headed toward a convenience store. After he exited the store Mr. Owens was confronted by numerous law enforcement officers and told that his wife had been shot in Maine. Mr. Owens collapsed to the ground and after taking some time to regain his composure was taken to the Londonderry Police

Department and interview by law enforcement. Mr. Owens waived his *Miranda* rights and agreed to answer questions from the officers. Mr. Owens denied involvement in the shooting.

During the motion hearing in the trial court the Government conceded that Officer Dyer went onto the lawn and driveway of Mr. Owens' residence. . Mr. Owens residence was at the end of a dead end road in a quiet residential neighborhood. The driveway is in the front of the house and is relatively short. The driveway is shielded in part from the neighbor's home by shrubs and trees. The garage provides direct entry into the home.

## **Argument**

The decision of the United states Court of Appeals for the First Circuit in this matter conflicts with decisions of the United States Supreme Court in

*Collins v. Virginia* , 138 S. Ct. 1663 (2018); *Kentucky v. King,* 563 U.S. 452 (2011); *Horton v. California*, 496 U.S. 128, (1990) and *Missouri v. McNeely,* 569 U.S. 141 (2013). The lower court's decision in this matter also implicates a questions of exceptional importance – namely when exigent circumstances justify, after the fact, entry onto private property for the purposes of conducting a search for evidence that naturally degrades or dissipates over time.

The First Circuit's decision in this matter determined that the search of Mr. Owens' vehicle in his driveway was reasonable under the exigent circumstances exception to the warrant requirement of the Fourth Amendment. *United States v. Owens,* 917 F.3d 26, 37 (1st Cir. 2019). Exigent circumstance can provide a recognized exception to the requirement that law enforcement obtain a warrant

prior to conducting a search of an individual's property or curtilage. *See Payton v. New York,* 445 U.S. 573, 590 (1980). However, where an officer has created an exigency or violated the Fourth Amendment in arriving at the place where the evidence is collected or the consent is obtained the exigency is null and void. *See Horton v. California*, 496 U.S. 128, 136-140 (1990) and *Kentucky v. King*, 563 U.S. 452, 462 (2011).

In *Horton* the Supreme Court ruled that weapons that constituted evidence of a crime which were discovered in plain view during the execution of a valid search warrant that did not authorize or reference weapons was lawful as the reason that the officers were in the place to view the weapons was a valid warrant that they were executing within its stated scope at the time of the plain view discovery. *Id*. at 141-142.

In *Collins v. Virginia*, 138 S. Ct. 1663 (2018) a law enforcement officer entered into the driveway of a residence to search a motorcycle. *Id.* Slip Op. at 2. The motorcycle was sitting in a partially enclosed section of the driveway a few yards from the perimeter of the house. Id. Slip Op. at 6. The motorcycle was visible from the street where it was parked. *Id.* Slip Op. at 2. In ruling that the search in *Collins* was unlawful it noted: "In physically intruding on the curtilage of Collins' home to search the motorcycle, Officer Rhodes not only invaded Collins' Fourth Amendment interest in the item searched, *i.e.,* the motorcycle, but also invaded Collins' Fourth Amendment interest in the curtilage of his home. The question before the Court is whether the automobile exception justifies the invasion of the curtilage. The answer is no." *Id.* at Slip Op. 6-7.

In this case Officer Dyer trespassed on Mr. Owens' lawn in order to gain access to the driveway to touch the vehicle. This all occurred in a scenario where Officer Dyer and Officer Lee went to Mr. Owens Londonderry residence under strict orders not to make contact with him, but to merely determine if he was at the residence. In this matter the search took place after and during a trespass on Mr. Owens property and for that reason is not congruous with the *King* or *Horton* or *Collins* decisions from the United States Supreme Court.

The First Circuit also analyzes the exigency in terms of the dissipation of heat from the engine of Mr. Owens' vehicle. "Courts have permitted warrantless home arrests for major felonies if identifiable exigencies, independent of the gravity of the offense, existed at the time of the arrest." *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984). Gravity of

the crime at issue is a factor to be considered regarding whether the warrantless entry into a home to effectuate an arrest is justified, but it isn't the only factor to be considered. *Id.* Furthermore, in the case at bar there was no evidence connecting Mr. Owens to any offense at the time the search was conducted. So while the officers involved were investigating a serious offense – they had no evidence the any evidence of said offense would be found in or on Mr. Owens' vehicle.

The First Circuit decision also likens the evanescence of heat present in the hood of Mr. Owens vehicle to the dissipation of alcohol in the blood stream. In *Missouri v. McNeely*, 569 U.S. 141 (2013) the Supreme Court rules that the natural dissipation of alcohol from the blood stream does not, in and of itself, create an exigency that justifies a warrantless blood draw. *Id.* at 145. In other words

other facts are needed to justify an exigency beyond the naturally occurring condition of metabolization of alcohol. *Id.* at 156. The First Circuit cites nothing other than the dissipation of the heat from Mr. Owens' vehicle as the exigency making this matter directly analogous to *McNeely* and missing the additional information present in *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber* there was evidence in the record that the officer reasonably feared that investigating the accident scene and getting a warrant would result in the loss of evidence. *Id.* at 770-771. There is no evidence in the record of this case that Officer Dyer searched Mr. Owens' vehicle without a warrant because he had no time or opportunity to get a warrant or that the time that it would take to do so would result in the complete loss of the evidence. In fact, Officer Dyer's entry onto Mr. Owens' property was not initially for

the purpose of searching Mr. Owens' vehicle. At the point in time where Officer Dyer and Office Lee approach Mr. Owens residence there is no reason to suspect Mr. Owens was involved in the commission of this crime or that evidence would be found in or on his vehicle. This is fitting with the fact that Officer Dyer and Officer Lee were task specifically with only determining if Mr. Owens was home without revealing their presence. Officer Dyer, furthermore, had no reason to believe that Mr. Owens would be leaving his house in the early morning hours and therefore the concern that the vehicle would be used again compromising the heat on the hood at the time of the search is a red herring. It was more reasonable for Officer Dyer to think that Mr. Owens was returning to bed at that time of morning. The seriousness of the offense being investigated does not, alone, justify exigent circumstance for a

warrantless search of Mr. Owens property. Absent articulable facts in the record that show more than the naturally occurring dissipation of heat the principles of *McNeely* must control and the search of Mr. Owens' vehicle must be deemed to be unreasonable.

In *Collins v. Virginia,* 138 S.Ct. 1663 (2018) a law enforcement officer entered into the driveway of a residence to search a motorcycle. *Id.* Slip Op. at 2. The motorcycle was sitting in a partially enclosed section of the driveway a few yards from the perimeter of the house. Id. Slip Op. at 6. The motorcycle was visible from the street where it was parked. *Id.* Slip Op. at 2. A visitor to the property would need to walk partially up the driveway to get to the front door of the home. *Id.* Slip Op. at 6. With all of this in mind the Supreme Court ruled that the portion of the driveway where the motorcycle was

parked was curtilage. *Id.* Slip Op. at 6. As part of their reasoning the Supreme Court indicated "It is of no significance that the motorcycle was parked just a "short walk up the driveway.'... The driveway was private, not public, property, and the motorcycle was parked in the portion of the driveway beyond where a neighbor would venture…" *Id*. Slip Op. at 10, fn. 3. In addition, the fact that the area of the driveway was visible from the public street was not dispositive of the issue – "the ability visually to observe an area protected by the Fourth Amendment does not give officers the green light to physically intrude on it." *Id.*

While it is true that a person approaching Mr. Owens' front door would need to enter on a portion of the driveway, all be it a small one, no one would expect visitors in the early morning hours around 5:00 am. As such, any license granted for a "knock

and talk" based on the fact that a visitor would need to be on the curtilage in order to access the front door would not apply in the early morning hours during which the events in this case unfolded. *United States v. Lundin*, 817 F.3d 1151, 1160 (9th Cir. 2016).

The determination that the area of Mr. Owens' residence trespassed upon by Officer Dyer was not curtilage by the trial court was erroneous. This is particularly true in light of the Supreme Court's decision in *Collins*.

**1. Entry onto Mr. Owens' property constituted a trespass.**

The entry onto Mr. Owens' property, and separately the touching of his vehicle, constituted a trespass and in line with *Florida v. Jardines*, 469 U.S. ___, 133 S.Ct. 1409, 1414 (2013). Appellant's Brief at 19-22. The Government conceded in the

lower court that Officer Dyer entered Mr. Owens' lawn in order to make his way to the driveway and did so for an investigative purpose. App. at 140.

To the extent that the Government is arguing that Mr. Owens' driveway was short and a visitor needed to access a portion of the driveway in order to get to the front door is being relied upon as factor in favor of excluding the driveway from the definition of curtilage they are ignoring the fact that the purpose of the entry is a highly relevant factor to the determination of whether the scope of the license to enter is exceeded. *Jardines,* 133 S.Ct. at 1416-17.

The factors that the Court considers in the determination of whether a location constitutes curtilage of a residence must be judged in light of the trespass principles enumerated in *Jardines*. In other words, the purpose of the visit will determine the

type of license to enter granted, if any. A law enforcement officer who enters a private property with only the intent to search a vehicle thereon has been granted no license by the homeowner.

Officer Dyer first entered onto Mr. Owens' lawn. This area of the lawn in front of the home was separated from the street by some bushes and shrubs. App. at 2811. An ordinary invitee to the property would not be found on this section of the lawn in their approach to the front door. In fact Officer Dyer testified that the approach to the home was made from that area because it would conceal his presence from the front door.

The Fourth Amendment of the United States Constitution protects people from unreasonable searched. U.S. Const. Amend. 4. "When it comes to the Fourth Amendment, the home is first among

equals." *Florida v. Jardines*, 469 U.S. ___, 133 S.Ct. 1409, 1414 (2013). The area immediately surrounding the home, the curtilage, is subject to Fourth Amendment protection. *Id.* Curtilage is "the area around the home [that] is "intimately linked to the home, both physically and psychologically and is where privacy expectations are most heightened." *Id* (internal quotations omitted)(citing *California v. Ciralo*, 476 U.S. 207, 213 (1986).

In order to determine whether an area outside of the home is part of its curtilage the Court must examine four factors: "1. The proximity of the area claimed to be curtilage to the home, 2. Whether the area is included within an enclosure surrounding the home, 3. The nature of the uses to which the area is put, and 4. The steps taken by the resident to protect the area from observation by people passing by."

*United States v. Brown*, 510 F.3d 57 (1st Cir. 2007). This is a fact specific inquiry.

In *United States v. Dunn*, 480 U.S. 294 (1987), law enforcement entered upon a suspect's property and looked in a barn that was located 50 yards from a fenced enclosure surrounding the defendant's house. The Court in *Dunn* pointed toward four factors to look at in order to determine whether a structure is curtilage of the residence and therefore subject to the same Fourth Amendment protections. *Id.* at 301. The Court also noted that these are not the only factors to be considered and that there is no magic formula for these determinations. *Id.*

The first factor reviewed in *Dunn* it the proximity of the area in controversy to the residence. *Id.* The second is the whether there is an enclosure surrounding the area. *Id.* The third is the use the

area is put to. *Id.* The fourth is whether the owner has taken pains to shield the area from public view. *Id.* These factors are applied as part of a case by case determination of whether a particular area is curtilage and the ultimate guiding principle is whether there is an expectation of privacy in the area searched – in other words should the area in questions be treated like a part of the home itself. *Id.* at 300.

Applying these four factors Mr. Owens driveway is curtilage. First, the area of the driveway that the officer entered upon was directly in front of the garage and the closest portion of the driveway to the home. Second, while there is no fence around the property the photographs in evidence show that there are trees bordering two sides of the property and trees and shrubs planted between Mr. Owens' home and the neighboring property. Third, the area

in question is used as an access point to the garage. Fourth, Mr. Owens' private residence is located on a dead end street which is not an area that the public ordinarily passes by.

Application of these factors must also be guided by subsequent case law. When looking at whether Mr. Owens' driveway, which was accessed by law enforcement via his lawn, which is clearly private property, is curtilage the factors in *Brown* and *Dunn* must be read in the context of *Florida v. Jardines*, 133 S.Ct. 1409 (2013) and *United States v. Jones*, 132 S.Ct. 945 (2012). A driveway can be part of the curtilage to the home. *See United States v. Deihl*, 276 F.3d 32, 39 (1st Cir. 2002) and *United States v. Wells*, 648 F.3d 671, 677 (8th Cir. 2011).

Once a law enforcement investigation that intrudes into a constitutionally protected area such

as one described above the inquiry turns to whether they were given permission, either expressly or impliedly, to do so. *Jardines*, 133 S.Ct. at 1415. "A police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Id.* at 1416 (quoting *Kentucky v. King*, 568 U.S. ___, 131 S.Ct. 1849, 1862 (2011)). Whether a law enforcement officer has an implied license to enter the curtilage of a home will depend upon the reason for the entry was made. *Id.* If the behavior of law enforcement reveals that their intent is to search the property it is outside the scope of what a traditional licensee would believe they were authorized to do. *Id.* at 1417.

In this matter law enforcement was instructed to go to Mr. Owens home and not make contact with him directly. As such this is not a situation where an officer was heading up the driveway to the door of

the residence to make contact with the occupant and merely placed his hand on the vehicle when passing by. The purpose of this visit was to search and gather information regarding whether Mr. Owens was at the residence, not to make notification to Mr. Owens that his wife was the victim of a shooting. No reasonable licensee would believe that they had the right to snoop around in someone's driveway and lay hands upon their vehicle. Therefore, this search runs afoul of the Fourth Amendment.

Mr. Owens vehicle itself is subject to protection by the Fourth Amendment from being trespassed upon. *United States v. Jones*, 564 U.S. __, 132 S.Ct. 945, 949 (2012). In *Jones* law enforcement applied a GPS tracking device to a vehicle while it was parked in a public parking lot. *Id.* at 948. The attachment of the GPS unit to this vehicle was a search for Fourth Amendment purposes. *Id.* at 950.

While observation of a vehicle traveling in public would not constitute a search or a violation of a person's expectations of privacy the touching of the vehicle constitutes a trespass and therefore is a search for the purposes of the Fourth Amendment. *Id.* at 953-54.

The entry onto Mr. Owens property without permission on the morning of December 18, 2014 constituted a trespass. When a law enforcement officer placed his hand on Mr. Owens' vehicle he conducted a search that he was not entitled to conduct and which violated Defendant's rights under the Fourth Amendment.

## Conclusion

Petitioner requests that this Honorable Court grant this Petition for a Writ of Certiorari to the United States Court of Appeal for the First Circuit

because the decision of the Court of Appeals runs counter to the Fourth Amendment to the United States Constitution.

Dated: June 25, 2019

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## Appendix A

United States Court of Appeals For the First Circuit

No. 16-1945

UNITED STATES OF AMERICA,

Appellee,

v.

GREGORY OWENS,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Nancy Torresen, U.S. District Judge]

Before

Howard, Chief Judge, Torruella and Thompson, Circuit Judges.

Sarah A. Churchill, with whom Nichols & Churchill, P.A., was on brief, for appellant.

John M. Pellettieri, Attorney, Appellate Section, Criminal Division, U.S. Department of Justice, with whom Sangita K. Rao, Attorney, Appellate Section, Criminal Division, John P. Cronan, Acting Assistant Attorney General, Criminal Division, Matthew S. Miner, Deputy

Assistant Attorney General, Criminal Division, Halsey B. Frank, United States Attorney, Darcie McElwee, Assistant United States Attorney, and James W. Chapman, Assistant United States Attorney, were on brief, for appellee.

February 26, 2019

**TORRUELLA**, **Circuit Judge**. This is a case about a double life, an attempted uxoricide, and excellent police work. Defendant-Appellant Gregory Owens ("Owens") was convicted of interstate domestic violence in violation of 18 U.S.C. § 2261(a)(1) and (b)(2); and discharge of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii). He was sentenced to life in prison. On appeal, Owens challenges the sufficiency of evidence supporting his convictions, the reasonableness of his sentence, and the district court's denial of his pretrial motions seeking to suppress evidence and dismiss the indictment on double

jeopardy grounds. After careful review, we find Owens's convictions supported by sufficient evidence, his sentence substantively reasonable, and the motions for suppression and dismissal properly denied. Seeing no reason to vacate Owens's convictions or sentence on the grounds that he has presented, we affirm.

## I. BACKGROUND

### A. Factual Background

#### 1. The Home Invasion

In the early morning hours of December 18, 2014, at approximately 2:45 a.m., Carol Chabot ("Carol") awoke to a shuffling noise coming from the downstairs of her two-story house in Saco, Maine. Sensing something was not right, she woke her husband, Steve Chabot ("Steve"), who lay beside her. Steve, however, did not hear the noise but told Carol "it's probably Rachel" who caused the noise —

with "Rachel" being Rachel Owens ("Rachel"), a family friend who was staying the night. Then Steve rolled over to go back to sleep. Undeterred, Carol got out of bed to investigate.

As she walked down the upstairs hallway, toward the spare bedroom where Rachel was staying, Carol heard a second noise -- this time the loud sound of glass shattering. With haste, she looked into the spare bedroom and noticed Rachel was soundasleep in bed. Steve also heard the loud noise and hurried out of bed to check what was going on. He peeked out of his bedroom towards the staircase and saw an intruder racing up the stairs with a gun in his right hand. The intruder, later identified as Owens, was approximately 5 feet 9 inches tall with a slim, athletic build; he wore dark clothing, gloves, and a black mask with a single opening at the eyes and glasses protruding from it.

Steve shouted an expletive at the intruder and dashed back into the master bedroom. Carol, who did not see theintruder but saw a look of horror on her husband's face, ran into a third bedroom used as a home office and barricaded herself inside. The intruder followed her and tried to force his way into the room, but, after a few failed attempts, suddenly stopped. He then walked toward the room where Rachel lay and fired at her three times, hitting her in the head, arm, and torso.

Having heard the gun shots, Steve peeked out of the master bedroom again. He saw the intruder about two feet away, heading towards him. They looked at each other face to face. Steve immediately slammed the door shut and held his arm against it. Undaunted, the intruder kicked the door in, looked inside through the now slightly-opened doorway, and fired shots through the door, striking Steve in the

arm, neck, and rib area.[1] The intruder then abandoned the Chabot residence. He did not take any valuables with him.

### 2. The Crime Scene

In response to a 911 call from Steve Chabot received at 2:47 a.m., police arrived at the Chabot residence. During their investigation of the crime scene, officers learned that the intruder gained entry into the garage through a door located in the back of the house, and into the interior of the Chabot residence through a door located in the garage that led to the kitchen. The upper part of this garage door was double-paned glass, sectioned into nine squares by wood framing. Theintruder broke the outer pane of the lower left square of glass, leaving glass shards scattered on the floor and separating the inner pane,

[1] Both Rachel and Steve survived the incident, but it left Rachel with a bullet lodged in her brain and severely limited use of her right hand.

which remained intact, from the door, thereby creating a gap that allowed the intruder to reach in and unlock the deadbolt. Officers retrieved human hair from the area between the shattered outer pane of glass and the inner pane of glass, and swabbed the area for DNA.

Police officers also recovered numerous .9mm shell casings stamped "WCC 1987," later identified as 27-year-old Western Cartridge Company casings, from the second floor of the house.

Finally, while inspecting the periphery of the Chabot residence, officers found a footprint in the damp dirt outside the first-floor window near the garage and proceeded to make a cast of it.

**3. Search, Intervention, and Interview**

At around 5:00 a.m., Maine police officers informed New Hampshire law enforcement of the shooting at the Chabot residence. Two New

Hampshire police officers, Randy Dyer ("Officer Dyer") and Keith Lee ("Officer Lee"), were instructed to visit Owens's residence in the town of Londonderry to verify the presence of his two vehicles. They were, however, instructed not to make contact with Owens. At approximately 5:20 a.m., the two police officers arrived at Owens's neighborhood and parked their car at the beginning of Winthrop Road, the dead-end street where Owens's residence was located. Under the cover of darkness, they began heading down Winthrop Road toward the house. At around 5:24 a.m., before the officers could reach their destination, a state trooper patrol car with flashing blue lights drove near the Owens residence. Contemporaneously, a light visible from the house's front windows went off, making the inside of the house go dark. The officers stopped the trooper and instructed him to turn off

the flashing lights. After this, the officers, now accompanied by the trooper, continued their approach towards the residence. With Officer Lee and the trooper providing cover, Officer Dyer eventually made his way into the driveway, where he placed his hand on Owens's Hyundai Santa Fe SUV ("Owens's vehicle") and noticed its hood and grill were warm.[2] The officers and trooper then retreated back down Winthrop Road to the staging area.

Several minutes after arriving at the staging area, the officers saw Owens's vehicle exit Winthrop Road and proceeded to follow it. The vehicle stopped at a nearby Circle K store, where Owens got out. The officers approached Owens and told him

[2] Owens's vehicle was parked on the upper part of his driveway, with its nose facing the garage. The driveway is easily observable and accessible to anyone passing by in the neighborhood. It is not enclosed in any way, nor does it have any fences or signs warning visitors to stay away.

that his wife had been shot. Owens acted surprised and complained of chest pains, after which the officers requested medical attention for him. While waiting for the medical personnel to arrive, the officers saw blood, a pair of boots with wet stains, and a computer hard drive inside Owens's vehicle. Owens agreed to go with the officers to the police station for a videotaped interview (the "police interview") after receiving medical assistance.

During the police interview, Owens provided a detailed account of his night. Specifically, he explained, albeit with some variation, that, after speaking to his wife Rachel at around 9:15 p.m., he went to bed, but got up a few times to work on his computer on a proposal for a military consultancy contract with the Ukrainian government that was due the next day. In particular, Owens claimed that at around 2:30 a.m. –- fifteen minutes before the

Chabot residence was broken into -- he sent an e-mail to one of his colleagues regarding a tweak to theproposal.

Owens also admitted to leaving his home on multiple occasions throughout the course of the night and early morning: first, to Circle K at around 12:30 a.m. to get a soda and cigarettes; then, to Dunkin' Donuts between 4:15-4:45 a.m. toget coffee and donuts; and finally, to Circle K again at around 6:30 a.m. to grab another cup of coffee, at which point he came in contact with officers Dyer and Lee. Furthermore, he informed the interviewing officers that he was a military retiree and hadwhat he described as an "arsenal" of weapons in his house. After collecting some evidence (e.g., DNA samples from his hands and mouth, clothes, etc.), the police released Owens fromcustody.

**4. The Double-Life and Motive**

To fully understand the motive behind Owens's crime, we must look back to the preceding decade. In 2005, Owens met Betsy Wandtke ("Wandtke"), a woman from Wisconsin, in a flight back from a hunters' rights convention, which they had both attended.[3] About three years later, their relationship turned into an affair. As the affair progressed, Owens and Wandtke began to spend moretime together -- up to ten days a month. Owens considered Wandtke his "lover" and his "life." He represented to her that he was in the process of divorcing Rachel, which Wandtke was unable to independently confirm, given that it was not true. To partly explain his long absences when he was actually with Rachel inNew Hampshire, Owens told

[3] From the moment they met, Wandtke was aware of Owens's marriage.

Wandtke that his work as a military consultant required him to travel and take part in covert missions in places like Afghanistan.

While the affair continued, in or about 2011, Rachel began to develop early-onset dementia. The responsibility of having to care for her burdened Owens, but did not deter him from continuing his affair with Wandtke. Then, on December 3, 2014, the affair came to an abrupt end. Due to an inadvertent call from Owens's mobile phone, Wandtke discovered that Owens was leading a double-life -- his marriage with Rachel continued in regular course. Wandtke confronted Owens about it and told him their relationship was over.[4] After a

[4] Owens was with Wandtke in Wisconsin a little over a week before their breakup. They had plans to celebrate Thanksgiving together. Notwithstanding, the weekend before the holiday, Owens suddenly cancelled their plans, leaving Wisconsin for a supposed emergency covert mission in Afghanistan. Then, on December 3, 2014, Wandtke found out that Owens was not in

failed attempt to convince Wandtke that she misunderstood the conversation she overheard, Owens promised Wandtke he was going to make it up to her.

A mere fifteen days after the breakup, the events at the Chabot residence unfolded. Furthermore, in the days following the shooting, Owens contacted Wandtke via e-mail and told her that he was being "targeted" because of his work and instructed her to "go dark" and not tell anyone about their relationship. Then, on December 31, 2014 -- thirteen days after the incident at the Chabot residence and with his wife still recovering from a gunshot wound to the head -- Owens unexpectedly arrived at Wandtke's doorstep with a limousine and roses. Owens and Wandtke celebrated New Year's

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Afghanistan, but rather with Rachel in New Hampshire, as the result of the accidental call made from Owens's cell phone.

Eve and spent time together during the first week of2015. On January 4, 2015, Owens returned to New Hampshire. Shortly thereafter, on January 11, 2015, Owens was arrested.

### B. Procedural Background

On March 11, 2015, a grand jury indicted Owens on two counts: interstate domestic violence (Count One) and dischargeof a firearm during and in relation to a crime of violence (Count Two). On July 6, 2015, Owens filed a motion to dismiss the indictment on double jeopardy grounds; a motion to suppress evidence gathered as the result of the entry into his property, namely, into his driveway; and, a motion to suppress search warrants issued and executed during the investigation for his vehicles and house, electronic items (e.g., an iPhone, Magellan GPS, etc.), and an external hard drive and

a laptop computer in a Swiss Army case.[5] The district court held an evidentiary hearing on Owens's motion to dismiss and motions to suppress. Evidence was presented, including the testimony of the officer who touched Owens's vehicle, as well as that of the officers who drafted the affidavits on which the search warrants were based. Unpersuaded, the district court denied Owens's

[5] Owens also moved to suppress DNA evidence obtained from a blood sample collected at the Chabot residence, and from a buccal swab law enforcement performed on his cheeks during the police interview. Owens, however, eventually withdrew his motion as to the blood sample collected from the Chabot residence. Notwithstanding, we note that a heading in his brief makes specific reference to the collection of the blood sample, which may be interpreted to suggest his intent to still seek suppression of the DNA test results obtained therefrom. The Government attributes Owens's reference to the collection of the blood sample in the heading to human error. It asserts that the section with this heading actually deals with Owens's challenge to a search warrant affidavit that mentions DNA evidence obtained from Owens's police interview buccal swab. See infra at 21-24. Based on the section's content, we agree. Neither there nor anywhere else in his brief does Owens develop an argument for suppression of the DNA test results obtained from the collection of a blood sample at the Chabot residence. Accordingly, Owens must "forever hold [his] peace" with the Government's use of this evidence. *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (citations and internal quotation marks omitted).

motions to dismiss and to suppress.

A ten-day jury trial followed. The jury found Owens guilty of both counts. For these charges, the district court sentenced Owens to life imprisonment (240 Months on Count Oneand Life on Count Two). Owens timelyappealed.

## I. ANALYSIS

### A. Motion to Suppress Evidence Gathered as a Result of Officer Dyer's Entry into the Driveway

We review a district court's denial of a motion to suppress scrutinizing its factual findings for clear error and its legal conclusions de novo. *United States v. Flores*, 888 F.3d 537, 543 (1st Cir. 2018) (citations omitted); *United States v. Brown*, 510 F.3d 57, 64 (1st Cir. 2007). To succeed on appeal, a defendant "must show that no reasonable view of the evidence supports the district court's decision." *United States v. Dunbar*, 553 F.3d 48, 55 (1st Cir.

2009) (citations and internal quotation marks omitted).

Owens argues that Officer Dyer's entry into his driveway and touching of his vehicle parked therein constituted an illegal search because the driveway formed part of his house's curtilage and, therefore, was protected from warrantless searches by the Fourth Amendment. Accordingly, he sustains that the district court erred in denying the suppression of evidence obtained as a result of the search, namely, any reference to the temperature of his vehicle's hood and grill.

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." 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, 5 (2013) (citations and internal quotation marks omitted).

For Fourth Amendment purposes, a house's curtilage is "the area immediately surrounding and associated with the home." Id. at 6 (citation and internal quotation marks omitted). "The protection afforded [to a house's] curtilage is essentially a protection of families and personal privacy in an areaintimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v. Cirilo*, 476 U.S. 207, 212–13 (1986). Therefore, "[w]hen a lawenforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred.... Such conduct thus is

presumptively unreasonable absent a warrant." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (citation omitted).

In determining whether a specific part of a house falls within its curtilage, we consider:

> [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.[6]

*Brown*, 510 F.3d at 65 (alterations in original) (quoting *United States v. Diehl*, 276 F.3d 32, 38 (1st Cir. 2002) (quoting *United States v. Dunn*, 480 U.S. 294, 301 (1987))). In the instant case, however, we need not address these factors given that, even assuming that the driveway formed part of the

[6] These factors are eponymously called the Dunn factors after the Supreme Court's seminal opinion in *United States v. Dunn*, 480 U.S. 294 (1987). See, e.g., *United States v. Bain*, 874 F.3d 1, 14 (1st Cir. 2017).

house's curtilage, Officer Dyer faced exigent circumstances when he entered the driveway and placed his hand on Owens's vehicle, which circumscribes his warrantless search within the bounds of the Fourth Amendment. We explain.

Although generally a warrant must be secured before searching a home and its curtilage, "the warrant requirement is subject to certain reasonable exceptions." *Kentucky v. King (King)*, 563 U.S. 452, 459 (2011) (citation omitted). These exceptions are born out of courts' need to "balance the privacy- related and law enforcement-related concerns to determine if the intrusion was reasonable" under the Fourth Amendment. *Maryland v. King*, 569 U.S. 435, 448 (2013) (quoting *Illinois v. McArthur*,531 U.S. 326, 331 (2001)). "One well-recognized exception applies when 'the exigencies of the situation make the needs of law

enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *King*, 563 U.S. at 460 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)); see also *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016)("The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant." (citing *Michigan v. Tyler*, 436 U.S. 499, 509 (1978))). This exception, commonly known as the "exigent circumstances exception," has been applied in instances where the "need 'to prevent the imminent destruction of evidence'" justifies a warrantless search. *King*, 563 U.S. at 460 (citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)).

In determining whether exigent circumstances justify a warrantless search, we examine the totality of the circumstances. *Missouri v. McNeely*,

569 U.S. 141, 149 (2013). Accordingly, in the present case we begin by considering the gravity of thecrime being investigated and the weather conditions at the time of the search to ascertain the constitutionality of Officer Dyer's actions. Officer Dyer was investigating a crime of the most serious nature, a potential double-homicide**,** on a cold December morning. *See Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984); *United States v. Veillette*, 778 F.2d 899, 902 (1st Cir. 1985) (listing the "gravity of the underlying offense" as one of the factors that courts must consider "[i]n determining whether the circumstances of a case fall into one of the emergency conditions characterized as exigent circumstances"). As conceded by Owens's counsel at oral argument, the temperature in Londonderry, New Hampshire at the time of the search was 30 degrees Fahrenheit. In this cold weather, it was

reasonable for Officer Dyer to believe that any warmth emanating from the vehicle -- the evidence -- would evanesce or be destroyed before he could obtain a search warrant.

It is not unprecedented to make a finding of exigency based on a naturally occurring event's destructive consequence over critical evidence. In *McNeely*, the Supreme Court recognized that the "the natural dissipation of alcohol in the blood may support a finding of exigency in . . . specific case[s]." 569 U.S. at 156. Such was the case in *Schmerber*, where the Court concluded that "further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence" given that it would have "negatively affect[ed] the probative value of the

[blood alcohol test] results." *McNeely*, 569 U.S. at 152 (citing *Schmerber v. California*, 384 U.S. 757, 770-71(1966)).

We do not find it difficult to draw parallels between the exigent circumstances found in *Schmerber* and those in the instant case. Unlike other "destruction-of-evidence cases" in which a "suspect has control over easily disposable evidence," here, like in *Schmerber*, law enforcement dealt with the type of "evidence [that]. . . naturally dissipates over time in a gradual and relatively predictable manner." Id. at 153. Just as the passing of time negatively affected the probative value of the blood-alcohol test in *Schmerber*, it negatively affected the probative value of Officer Dyer's gauging of the temperature of Owens's vehicle through his sense of touch, and, as such, threatened the destruction or loss of evidence. *See id.* at 152.

The natural dissipation of the vehicle's heat, however, was not the only way the evidence could have been lost in the present case. If Owens turned on his vehicle's engine, as he eventually did, the evidence would have likewise been destroyed. Ignition would have made it practically impossible for law enforcement to know, based on touch, whether the vehicle was previously warm. In deciding whether to enter the driveway and touch Owens's vehicle, Officer Dyer was "forced to make [a] split- second judgment[] -- in circumstances that [were] tense, uncertain, and rapidly evolving." *United States v. Almonte-Báez*, 857 F.3d 27, 31 (1st Cir. 2017) (quoting *King*, 563 U.S. at 466).[7]Because

[7] Apart from knowing that Owens was being investigated in relation to a double-shooting, officers Dyer and Lee were aware that Owens had a military background and possessed firearms in his house. Also, they did not want to be seen because their instructions were to verify the presence of Owens's vehicles without making contact with him.

a light inside Owens's house was shut off a few minutes before his entry into the driveway, Officer Dyer had an objectively reasonable basis to believe Owens was awake and thereforecapable of exiting his house and turning on his vehicle at any moment, thereby destroying the evidence. These inevitable natural dissipation of the vehicle's warmth, support a finding of exigency and, thus, of reasonableness as to Officer Dyer's search. *See Almonte-Báez*, 857 F.3d at 32 ("[T]he government . . . may invoke the exigent circumstances exception when it can identify an 'objectively reasonable basis' for concluding that, absent some immediate action, the loss or destruction of evidence is likely."(citation omitted)).

Finally, the scope and intrusiveness of Officer Dyer's search also weigh in favor of its reasonableness. *See Maryland v. King*, 569 U.S. at 448 ("Th[e] application of 'traditional standards of

reasonableness' requires a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))). The scope of Officer Dyer's search was limited to verifying the temperature of Owens's vehicle, and its intrusiveness was minimal -- Officer Dyer simply placed his hand on the vehicle's hood and grill for a few seconds. *Cf. Schmerber*, 384 U.S. at 770-72 (holding that drawing a drunk-driving suspect's blood was reasonable); *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (holding that the "ready destructibility of the evidence" and the suspect's observed efforts to destroy it "justified the police in subjecting him to the very limited search," the scraping of his fingernails, which was "necessary to preserve the highly evanescent evidence they found under his

fingernails"); *Nikolas v. City of Omaha*, 605 F.3d 539, 546 (8th Cir. 2010) (holding that the exterior search of a garage, which warrants "protection comparable to that afforded the curtilage of a residence," by "look[ing] through the windows was constitutionally reasonable").

In short, based on our fact-bound and case-specific inquiry, we conclude that Officer Dyer's warrantless search of Owens's vehicle while parked in his house's driveway did not offend the Fourth Amendment because, within the totality of the circumstances, it was objectively reasonable for Officer Dyer to believe the search was necessary to prevent the imminent destruction of evidence.[8]

[8] Even if we were to find that the district court erred in denying Owens's motion to suppress evidence referencing the temperature of his vehicle, we would deem such error harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 24 (1967); see also *Chambers v. Maroney*, 399 U.S. 42, 53 (1970). As discussed in detail below, the Government presented a plethora of evidence unrelated to the temperature

## B. Motion to Suppress the Search Warrants

During the investigation of Owens's crimes, a total of five search warrants were issued.[9] On

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of Owens's vehicle that provided a more than compelling basis for Owens's convictions. See infra at 26-29; see also United States v. Jiménez, 419 F.3d 34, 42 (1st Cir. 2005) (finding harmless error when erroneously admitted evidence "pale[d] in light of the other evidence introduced at trial").

By the same token, the very limited evidence regarding the temperature of Owens's vehicle was inconsequential and cumulative. See Harrington v. California, 395 U.S. 250, 254 (1969) (recognizing that cumulative nature of contested evidence is a factor that contributes to the conclusion that any error in admitting the evidence was harmless). To the extent that the warmth emanating from Owens's vehicle was probative, it served to suggest that his vehicle had been recently used. But it was essentially conceded that Owens had left his house and driven his vehicle in the hours surrounding the incident at the Chabot residence. Owens himself testified that he left his house multiple times that night and early morning. Still more, video surveillance footage placed him outside of his house and at Dunkin' Donuts not long after the time of the incident. Unsurprisingly, in its closing statement the Government did not once meaningfully refer to the temperature of Owens's vehicle.

Thus, viewed in context, the evidence that Owens's vehicle felt warm when Officer Dyer touched it was simply unessential to both the Government's case and the jury's guilty verdicts. See United States v. Hasting, 461 U.S. 499, 506 (1983) ("Supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since by definition, the conviction would have been obtained notwithstanding the asserted error.").

[9]Two state courts, New Hampshire's Salem Circuit Court and Maine's Biddeford District Court, and the United States

appeal, Owens argues that the district court erred in denying his motion to suppress the evidence seized pursuant to all the warrants, albeit on two different grounds. He challenges the first four warrants arguing that the affidavits on which they were based contained false or misleading information.[10] Specifically, Owens sustains that these four affidavits contain certain misstatements, omissions, and inconsistencies that affected the issuing judges' probable cause determinations. Owens challenges the fifth warrant to the extent its supporting affidavit relied on: (1) evidence seized

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District Court for the District of Maine issued the search warrants Owens challenges on appeal.

[10] In his brief, Owens also posits that the district court erred because on their face the search warrant affidavits did not support a finding of probable cause and did not establish a nexus between the locations to be searched and the items sought. Owens, however, does not support this argument with anything more than conclusory statements. Accordingly, we deem it waived on appeal. *Zannino*, 895 F.2d at 17 (citations omitted).

pursuant to one of the four prior "faulty warrants," or (2) the match between DNA collected from the crime scene and the DNA obtained from the buccal swab taken during the police interview, which Owens avers was obtained "due to [his] uninformed and/or involuntary consent." On these grounds, Owens contends that we should invalidate the warrants or, in the alternative, remand to the district court for a hearing to "fully determine the depth and breadth" of the purported inaccuracies. We de

Affidavits supporting search warrants are presumptively valid. *United States v. Barbosa*, 896 F.3d 60, 67 (1st Cir. 2018); *United States v. McLellan*, 792 F.3d 200, 208 (1st Cir. 2015). A defendant may "rebut this presumption and challenge the veracity" of a warrant affidavit at a pretrial hearing commonly known as a *Franks* hearing. *Barbosa*, 896 Fd.3d at 67 (quotation and

citations omitted); *see also Franks v. Delaware*, 438 U.S. 154, 171 (1978).

To be entitled to a *Franks* hearing, however, a defendant must first make two "substantial preliminary showings: (1) that a false statement or omission in the affidavit was made knowingly and intentionally or with reckless disregard for the truth; and (2) the falsehood or omission was necessary to the finding of probable cause." *United States v. Rigaud*, 684 F.3d 169, 173 (1st Cir. 2012) (citation and internal quotation marks omitted).[11] A defendant's "failure to make a showing on either of these two elements dooms [his] challenge." *McLellan,* 792 F.3d at208.

In its order denying Owens's motion to suppress the evidence obtained pursuant to the

[11] These showings are referred to as the "intentionality" and "materiality" prongs of the *Franks* test. *See e.g., United States v. Lull*, 824 F.3d 109, 113-14 (4th Cir. 2016).

search warrants, the district court made a detailed assessment of Owens's claims as to each misstatement and omission he identified in the affidavits. Order on Def.'s Mots. to Suppress and Dismiss, *United States v. Owens*, No. 2:15-CR-55-NT, 2015 WL 6445320, at *12-18 (D. Me. Oct. 23, 2015). In doing so, the district court concluded that Owens did not make a showing of the two required elements --intentionality and materiality -- for any single misstatement or omission contained in the affidavits. *Id.* Specifically, it found that the misstatements and omissions were either the result of negligence or innocent mistakes, or had no bearing on the probable cause determinations.[12] *Id.*

[12] We note that, in support of his motion to suppress, Owens even labelled as "recklessly false" statements that were actually true. For example, Owens argued that one of the affidavits falsely identified him as a suspect, but Owens was in fact a suspect at the time the affidavit was submitted. The same goes for some of the omissions on which Owens's motion rested. For example, he claimed that one of the affidavits omitted that the

As to Owens's contention regarding his lack of consent to the buccal swab during the police interview, the district court reviewed video recordings of the interview and concluded that Owens's consent "was voluntarily given, and not the result of duress or coercion, express or implied." Id. at *3 n.2 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 248(1973)).

After a careful analysis of the record, we agree with and adopt the district court's factual findings and legal conclusions regarding Owens's failure to make the intentionality and materiality showings that would entitle him to a Franks hearing, and Owens's consent to the buccal swab during thepolice interview. Accordingly, we find no error in the district court's denial of Owens's motions to suppress

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Chabot residence's intruder first attempted to gain entry into the room where Carol was hiding, when the affidavit specificallymentioned this fact.

the evidence seized pursuant to the search warrants. *See United States v. Arias*, 848 F.3d 504, 511 (1st Cir. 2017) ("In considering a district court's decision to deny a *Franks* hearing, we review factual determinations for clear error and the probable cause determination de novo." (citation omitted)); *see also United States v. Tzannos*, 460 F.3d 128, 136 (1st Cir. 2006) (recognizing that "a defendant must meet a high bar even to get a *Franks* hearing").

### C. Sufficiency of Evidence for Owens's Convictions

In reviewing sufficiency challenges, "[w]e view 'all [the] evidence, credibility determinations, and reasonable inferences therefrom in the light most favorable to the verdict[] in order to determine whether the jury rationally could have found that the government established each element of the charged offense beyond a reasonable doubt.'" *United States v.*

*Valdés-Ayala*, 900 F.3d 20, 30 (1st Cir. 2018) (quoting *United States v. Serunjogi*, 767 F.3d 132, 139 (1st Cir. 2014)). Our analysis "is weighted toward preservation of the jury verdict." *Rodríguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 57 (1st Cir. 2005). "[A]s long as the guilty verdict finds support in a 'plausible rendition of the record,' it must stand." *United States v. Moran*, 312 F.3d 480, 487 (1st Cir. 2002) (citation omitted). Importantly, as we conduct our review, we place "no premium . . . upon direct as opposed to circumstantial evidence" since "both types of proof can adequately ground a conviction." *United States v. Valerio*, 48 F.3d 58, 63 (1st Cir. 1995) (quoting *United States v. Ortiz*, 966 F.2d 707, 711 (1st Cir. 1992)). For Owens's conviction on Count One, interstate domestic violence, the jury must have found that the Government proved beyond reasonable doubt that: (1) Owens was married to

Rachel; (2) Owens traveled in interstate commerce -- in this case, from New Hampshire to Maine -- with the intent to "kill [or] injure" Rachel;

(3) "as a result of such travel," Owens " commit[ted] or attempt[ed] to commit a crime of violence" against Rachel; and

(4) a "life threatening bodily injury" resulted from Owens's actions.[13] 18 U.S.C. § 2261(a)(1) & (b)(2). Meanwhile, for Owens's conviction on Count Two, discharge of a firearm during and in relation to a crime of violence, the Government had to prove that "during and in relation to [a] crime of violence," namely the crime of interstate domestic violence

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[13]The Government sought to prove the fourth prong, that Rachel sustained a "life threatening bodily injury," for purposes of 18 U.S.C. § 2261(b)(2), which provides a penalty of up to 20 years' imprisonment if defendant's commission of interstate domestic violence under § 2261(a) results in "permanent disfigurement or life threatening bodily injury to the victim." 18 U.S.C.
§ 2261(b)(2).

charged in Count One, Owens knowingly "use[d] . . . a firearm" by discharging it "during and in relation" to the commission of that crime. 18U.S.C. § 924(c)(1)(A)(iii).

Owens's sufficiency challenge rests on the Government's alleged failure to prove that Owens was the person who intruded into the Chabot residence, and the purported impossibility of Owens travelling from Londonderry to Saco, invading the Chabot residence, and returning to Londonderry within a time frame of approximately four hours and twenty-four minutes. Owens claims that neither Carol, Steve, nor Rachel identified him as the intruder. Furthermore, Owens stresses that Rachel identified the intruder as a "dark skinned person with dread locks [sic]," which does not match his physical description since he is a "white male who does not have dread locks [sic]." As to the second

ground of his sufficiency challenge, Owens claims that, because he was present in Londonderry at 12:11 a.m. and 4:35 a.m., as reflected by two store's video surveillance footage, it was impossible for him to have been present in Saco when the shooting took place, 2:45-2:47 a.m. He focuses on the amount of time it would have taken him to make the trip back from Saco to Londonderry. In particular, Owens contends that a trip from the Chabot residence in Saco to Londonderry would take him at least two hours and fifteen minutes, while under the Government's theory it took him approximately one hour and forty-eight minutes. We are not persuaded.

As the Government avers, the jury was presented a vast amount of direct and circumstantial evidence identifying Owens as the Chabot residence intruder. Specifically, the Government identifies the following incriminating

evidence presented at trial: (1) laboratory testing confirming that Owens's DNA was found in an area where the two window panes had been affixed to each other -- an area that would not have been exposed until the intruder shattered the outer pane -- as well as in the door handle and deadlock used to access the Chabot residence; (2) boot prints and a cast of boot impression taken from the scene that matched the boots found in Owens's car a few hours after the incident; (3) testimony regarding bloodstains found on the armrest of the driver's door and inside the driver's door of Owens's vehicle a few hours after the incident; (4) Steve's testimony identifying the intruder as a person with a similar physique to Owens's and who, like Owens, wore glasses; (5) expert testimony revealing Owens's efforts to manipulate his laptop's clock to make it seem that he was at his Londonderry home at the

time of the incident; and, relatedly, (6) testimony regarding Owens's attempt to manufacture an alibi by having his former boss lie to law enforcement about a Skype call that never took place. This evidence, in conjunction with the rest of the evidence presented at trial, allows a reasonable jury to conclude beyond reasonable doubt that it was Owens who broke into the Chabot's residence.[14] Owens's reference to Rachel's alleged identification of the intruder as a "dark skinned person with dread locks [sic]," which we read as an attempt to highlight evidence of exculpatory nature, does not help him. We are not to "weigh the evidence or make

[14]Although not specifically listed by the Government as evidence that led the jury to identify Owens as the Chabot residence's intruder, we note that the .9mm ammunition stamped "WCC 1987"and dark clothes seized from Owens's house also strongly support the jury's guilty verdicts. The .9mm ammunition casings matched the shell casings recovered from the Chabot residence, while thedark clothes, some of which was found in Owens's washing machine, matched that worn by the residence's intruder.

credibility judgments" in our sufficiency review, as "these tasks are solely within the jury's province." *Serunjogi*, 767F.3d at 139 (quoting *United States v. Hernández*, 218 F.3d 58, 64 (1st Cir. 2000)).[15]

Finally, as to the alleged impossibility of Owens making the trip back from Saco to Londonderry in less than two hours and fifteen minutes, the jury was presented with ample testimonial evidence, including Owens's own trial testimony, reflecting that this ninety-mile trip usually took about one hour and thirty minutes. Moreover, Carol testified that Owens frequently bragged about making the trip in just over an hour. Accordingly, thejury was presented with sufficient evidence to conclude that

[15] In any event, we note that the record is devoid of any testimony describing the intruder as such. What Rachel did testify was that the intruder was wearing a "Jamaican hat" or "floppy [black] hat.

Owens's Londonderry-Saco roundtrip would have lasted three hours orless, which fits easily within the four hour and twenty-four-minute window separating the two instances in which he was recorded at the Londonderry stores.

Based on the foregoing analysis, we conclude that there was sufficient evidence to support Owens'sconvictions.

**D. Reasonableness of Owens's Life Sentence**

Owens challenges the procedural and substantive reasonableness of his sentence. He claims the district court erred procedurally by not considering some factors outlined in 18 U.S.C. § 3553, and that it substantively erred in imposing a life sentence.

Our review is bifurcated. First, we ensure the district court did not commit any procedural errors, such as "failing to consider the section 3553(a)

factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *United States v. Gierbolini-Rivera*, 900 F.3d 7, 12 (1st Cir. 2018) (citation omitted). If a sentence is procedurally sound, we proceed to the second step of our inquiry: determining whether the sentence is substantively reasonable. *Id.* In reviewing the substantive reasonableness of a sentence, we "focus[] on the duration of the sentence in light of thetotality of the circumstances." *Id.* (citing *United States v. Del Valle- Rodríguez*, 761 F.3d 171, 176 (1st Cir. 2014)). Although a district court is "under a mandate to consider a myriad of relevant factors," the weight it decides to afford to those factors is "largely within the court's informed discretion." *United States v. Clogston,* 662 F.3d 588, 593 (1st Cir. 2011); *see also* 18 U.S.C. § 3553(a). We will ultimately find a sentence

substantively reasonable "so long as the sentencing court has provided a 'plausible sentencing rationale' and reached a 'defensible result.'" *Gierbolini-Rivera,* 900 F.3d at 12 (citing *United States v. Martin*, 520 F.3d 87, 96 (1st Cir. 2008)).[16]

Because Owens failed to preserve his objection below, we review his procedural challenge based on the district court's alleged failure to consider § 3553(a) factors for plain error. *Id.* at 13. Hence, for Owens's procedural challenge to succeed, he must show: "(1) that an error occurred, (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously

[16] In considering a challenge to the substantive reasonableness of a sentence preserved below, this court applies the abuse of discretion standard. *Gierbolini-Rivera*, 900 F.3d at 14. Owens, however, did not object to his life sentence below. In such cases, it remains an open question in this Circuit whether the abuse of discretion standard or the plain error standard applies. *Id.* at 15 (citation omitted). Notwithstanding, we need not decide this issue in the instant case given that Owens's claim fails under both.

impaired the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 12 (citations omitted). Owens's procedural challenge to his sentence fails on the first prong of the plain error test. The record reveals that the district court took into consideration all the mitigating factors Owens claims it did not, namely, his military accolades, lack of criminal history, productive work history, and age. *See* 18 U.S.C. § 3553(a) (stating that a sentencing court "shall consider . . . the history and characteristics of the defendant"). The district court, however, weighed these mitigating factors against the following aggravating factors: the severity of the crime; Owens's premeditation, given that he planned to kill Rachel both to avoid the responsibility of caring for her as she suffered from dementia and to be able to continue his affair, while avoiding the scorn that divorcing Rachel would have caused; the

attempted murder of a witness and friend, Steve, to prevent him from identifying Owens as the intruder; Owens's deceitful character, as revealed through his participation at trial and during allocution; and, finally, the need to protect the public, among others. *See id.* This balancing of sentencing factors "is precisely the function that a sentencing court is expected to perform," *United States v. Ledée,* 772 F.3d 21, 41 (1st Cir. 2014) (citation omitted), and we find that the district judge did not procedurally err, plainly or otherwise, while carrying it out in the present case.

Further, the district court thoroughly explained the rationale behind Owens's life sentence. Apart from the factors listed above, it emphasized Owens's "cold-blooded behavior . . . [and] obvious lack of conscience," as well as the "long lasting emotional damage to both Chabots" and the

severity of the injuries inflicted on Rachel. Considering the totality of the circumstances of Owens's crime, we find that the districtcourt's life sentence is a defensible result. See *Gierbolini-Rivera*, 900 F.3d at 12. Accordingly, we conclude that the district court did not substantively err.

### E. Motion to Dismiss the Indictment on Double Jeopardy Grounds

Finally, Owens claims that the district court erred in denying his motion to dismiss the indictment on double jeopardy grounds. The Double Jeopardy Clause "provides that no person may be tried more than once 'for the same offence.'" *Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018). It protects "an individual against (1) a second prosecution for the same offense, following an acquittal; (2) a second prosecution for the same offense, following a conviction; and (3) multiple punishments for the

same offense." *United States v. Stoller*, 78 F.3d 710, 714 (1st Cir. 1996) (citation omitted). Owens, however, does not establish that his double jeopardy challenge is premised on a prior criminal conviction, acquittal, or punishment for the same offenses for which he was convicted and sentenced in this case.[17] We thus find no error in the district court's denial of his motion to dismiss the indictment on double jeopardy grounds.

## II. CONCLUSION

For the reasons explained above, each of Owens's claims is unavailing. We therefore affirm the district court's denial of his pretrial motions, his convictions, and sentence.

**Affirmed.**

[17] He does not even allege that he was subject to any prior criminal prosecution for offenses resulting from the events that unfolded at the Chabot residence.

## Appendix B

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**

UNITED STATES OF AMERICA,

v.

GREGORY OWENS,
Defendant.

Docket No. 2:15-cr-55-NT

**ORDER ON DEFENDANT'S MOTIONS TO SUPPRESS AND DISMISS**

Defendant Gregory Owens is charged with Interstate Domestic Violence in violation of 18 U.S.C. § 2261(a)(1), (b)(2) and Discharge of a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. 924(c)(1)(A)(iii). This matter comes before the Court on the Defendant's motion to dismiss (ECF No. 40) and two motions to suppress

(ECF Nos. 41 & 43).[1] I have considered the testimony, evidence, and arguments presented at the hearing on September 9, 2015, as well as both parties' supplemental briefs. For the reasons stated below, the Defendant's motions are **DENIED.**

## FINDINGS OF FACT

The charges against the Defendant arise out of a shooting that occurred in the early hours of December 18, 2014 at a home on Hillview Avenue in Saco, Maine. I glean these facts from the testimony of Officer Randy Dyer, Sergeant Marc Beaudoin, and Detective Frederick Williams and from the exhibits offered by the parties.

On the night of the shooting Steven and Carol Chabot, the owners of the home, were hosting their

[1] The Defendant initially filed three motions to suppress but later withdrew his motion to suppress DNA test results (ECF No. 42). *See* Def.'s Suppl. Brief 6 (ECF No. 61).

longtime friend Rachel Owens, the Defendant's wife. At 2:47 a.m., Steven Chabot called 911 to report a shooting in his home. Def.'s Ex. B ¶ 3 (ECF No. 54-1). When officers arrived, they learned that both Steven Chabot and Rachel Owens had been shot. Def.'s Ex. B ¶ 3. Carol Chabot was found unharmed. Def.'s Ex. B ¶ 3.

During the ensuing investigation at the Chabot residence, Rachel Owens was unresponsive, but Steven Chabot was able to speak. He told investigators that he had heard a noise coming from downstairs while he was in bed with his wife in their second floor bedroom. Def.'s Ex. B ¶ 5. When they went into the hallway to investigate, Steven Chabot saw an individual walking up the stairs holding a gun. Def.'s Ex. B ¶ 5. Steven Chabot described the subject as 5' 9" tall with a medium build and wearing

all black clothing, including a black ski mask. Def.'s Ex. B ¶ 5.

Carol Chabot did not see the subject but saw the look of fear on her husband's face when he saw the individual ascending the stairs. She ran to a nearby bedroom to hide. The intruder initially tried—but failed—to gain entry into the bedroom where Carol Chabot had barricaded herself. Thereafter, Carol Chabot heard Rachel Owens screaming, followed by gunshots and moaning. Def.'s Ex. B ¶ 6. After shooting Rachel Owens three times, the intruder attempted to enter the locked bedroom where Steven Chabot was hiding. Def.'s Ex. B ¶ 5. The intruder fired several shots through the bedroom door, striking Steven Chabot in the torso three times. Def.'s Ex. B ¶¶ 3-5.

The intruder then fled, and Steven Chabot called the police. Def.'s Ex. B ¶ 5. The police

discovered several 9mm bullet castings, large spots of what appeared to be blood on a carpet, and signs of forced entry through a glass door that had been broken in the back of the Chabot's garage. Def.'s Ex. B ¶ 4. The police also discovered and took casts of boot prints at the scene. Def.'s Ex. A ¶ 10 (ECF No. 54).

At approximately 4:20 a.m., Detective Fred Williams of the Saco Police Department contacted the Londonderry Police Department for assistance in locating the Defendant. Officer Randy Dyer and Officer Keith Lee of the Londonderry Police Department were dispatched to the Defendant's residence to check if the Defendant's motor vehicles were present. They were specifically instructed not to make contact with the Defendant. Officer Lee, who had a personal relationship with the Defendant, was aware that the Defendant possessed firearms, and as

a result, the officers approached the home cautiously. The Defendant's split-level house is at the end of a dead-end street lined with several other houses. There are no streetlights on the road. Officers Dyer and Lee arrived at 5:24 a.m., parked at the far end of the street, and walked toward the Defendant's home. Photographs of the Defendant's house and yard, admitted as Defendant's Exhibits 3 and 4, show that the house sits back about forty feet from the street. As one faces the house from the street, on the ground floor of the left side of the house is a garage. A driveway runs from the garage straight to the street. A paved walk connects the driveway to the Defendant's front steps. At the foot of the driveway there is a mulched bed containing a mailbox and several bushes. To the left of the driveway is a side yard with a row of evergreen trees that sit back approximately 10-20 feet from the street and run

parallel to the street. In front of the evergreen trees is a lawn area. There are no fences or signs posted on the Defendant's property.

As Officers Dyer and Lee approached they noticed lights on in the Defendant's house. At this point, a New Hampshire state trooper arrived with his cruiser's blue lights on. The officers stopped the trooper and asked him to turn off his lights. Around this time, the lights in the Defendant's home went off.

The police observed a vehicle parked on the upper part of the driveway with its nose facing the garage. At this point, Officer Dyer crossed the lawn in front of the evergreen trees, walked toward the vehicle, touched the hood, and determined that the engine was warm. He then retreated back to the evergreen trees, joined Officer Lee and the state trooper, and they all returned to their vehicles to sit

watch. Between around 6:00 and 6:30 a.m., the Defendant left his home and went to a nearby Circle K gas station. The officers followed and made contact with the Defendant at the gas station where they informed him that his wife had been shot. The officers noticed what appeared to be blood on the Defendant and along the driver's side armrest and steering wheel of the Defendant's vehicle. Def.'s Ex. B ¶ 8.

Around this time, Sergeant Marc Beaudoin of the New Hampshire State Police arrived at the Circle K gas station. By this time, Sergeant Beaudoin had learned that two people had been seriously injured in a shooting in Saco and that there was a suspect in Londonderry. Sergeant Beaudoin understood that the authorities in Maine did not know if the victims were going to live or die. The Defendant agreed to go to the Londonderry Police

Department for questioning. Sergeant Beaudoin, along with Sergeant Nicholas Pinardi of the Londonderry Police Department, conducted a recorded Mirandized interview. When Sergeant Beaudoin told the Defendant that his wife had been shot, the Defendant asked about his wife's status. When told his wife was alive but in surgery, the Defendant briefly lost his composure and then asked about her prognosis. The Defendant then asked what had happened, and Sergeant Beaudoin told the Defendant that the police were investigating. Def.'s Exhibit 1A, 2:29-3:08. The Defendant told Sergeant Beaudoin that Carol Chabot had picked Rachel Owens up on Monday, December 15th to take her to Maine for a visit. His wife had been staying with the Chabot's—who are close family friends—for a few days. When asked about his whereabouts over the last day, the Defendant stated that:

- He woke up early on December 17th when the automatic light in his living room went on at 5:30 a.m. Def.'s Ex. 1A, 7:48-7:54.
- He worked throughout the day in his home office on a proposal for the Ukrainian government. Def.'s Ex. 1A, 8:00-8:20.
- He left to grab a coffee from the gas station at around 3:30 or 4:00 in the afternoon. Def.'s Ex. 1A, 8:35-8:44.
- He spoke with his wife on the phone at around 9:15 p.m. Def.'s Ex. 1A, 12:04-12:10.

- He continued to work on the project and then left his house between 12:30 a.m. and 12:45 a.m. to grab a diet soda and a pack of cigarettes from a nearby gas station. Def.'s Ex. 1A, 8:56-9:04.
- When he returned home, he worked for a few minutes. He then tried to go to sleep but got up to fix

something in his project at about 2:30 or 2:45 a.m. Def.'s Ex. 1A, 10:30-10:44.

- Later that morning, he woke up early to check his email for work and then drove down to get a cup of coffee. Def.'s Ex. 1A, 9:14-9:36.

Later on in the interview, the Defendant gave a somewhat different account of what happened in the evening of December 17th into the early morning of December 18th.

- He went to bed around 11:45 p.m. or midnight but woke up around 2:30 a.m. to do some work on his computer. Def.'s Ex. 1A, 39:16-39:50.
- He went to Dunkin Donuts early in the morning on December 18th between 4:15 a.m. and 4:45 a.m. to get a coffee and donuts. Def.'s Ex. 1A, 40:06-41:16.

Sergeant Beaudoin left the interview around this point and Detective Jeff Cook of the Saco Police Department eventually took his place. The Defendant told Detective Cook about his midnight trip to the Circle K gas station and his early morning trip to Dunkin Donuts. Def.'s Ex. 1A, 1:24:56-1:27:18. During the interview, Sergeant Beaudoin asked whether the Defendant owned any firearms, and the Defendant said he had an entire arsenal at his house. Def.'s Ex. 1A, 18:10-18:14. The Defendant explained that he had a rack of pistols because he trains with departments that work with 9mm handguns, GLOCK .40 handguns, and the new M&P .40. Def.'s Ex. 1A, 18:18-18:32. Sergeant Beaudoin then specifically asked the Defendant whether he owned any 9mm handguns, and the Defendant said that he owned two. Def.'s Ex. 1A, 19:40-19:44.

Sergeant Beaudoin was aware that 9mm casings were recovered at the scene of the crime.

The officers also inquired about the amount of time it normally takes the Defendant to travel to Maine. The Defendant said that it normally takes him 2 hours and 10 minutes to drive from his home in Londonderry to Saco and it would take him longer if the weather was poor. Def.'s Ex. 1A, 25:28 – 25:46. However, the Defendant had told the officers earlier in the interview that it takes him about 90 minutes to travel to his wife's parents' home on Portland Road in Saco. Def.'s Ex. 1A, 6:10-6:26. At one point during the interview, Sergeant Beaudoin pointed out that the Defendant had blood on his hand. Def.'s Ex. 1B, 10:58-11:00. The Defendant said he had cut his hand on a glass and that the broken glass was in the trash at his home. Def.'s Ex. 1B, 11:00-11:06. The officers later obtained the Defendant's consent to

swab his hand for DNA testing and did in fact take a sample.[2] Def.'s Ex. 1B, 41:46-42:22.

After the interview ended, Sergeant Beaudoin and Detective Cook drove to the State Police Barracks in Bedford, New Hampshire to photograph the Defendant's vehicle. Def.'s Ex. A ¶ 15. While taking pictures, Detective Cook observed blood on the steering wheel and driver's side door near the handle and noticed a pair of black boots in the back seat. Def.'s Ex. A ¶ 15. Later that day, the officers

[2] In his motion to suppress search warrants, the Defendant argued that his consent to provide a DNA sample was involuntary because the Defendant "was in custody" and not aware that he was the target of an investigation. *See* Def.'s Mot. to Suppress Search Warrants 10. Although it is the Government's burden to prove that consent was voluntary, *United States v. Romain*, 393 F.3d 63, 69 (1st Cir. 2004), this issue was not addressed at the suppression hearing. However, a review of the video recordings establishes that the Defendant's consent "was voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). In the video, Sergeant Beaudoin straightforwardly asked about obtaining a swab of the Defendant's mouth for DNA and a swab of his hand. The Defendant then orally provides consent for both searches. *See* Def.'s Ex. 1B 10:56-11:08.

reviewed the surveillance videos from the Circle K gas station and Dunkin Donuts. The Defendant was at the Circle K gas station at 12:11 a.m. and Dunkin Donuts at approximately 4:50 a.m. Def.'s Ex. A ¶ 16; Def.'s Ex. C ¶ 15 (ECF No. 54-2). In both surveillance videos, the Defendant was wearing dark clothing and dark boots similar to those in the Defendant's vehicle. Def.'s Ex. A ¶ 16. The Defendant was wearing different clothing when he was interviewed by the police. Def.'s Ex. A ¶ 16. Based on this, Sergeant Beaudoin suspected that the Defendant changed his clothing at his home after getting home from Dunkin Donuts. Def.'s Ex. A ¶ 16.

Detective Williams had responded to the scene of the shooting in the early morning hours of December 18th and had transported Carol Chabot back to the Saco Police Department. Thereafter, Detective Williams received periodic updates from

his supervisor, Detective Sergeant Huntress, who was directing the investigation in Maine and receiving information from a number of different officers working on the case in both Maine and New Hampshire.

Detective Williams drafted an affidavit outlining the investigation that was taking place in Maine. Detective Williams's affidavit includes a description of the shooter provided by Steven Chabot. This description was relayed to Detective Williams by Detective Granata who was with the shooting victims at the hospital. The affidavit does not include a description from Carol Chabot because she never saw the intruder. Detective Williams drafted his initial affidavit before Rachel Owens could be interviewed by Detective Granata.[3] Detective

[3] Detective Williams testified that he did not have information from Detective Granata's interview of Rachel Owens at the time he drafted any of his affidavits in support of search warrants.

Williams also did not include in his affidavit the fact that blood was not found at the point of entry into the Chabot's home and that the intruder was wearing gloves. Detective Williams testified that he did not include this information because he was not aware of it until months later. Detective Williams's affidavit included information regarding the surveillance videos and travel times between Maine and New Hampshire. In paragraph 11 of his affidavit, Detective Williams stated that the Defendant was at Dunkin Donuts at 4:15 a.m. Def.'s Ex. B ¶ 11. Detective Williams testified that he later learned that the Defendant was at Dunkin Donuts at 4:50, and he attributes the error to a miscommunication over the telephone. In paragraph 12, Detective Williams wrote that the Circle K gas station was 96 minutes away from the Chabot's home on Hillview Avenue in Saco and that

the Dunkin Donuts was 88 minutes away from the Chabot's house. Def.'s Ex. B ¶ 12. Detective Williams used Google Maps to make these calculations. Detective Williams was aware that the Defendant had said it normally takes him 2 hours and 10 minutes to get from his home in Londonderry to Saco. At some point after he drafted this affidavit, Detective Williams learned that the Defendant's Transpass was not used on the night of the shooting. Detective Williams finished his affidavit early in the morning of December 18th and emailed it to Sergeant Beaudoin. Sergeant Beaudoin attached Detective Williams's affidavit to his own search warrant affidavit as an appendix. At the time

Sergeant Beaudoin drafted his affidavit, he knew that both shooting victims were still alive but was not sure whether they were going to make it. Sergeant Beaudoin was unaware that blood was not

found at the point of entry into the Chabot's home. He also did not know about any reports describing the intruder as wearing gloves. He did, however, indicate in his affidavit that entry into the Chabot's house had been made by breaking a window and that the Defendant had a cut on his hand at the time of the interview. Sergeant Beaudoin finished drafting and submitted his application for a warrant to search the Defendant's residence and vehicle around 10:15 p.m. on December 18, 2014. He received a fax of the warrant signed by a New Hampshire judge at 10:43 p.m. on December 18th. On December 19, 2014, the New Hampshire State Police conducted a search of the Defendant's residence and seized the Defendant's vehicle so that it could be transported to Maine to be searched.

On December 18, 2014, a Maine District Court Judge signed an anticipatory search warrant for the

Defendant's vehicle, which was then still located in New Hampshire. *See* Def.'s Ex. B. This warrant was supported by Detective Williams's December 18, 2014 affidavit, and it authorized the search of the vehicle in Maine once the Maine authorities were allowed to take possession of the vehicle. Def.'s Ex. B. The Defendant's vehicle was searched on December 22, 2014 at the Maine State Police Crime Laboratory. On December 23, 2014, a Maine District Court Judge signed a search warrant for 16 electronic items that had been seized from the Defendant's home. Def.'s Ex. C.

This warrant was supported by Detective Williams's December 18th affidavit, which added the fact that the Defendant's home in New Hampshire had been searched on December 19th and clarified the mistake in earlier affidavits concerning the time

the Defendant was at Dunkin Donuts on December 18th. Def.'s Ex. C ¶ 15.

On January 16, 2015, a Maine District Court Judge signed a search warrant for the Defendant's external hard drive and black Swiss Army carry-on laptop travel bag. Def.'s Ex. D (ECF No. 54-3). This warrant was supported by the affidavit prepared by Detective Williams that had been further updated to note that the Maine State Police Crime Laboratory had matched the Defendant's DNA to DNA found at the scene of the shooting, that the clock on the Defendant's computer had been tampered with, and that the Defendant had been involved in an extra-marital affair since 2008. Def.'s Ex. D. ¶¶ 17-18, 22. The affidavit also stated that 15 rounds of the same exact 27 year-old 9mm ammunition was found in the Defendant's home and that the black boots seized from the backseat of the Defendant's car had the

same exact size and tread of the foot impressions taken from the scene of the crime. Def.'s Ex. D. ¶¶ 16-17.

Finally, on January 20, 2015, Magistrate Judge John Rich III issued a search warrant for a buccal swap of the Defendant's cheek. Def.'s Ex. E (ECF No. 54-4). This warrant was based on an affidavit prepared by Special Agent Pamela Flick.

## DISCUSSION

The Defendant argues that: (1) his indictment should be dismissed on double jeopardy grounds; (2) Officer Dyer's touch of the Defendant's vehicle in his driveway was an unconstitutional search; (3) each search warrant lacks probable cause on its face; and (4) he is entitled to a *Franks* hearing to contest each search warrant issued in this matter because of

alleged false statements and material omissions contained in affidavits supporting the warrants. I address each argument in turn

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## I. Motion to Dismiss the Indictment

"[P]rosecutions undertaken by separate sovereign governments, no matter how similar they may be in character, do not raise the specter of double jeopardy as that constitutional doctrine is commonly understood." *United States v. Guzman*, 85 F.3d 823, 826 (1st Cir. 1996). "When a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offenses." *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (internal quotation marks omitted). This doctrine is not an exception to double jeopardy, but rather "a manifestation of the maxim that where a defendant violates the laws of two

sovereigns, he commits separate offenses." *United States v. Angleton*, 314 F.3d 767, 771 (5th Cir. 2002).

There is a very limited exception to the dual sovereign rule created by *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959). The *Bartkus* exception applies only where "one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." *Guzman*, 85 F.3d at 827. To fall within this exception, a defendant bears an entry-level burden of producing "some evidence" that "one sovereign was a pawn of the other, with the result that the notion of two supposedly independent prosecutions is merely a sham." *Id*. The fact that two sovereigns cooperated in conducting an investigation is insufficient to invoke this limited exception. *Id.* at 828 ("Cooperative law enforcement efforts between independent sovereigns are commendable, and,

without more, such efforts will not furnish a legally adequate basis for invoking the *Bartkus* exception to the dual sovereign rule."). The Defendant argues that his indictment must be dismissed because he is facing charges stemming from the same incident in state court.[4] He contends that this case falls under the *Bartkus* exception because "the investigation was conducted by both state and federal authorities working together and prosecutorial decisions were made at approximately the same time." Def.'s Mot. to Dismiss 4 (ECF No. 40). The Defendant notes that the discovery in the state and federal cases is identical and that "[c]ounsel has a good faith basis to believe that the prosecutorial entities are at a minimum working together on this matter." Def.'s

[4] The State is charging multiple counts of aggravated attempted murder, attempted murder, elevated aggravated assault, aggravated assault, burglary, and criminal mischief.

Reply 2 (ECF No. 50). Even assuming for the purposes of argument that jeopardy has attached in the state court matter, the Defendant has presented insufficient evidence to meet the entry-level showing required by *Bartkus*. Accordingly, his motion to dismiss on this basis fails.[5]

## II. Officer Dyer's Touching of the Defendant's Vehicle

The Defendant argues that Officer Dyer performed an unconstitutional search when he entered the Defendant's driveway and touched the

[5] The Defendant also urges the Court to dismiss his indictment because the Government's interest in the matter has been extinguished by the more serious charges brought in state court. This argument fails as well. *See Heath v. Alabama*, 474 U.S. 82, 93 (1985) (rejecting an interest-based approach and noting that "[a] [sovereign's] interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another [sovereign's] enforcement of *its* own laws."

Defendant's vehicle to determine whether it had been driven recently. Def.'s Mot. to Suppress Search of Vehicle 3-4 (ECF No. 43). The Government argues that a search did not occur because the Defendant's driveway was not within the curtilage of his home.[6] Gov.'s Suppl. Brief 3-5 (ECF No. 62).

### A. The Curtilage Question

At the Fourth Amendment's "'very core' stands 'the right of [an individual] to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Under the Fourth Amendment, the curtilage—or the area "immediately

[6] Alternatively, the Government contends that the search was justified by exigent circumstances. I do not reach this argument.

surrounding and associated with the home"—is considered part of the home itself. *Id.* After all, the paramount protection provided to the home under the Fourth Amendment would be essentially hollow if the government "could stand in a home's porch or side garden and trawl for evidence with impunity." *Id.*

Courts generally utilize four factors, known as the *Dunn* factors, in determining whether a location falls within the home's curtilage. These factors are: [1] [T]he proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by. *United States v. Brown*, 510 F.3d 57, 65 (1st Cir. 2007) (quoting *United States v. Diehl*, 276 F.3d 32, 38 (1st Cir. 2002)).

Although "these factors are useful analytical tools, "the guiding question is whether the location is "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301 (1987).

Applying the *Dunn* factors here, the Defendant's vehicle was parked so that the hood of the vehicle was closest to the Defendant's garage, and Officer Dyer was near the garage when he touched the hood of the vehicle. The driveway is not enclosed in any way. Although the Defendant's home is partially surrounded by trees on the sides and back, nothing surrounds the driveway, which is completely open to the public. The Defendant used the driveway, at least on the night in question, to park his vehicle. It also serves as an access point to the garage and connects the street to the paved walk

to the front door. The open nature of the driveway makes it unlikely that the Defendant would use the driveway for private activities. Finally, the Defendant took no steps to protect his driveway from observation. There were no fences, dogs, or signs warning visitors away. The Defendant's entire driveway is easily observable to anyone passing by in the neighborhood. Although the Defendant lives at the end of a quiet dead-end street, the street is public and the driveway was not blocked or protected in anyway.

The First Circuit has remarked that "[i]f the relevant part of the driveway is freely exposed to public view, it does not fall within the curtilage . . . even [if] the relevant part of the driveway is somewhat removed from a public road or street, and its viewing by passersby is only occasional." *Brown*, 510 F.3d at 65-66 (driveway adjacent to the garage

was not within the curtilage); s*ee also United States v. Roccio*, 981 F.2d 587, 591 (1st Cir.1992) (no expectation of privacy in a driveway exposed to public); *Pina v. Morris*, No. 09-11800-RWZ, 2013 WL 1283385, at *6 (D. Mass. Mar. 28, 2013) (driveway not considered within curtilage); *United States v. Sayer*, No. 2:11-cr-113-DBH, 2012 WL 2180577, at *2 (D. Me. June 13, 2012) (same); *United States v. Sparks*, 750 F. Supp. 2d 384, 389 (D. Mass. 2010), *aff'd*, 711 F.3d 58 (1st Cir. 2013) (parking area near defendant's apartment building not within curtilage). *But see Diehl*, 276 F.3d at 35, 40-41 (driveway was within the curtilage when the relevant part of the driveway was 500 feet from a discontinued town road in a remote rural area, the residents had posted "no trespassing signs" to discourage members of the public from entering, and the driveway was enclosed by a forest."). Only the proximity factor of the *Dunn*

framework favors the Defendant's position that the driveway where the car was parked was within the home's curtilage.

However, proximity to the home, standing alone "is not dispositive." *Brown*, 510 F.3d at 65 (citing *United States v. French*, 291 F.3d 945, 952 (7th Cir. 2002)); *see also United States v. Bausby*, 720 F.3d 652, 656-57 (8th Cir. 2013) (holding that enclosed yard within close proximity to the home was not within curtilage). I find that the Defendant's driveway was not intimately tied to the home itself.[7]

[7] I also note that the officers did not intrude upon the curtilage when they gathered on the side of the Defendant's property at the tree line near the public road. Defendant's photographic evidence plainly demonstrates that this location was farther from his home, devoid of any enclosures or signs, and completely open and accessible from the public road and the neighboring property. *See* Def.'s Ex. 4 & 5. Thus, any argument that this portion of the Defendant's property is within the curtilage fails. For the same reasons, Officer Dyer's line of approach, which cut across the Defendant's lawn, was also not an intrusion into the curtilage. *See* Def.'s Ex. 3; *see also United States v. Bausby*, 720 F.3d 652, 656-57 (8th Cir. 2013) (holding that enclosed yard within close proximity to the home was not within curtilage).

Because the driveway was not within the curtilage, it does not fall "under the home's 'umbrella' of Fourth Amendment protection." *Dunn*, 480 U.S. at 301.

### B. The Property-Rights Baseline of the Fourth Amendment

The Defendant contends that the *Dunn* factors, and the decisions interpreting them, need to be read in light of the reemergence of the trespass analysis of the Fourth Amendment articulated in *United States v. Jones*, 132 S. Ct. 945 (2012) and *Florida v. Jardines*, 133 S. Ct. 1409 (2013). *Jardines* and *Jones* establish that a search occurs for Fourth Amendment purposes either when: (1) the government physically intrudes on a constitutionally protected area for the purposes of obtaining information, *Jones*, 132 S. Ct. at 949, or (2) the government violates a person's reasonable

expectation of privacy. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

### *1. Florida v. Jardines*

In *Jardines*, the Court held that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." 133 S. Ct. at 1417-18. Significantly, the Court found that the search at issue occurred in the home's curtilage because the "front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends." *Id*. at 1415 (internal quotation marks omitted).

Justice Scalia's opinion in *Jardines* did not discuss the *Dunn* factors, but there is no suggestion that *Dunn* has been overruled. Post-*Jardines*, other

courts have applied these decisions in tandem. *See, e.g., Harris v. O'Hare*, 770 F.3d 224, 240-42 (2d Cir. 2014); *Bausby*, 720 F.3d at 656-57; *United States v. Apicelli*, No. 14-cr-012-01-JD, 2015 WL 2064290, at *5 (D.N.H. May 4, 2015); *United States v. Bain*, No. 14-cr-10115-IT, 2015 WL 666958, at **6-8 (D. Mass. Feb. 17, 2015).

While the Defendant argues that *Jardines* applies to the facts of this case, I disagree. Unlike the front porch at issue in *Jardines*, the Defendant's driveway was not within the home's curtilage. *See supra* sources cited in Part II. A.[8]

[8] *Jardines* is also arguably distinguishable on the grounds that the scent of marijuana detected by the drug-sniffing dog emanated from inside the home itself where citizens enjoy heightened privacy protection. 133 S. Ct. at 1413; *see also Kyllo v. United States*, 533 U.S. 27, 40 (2001) (use of thermalimaging device to observe heatwaves emitted from home unconstitutional); *Payton v. New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house."). The conduct at issue here did not lead to the discovery of any details originating from within the Defendant's home. Instead, Officer Dyer only gleaned information pertaining to the Defendant's vehicle. It is well-

### *2. United States v. Jones*

The Defendant also argues that Officer Dyer's conduct constituted a search under the framework set forth in *Jones* because "the touching of the vehicle constitute[d] a trespass." Def.'s Mot. to Suppress Search of Vehicle 5. In *Jones*, the Court held that a search occurred when law enforcement physically intruded on the defendant's constitutional "effect"—his vehicle—by attaching a GPS device to it. 132 S. Ct. at 949 ("The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth

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established that citizens have a significantly reduced expectation of privacy in their vehicles. *See California v. Carney*, 471 U.S. 386, 393 (1985).

Amendment when it was adopted."). Thus, under *Jones*, a trespass combined with "an attempt . . . to obtain information" constitutes a search. *Jones*, 132 S. Ct. at 951 n.5.

The Defendant has not cited to any law extending *Jones* to the limited type of search at issue here. The conduct at issue in *Jones*—mounting a GPS device to the undercarriage of the defendant's car for 28 days—is far more physically intrusive than Officer Dyer's momentary contact with the exterior of the hood of the Defendant's vehicle. Indeed, it is a stretch to describe this type of momentary contact with the outside of an inanimate object as an "intrusion" upon the Defendant's effect. I do not believe that *Jones* extends this far.[9]

[9] My conclusion is consistent with other pre-*Katz* trespass-based Supreme Court decisions. *Compare Silverman v. United States*, 365 U.S. 505, 506-09 (1961) (unconstitutional search occurred when the police inserted a microphone "into a crevice extending several inches into the party wall, until the [microphone] hit

As a result, even considering the police conduct here in light of the Supreme Court's recent decisions in *Jardines* and *Jones*, I find that there was no search when Officer Dyer walked up to the Defendant's vehicle and placed his hand on the exterior of its hood to determine whether it had been driven recently.

## III. Search Warrants

The Defendant next contends that each search warrant lacked probable cause on its face and that he

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something solid that acted as a very good sounding board," because "eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the [defendants]"), *with Goldman v. United States*, 316 U.S. 129, 135-36 (1942) (placing a detectaphone against an office wall in order to listen to conversations taking place in the office next door did not violate the Amendment), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967); s*ee also New York v. Class,* 475 U.S. 106, 114-15 (1986) (momentary reaching *into the interior* of a vehicle did constitute a search); *Clinton v. Virginia*, 377 U.S. 158, 158 (1964) (Clark, J., concurring)(per curiam) (insertion of an electronic device into a wall with a tack constituted a physical intrusion into the home).

is entitled to a *Franks* hearing because of false statements and material omissions contained within the affidavits supporting the warrants. Def.'s Mot. to Suppress Search Warrants 4, 10 (ECF No. 41). The Government argues that each search warrant is supported by probable cause and that the Defendant has failed to make the required preliminary showing for a *Franks* hearing. Gov.'s Consolidated Obj. to Def.'s Mot. to Suppress 7 (ECF No. 47).

### A. Facial Sufficiency of the Warrants

"A search warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause to search." *United States v. Graf*, 784 F.3d 1, 7 (1st Cir. 2015) (citation and internal quotation marks omitted). A warrant application "must demonstrate probable cause to

believe that (1) a crime has been committed—the 'commission' element, and (2) enumerated evidence of the offense will be found at the place to be searched—the so-called 'nexus' element." *United States v. Feliz*, 182 F.3d 82, 86 (1st Cir. 1999). In establishing the nexus element, the magistrate must consider the totality of the circumstances to determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "[T]he facts presented to the magistrate need only warrant a man of reasonable caution to believe that evidence of a crime will be found." *Feliz*, 182 F.3d at 86 (citation and internal quotation marks omitted). "There is no requirement that the belief be shown to be necessarily correct or more likely true than false." *Id.* at 87.

Because a magistrate's determination of probable cause "must be accorded great deference by reviewing courts," the duty of "a reviewing court is simply to ensure that the [magistrate] had a substantial basis for concluding that probable cause existed." *United States v. McMullin*, 568 F.3d 1, 6 (1st Cir. 2009) (citations and internal quotation marks omitted).

The Defendant first challenges the December 18, 2014 search warrant for the Defendant's home and vehicle issued in New Hampshire. This warrant was drafted on December 18, 2014 and contains both Sergeant Beaudoin and Detective Williams's affidavits. Among other things, Sergeant Beaudoin's affidavit established that: (1) law enforcement officers who arrived at the Defendant's home early in the morning on December 18, 2014 saw that the lights in the Defendant's home were going on and off;

(2) the hood of the car parked in the Defendant's driveway was warm to the touch; (3) the Defendant changed his story regarding his whereabouts throughout the course of his interview with law enforcement; (4) the Defendant had blood on his hand when he was interviewed by the police and Sergeant Beaudoin knew that the intruder had gained entry into the Chabot's home by breaking a window; (5) the Defendant stated he had 9mm handguns at his home; (6) Detective Cook observed blood and black boots inside the Defendant's car; (7) the surveillance video from the Circle K gas station showed the Defendant wearing dark clothing and dark boots before the shooting occurred; (8) the surveillance video from Dunkin Donuts on Route 102 at Mohawk Drive showed the Defendant arrive at 4:50 a.m. wearing dark colored clothing and dark

boots; (9) the boots in the Defendant's vehicle appeared similar to the boots the Defendant was wearing in both surveillance videos, and (10) the Defendant was wearing a different jacket and boots when the police interviewed him later that morning. Def.'s Ex. A.

Detective Williams's affidavit repeated much of the information contained in Sergeant Beaudoin's affidavit, but it also added the following information: (1) officers found 9mm bullet casings at the scene of the crime; (2) forced entry into the Chabot's home was made through a rear garage door and window; (3) Steven Chabot described the shooter as wearing all black clothing and a black ski mask; (4) Carol Chabot described the Defendant as having killed people in the army and said that he owned several weapons that he would show off after consuming alcohol; and (5) based on Google Maps, the

Defendant would have been able to make it from the Circle K gas station in New Hampshire to the Chabot's house in Saco, Maine in 96 minutes and from the Chabot's house to Dunkin Donuts in New Hampshire in 88 minutes. Def.'s Ex. B. Both affidavits also referenced Defendant's story that he had been awake off and on throughout the early morning hours of December 18, 2014 working on a presentation, and Sergeant Beaudoin noted that the Defendant had sent and received several emails.

Based on all of this information, there was more than a fair probability that evidence of the crime would be found in the Defendant's home and vehicle.[10] For the same reasons, the later warrants

[10] I would reach this same conclusion about the facial validity of the warrant even if I had excised the fact that the Defendant's hood was warm to the touch. The warm hood is relevant to establish that the Defendant was up and about in the early hours of December 18th. The video recording showing the Defendant at Dunkin Donuts at 4:50 a.m. serves that purpose as well.

were also supported by probable cause. The December 18, 2014 anticipatory search warrant for the Defendant's vehicle and the December 23rd search warrant for 16 of the Defendant's electronic items were both supported by an essentially identical version of Detective Williams's affidavit.

Further, the January 16, 2015 search warrant for the Defendant's external hard drive, laptop, and laptop travel bag was supported by an updated version of Detective Williams's affidavit which contained significant additional evidence. Finally, in support of the January 20, 2015 warrant for a buccal swap, Special Agent Flick averred that preliminary testing showed a positive match between the Defendant's DNA and material taken from a swab of the area of the broken window at the Chabot's home. Each affidavit was supported by probable cause, and, accordingly, the Defendant's facial challenge fails.

## B. False Statements and Material Omissions

The Defendant also contends that he is entitled to a *Franks* hearing because the affidavits submitted in support of the warrant applications contained false statements and material omissions. Def.'s Mot. to Suppress Search Warrants 10. Additionally, the Defendant contends that both Sergeant Beaudoin and Detective Williams's affidavits omitted material information that, although not known to them individually, should be imputed to them under the collective knowledge doctrine. Affidavits supporting search warrants are presumptively valid. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). This presumption is not absolute and a defendant may overcome the presumption during an evidentiary hearing known as a *Franks* hearing. *Id.* However, in

order to be entitled to such a hearing, a defendant must first make two "substantial preliminary showings: (1) that a false statement or omission in the affidavit was made knowingly and intentionally or with reckless disregard for the truth; and (2) the falsehood or omission was necessary to the finding of probable cause." *United States v. Rigaud*, 684 F.3d 169, 173 (1st Cir. 2012) (citation and internal quotation marks omitted). If a party cannot establish both elements, then a *Franks* hearing is not warranted. *Id.* If a hearing is held, suppression of the evidence seized is justified if "the defendant proves intentional or reckless falsehood by preponderant evidence and the affidavit's creditworthy averments are insufficient to establish probable cause." *United States v. Tanguay*, 787 F.3d 44, 49 (1st Cir. 2015).

An affiant is not required to include "every shred of known information . . . in a warrant

affidavit." *Id.* However, in some situations "[a] material omission of information may . . . trigger a *Franks* hearing." *United States v. Castillo*, 287 F.3d 21, 25 (1st Cir. 2002). An omission only triggers a *Franks* hearing "if it is designed to mislead, or . . . made in reckless disregard of whether [it] would mislead, the magistrate in his appraisal of the affidavit." *Tanguay*, 787 F.3d at 49 (citation and internal quotation marks omitted). Moreover, the omitted material must nullify the finding of probable cause when considered with the remainder of the affidavit. *Castillo*, 287 F.3d at 25 n.4 ("With an omission, the inquiry is whether its inclusion in an affidavit would have led to a *negative* finding by the magistrate on probable cause.").

Allegations of deliberate falsehoods or material omissions must be accompanied by an offer of proof, such as affidavits or sworn statements of

witnesses, or their absence satisfactorily explained. *Franks*, 438 U.S. at 171; s*ee also United States v. Scalia*, 993 F.2d 984, 987 (1st Cir. 1993). Self-serving statements by the Defendant and arguments contained in briefs are insufficient. *See United States v. McDonald*, 723 F.2d 1288, 1294 (7th Cir. 1983). Here, in his motion to suppress the Defendant identified portions of the warrants' affidavits that he claimed were false and he pointed to several material omissions from the warrants' affidavits. He did not, however, provide any affidavits or sworn statements of witnesses. Despite the lack of a substantial preliminary showing, the Defendant was able to cross-examine both Sergeant Beaudoin and Detective Williams at an evidentiary hearing. At the close of the hearing, defense counsel indicated that there were additional discrepancies between recorded interviews and police reports, and that other

material information could have been left out of the affidavits. Defense counsel indicated that additional live testimony was not needed to make that showing. I allowed the Defendant an opportunity to file a supplemental brief.

### 1. Alleged False Statements and Material Omissions in the Beaudoin Affidavit

The Defendant contends that the affidavit drafted by Sergeant Beaudoin on December 18, 2014 contains numerous false statements and material omissions.

#### a. Paragraph 4's Reference to a "Homicide"

First, the Defendant claims that paragraph four of the Beaudoin affidavit is false and misleading because it refers to the crime as a homicide rather than an attempted murder. Def.'s Mot. to Suppress Search Warrants 5. Sergeant Beaudoin testified that he was initially informed that the police were looking for a homicide suspect in Londonderry and when he drafted the affidavit, he did not know whether the victims were going to live or die. Even assuming that Sergeant Beaudoin's statement was intentionally false, the statement would not have affected the probable cause analysis. *See Rigaud*, 684 F.3d at 173.

**b. Paragraph 7's Reference to Owens as a "Suspect"**

In paragraph seven of his affidavit, Sergeant Beaudoin described the Defendant as a suspect. Def.'s Ex. A ¶ 7. I see nothing wrong with the affidavit's identification of the Defendant as a suspect. By the time the affidavit was submitted, the Defendant was clearly a suspect.

**c. Paragraph 10's Statement that Owens did not Ask What Happened to his Wife.**

In paragraph 10 of his affidavit, Sergeant Beaudoin noted:

"After he signed the Miranda form, I informed Mr. Owens that his wife had been shot but that she was still alive and in surgery. He showed relief, but did not ask what had happened." Def.'s Ex. A ¶ 10. The Defendant argues that this statement is false and that it is belied by the video recording of the

interview of the Defendant, in which the Defendant did ask about what happened to his wife. Def.'s Mot. to Suppress Search Warrants 6; Def.'s Suppl. Brief 6 (ECF No. 61).

On the videotape, after the Defendant signs the *Miranda* Form, he asks, "status of my wife?" Sergeant Beaudoin states, "she's at the hospital right now." The Defendant states, "she's alive," and Sergeant Beaudoin confirms, "she's alive." The Defendant leans back, loses composure for a few seconds, and then asks, "prognosis?" Sergeant Beaudoin states: "We're not sure right now. She's still in surgery. But she is still alive right now." The Defendant then asks: "Steve? Carol?" Sergeant Beaudoin states: "Right now he is still alive too, and he is also in surgery." The Defendant then asks: "Any idea what happened?" Sergeant Beaudoin then explains that the police are investigating. The interview then goes

on into different topics, and the Defendant, although emotional from time to time in the interview, does not inquire further about what happened to his wife until about 75 minutes into the interview when Detective Cook joins, and the Defendant again asks: "Status of my wife?" About 130 minutes into the interview, the Defendant asks if the Maine Police know where his wife was shot.

Sergeant Beaudoin's statement that the Defendant did not "ask what happened" in Paragraph 10 of the Beaudoin affidavit is technically false. The Defendant did ask what happened to his wife just after the *Miranda* warning was given. At the suppression hearing, Sergeant Beaudoin explained that he meant that the Defendant's reaction was not as forceful as Sergeant Beaudoin expected. It is true that the Defendant did not ask follow up questions about what happened after Sergeant Beaudoin

initially explained that the police were still investigating. Sergeant Beaudoin's general impression that the Defendant did not react as forcefully as he would have expected is reasonable when assessed in context of the entire interview. Although the Defendant made several inquiries about his wife's status throughout the three-hour interview, he did not ask many questions about what had happened. I find that the statement in Paragraph 10 that the Defendant did not inquire about what happened to his wife is, at most, a reckless falsehood. But I also find that even excluding this misstatement, the creditworthy averments in the affidavit are sufficient to establish probable cause.

### d. Missing Information about Blood and Gloves

The Defendant also contends that paragraph 10 omits two key facts: (1) that blood was not found in the vicinity of the window that was broken to gain entry into the Chabot's home; and (2) that Steven Chabot said the shooter was wearing gloves. Def.'s Mot. to Suppress Search Warrants 6. Sergeant Beaudoin credibly testified that he was unaware that blood was not found at the point of entry into the Chabot's home and that he could not recall ever hearing that the intruder was described as wearing gloves.[11] Even if I were to find that Sergeant Beaudoin intentionally or recklessly omitted these

[11] The Defendant also faults Detective Williams's affidavit for leaving out this information. Detective Williams testified that he did not learn about the lack of blood at the point of entry until months after he drafted his affidavit. He also testified that he did not know that Steven Chabot had described the shooter as wearing gloves when he drafted his affidavit on December 18th, 2014. This testimony was also credible and I find no basis for concluding that either officer deliberately omitted this information.

facts, their inclusion in the warrant would not extinguish probable cause.

### e. Paragraph 11's Reference to Firearms

The Defendant also argues that Sergeant Beaudoin mischaracterized how the Defendant spoke about his firearm collection in paragraph 11. The Defendant argues that he did not initially offer that he owned 9mm handguns until Sergeant Beaudoin specifically asked about that type of weapon. However, Sergeant Beaudoin's statement in his affidavit is fairly consistent with the video recording of his interview with the Defendant. Contrary to the Defendant's argument, the Defendant is the first person to mention 9mm handguns. The Defendant implies that he owns 9mm handguns because he says he trains with departments that use them. This then

leads Sergeant Beaudoin to ask the Defendant directly whether he owns this type of weapon. The differences between Sergeant Beaudoin's account in his affidavit and the video recording of the interview are minor inconsistencies caused, at most, by negligence. Conduct that is negligent or the result of innocent mistake is not enough to warrant a *Franks* hearing. *Franks*, 438 U.S. at 171 ("Allegations of negligence or innocent mistake are insufficient."); *United States v. Soto*, 779 F. Supp. 2d 208, 223 (D. Mass. 2011) ("A showing of negligence or good faith factual error is insufficient to trigger a *Franks* hearing.").

**f. Paragraph 12's Reference to the Defendant Changing his Story**

Finally, the Defendant suggests that Sergeant Beaudoin falsely claimed in paragraph 12 that the Defendant changed his story when he was interviewed by

Detective Cook to include the fact that the Defendant went to Dunkin Donuts. Def.'s Ex. A ¶ 12. A review of the video recording confirms that the Defendant initially left out the fact that he made a trip to Dunkin Donuts when he first explained his whereabouts to Sergeant Beaudoin and Sergeant Pinardi at the beginning of the interview. While going over his story again with Beaudoin and Pinardi, the Defendant mentions his trip to Dunkin Donuts for the first time. Although Sergeant Beaudoin was wrong about precisely when the Defendant's story changed, he was correct that it had changed. The Defendant's attempt to characterize this minor discrepancy as a false statement made

intentionally or with reckless disregard for the truth is unpersuasive. At worst, the inconsistency between the video and the affidavit was a mistake, not an intentional or reckless act.[12]

### 2. Alleged False Statement and Material Omissions in Detective Williams's Affidavits

The Defendant further contends that the affidavits drafted by Detective Williams contain numerous false statements and material omissions

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[12] The Defendant also argues that paragraph 16 of Sergeant Beaudoin's affidavit incorrectly states that the Defendant was at Dunkin Donuts at 4:50 a.m. Def.'s Mot. to Suppress Search Warrants 6. This argument appears to be based on paragraph 11 of Detective Williams's affidavit which erroneously stated the Defendant was at Dunkin Donuts at 4:15 a.m. Detective Williams credibly testified that this error was the result of a miscommunication over the telephone. Further, Detective Williams's later affidavits clarify that the correct time is 4:50 a.m. *See* Def.'s Ex. C ¶ 15.

### a. Paragraph 5's Description of Suspect

The Defendant attacks paragraph five of Detective Williams's affidavit because it describes the Defendant as wearing all black with a black ski mask and this "is not the same as the description of clothing that Sergeant Beaudoin attributes to [the] Defendant at the time he [makes] contact with law enforcement." Def.'s Mot. to Suppress Search Warrants 7. I fail to see how this purported inconsistency can be characterized in any way as false or misleading. It is not uncommon for a suspect to change clothes in an attempt to avoid detection.

### b. Omission of Defendant's Estimate of Travel Time

Next, the Defendant faults Detective Williams's affidavit for failing to note that the Defendant estimated that it takes over two hours to travel from Londonderry to Saco. Def.'s Mot. to Suppress Search Warrants 7. In Paragraph 12 of his affidavit, Detective Williams includes the mileage and estimated travel times between pertinent points. Detective Williams testified that he used Google Maps to get the information. The Defendant claims that the omission was material because the shooting occurred at approximately 2:47 a.m. in Saco and the Defendant arrived at Dunkin Donuts in New Hampshire at 4:50 a.m. This claim is unconvincing. The most relevant time period is the objective fact of how long it takes to travel from Saco to Londonderry, not the Defendant's own self-serving version of how

long the trip normally takes him.[13] Even if this information had been included in Detective Williams's affidavit along with the Google Maps calculations, this would not have impacted the finding of probable cause. A reviewing magistrate would certainly afford more weight to an objective estimate of the time it takes to complete the trip than the Defendant's own assessment.[14]

### c. Omission of Intruder's Order of Attack

[13] I would also note that the Defendant mentioned at the beginning of his interview that it takes him around 90 minutes to drive from his home to Rachel Owens's parents' home in Saco, Maine. It was only later in the interview that the Defendant stated that it takes him over two hours to reach Saco, Maine.

[14] At some point in the investigation, Detective Williams was made aware that the Defendant's Transpass was not used on December 18, 2014. Detective Williams could not remember when he became aware of this information. The Defendant has not provided any evidence suggesting that this information was known by Detective Williams before he drafted his affidavits. Moreover, a reviewing judicial official could easily conclude that a defendant would be unlikely to use a Transpass en route to an attempted murder.

At the suppression hearing and in his supplemental brief, the Defendant argued that Detective Williams omitted from his affidavit the fact that the intruder first went after Carol Chabot, not Rachel Owens. To the contrary, Detective Williams's affidavit specifically mentions the fact that the intruder first attempted to gain entry into the room where Carol Chabot was hiding. Def.'s Ex. B ¶ 6.

### d. Failure to Include Rachel Owens's Description of Intruder

The Defendant claims that by the time Detective Williams drafted his December 23, 2014 affidavit, Rachel Owens had provided a statement to Detective Granata describing the intruder as being dark skinned with wild hair. The Defendant

contends that Detective Williams intentionally or recklessly omitted this material information.

Detective Williams testified that he was unaware of any such description by Rachel Owens. He testified that he could not remember when he reviewed Detective Granata's report but that it was after he had written all of his affidavits. Detective Williams also testified that he had spoken with Detective Granata in the weeks after the shooting, but that he did not know the exact date. Defense counsel used the Granata report, marked for identification only as Defendant's Exhibit 9, to refresh Detective Williams's recollection. After handing the report to Detective Williams, defense counsel asked whether Detective Granata ever told Detective Williams that Rachel Owens described the intruder as having wild hair or dark skin, and Detective Williams indicated that he did not recall

Detective Granata ever saying that. Defense counsel then asked to have the report back. With this line of questioning, defense counsel left me with the impression that Detective Granata's report contained information that Rachel Owens had described the Defendant as having wild hair and dark skin. Defense counsel's line of questioning was reinforced by the Defendant's motion to suppress in which the Defendant states: "By the time Detective Williams authors this affidavit Rachel Owens has been interviewed and had indicated that she saw her attacker and her attacker was a dark skinned man who appeared to be Jamaican and had wild spiky hair. This fact is absent from the warrant application." Def.'s Mot. to Suppress Search Warrants 8. The Defendant takes the impression one step further in his supplemental brief where he states: "Detective Granata interviewed Rachel

Owens again on December 19, 2015. At that time Mrs. Owens indicated that the shooter had 'wild looking hair' and that the intruder's skin and clothing and skin [sic] were dark. *See* Audio recording of 12/19/14 Interview with Rachel Owens." Def.'s Suppl. Brief 3. Although the Defendant cites the audio recording, he does not provide the recording or any evidence establishing that Rachel Owens did in fact describe the intruder as being dark-skinned with wild hair.

Defendant's Exhibit 9, which purports to be pages three and four of Detective Granata's report, recaps Detective Granata's interview with Rachel Owens on December 18th, but it does not state that Rachel Owens described her assailant as dark skinned or Jamaican looking with wild, spiky hair. Ordinarily, an exhibit not in evidence should not be considered, however, where defense counsel has

created a false impression about the Granata report, I think I am entitled, if not obligated, to correct the record.

The Government, in closing arguments, contested that Rachel Owens ever said anything about dark skin and spiky hair. In response, defense counsel stated that her notes indicated that Carol Chabot (who never saw the intruder) may have given that description. Given that the confusion on this issue was apparent at the hearing, the Defendant's failure to come forward with evidence speaks volumes.

I credit Detective Williams's testimony that Detective Granata never relayed to him information that Rachel Owens described the attacker as dark skinned or wildhaired. Since I conclude that Detective Williams did not possess the information, I

find that he did not intentionally or recklessly omit it.

### e. Omission of Key Facts of the Defendant's Affair

The Defendant also takes issue with Detective Williams's affidavit in support of the January 16, 2015 search warrant for the Defendant's external hard drive and laptop computer. In that affidavit, Detective Williams stated that the Defendant had been having an affair since 2008. The Defendant contends that Detective Williams omitted the key fact that Rachel Owens was aware of his affair. This argument is unavailing, as Detective Williams presented credible testimony that he never learned that Rachel Owens was aware of her husband's affair.

### 3. Omissions of Information Known by Other Officers Under the Collective Knowledge Doctrine

In his supplemental brief, the Defendant identifies numerous "facts"[15] that he claims "pointed away from [his] involvement in the crime" and

[15] The Defendant points to the following "facts": 1) The first-responding officer's noting of a Nissan Pathfinder in the area of the crime scene; 2) Detective Granata's hospital interview of Rachel Owens in which she described the suspect as dark-skinned with wild hair and referred to the intruder as "they"; 3) an initial interview of Carol Chabot in which she stated that she had a lot of jewelry in the house and that her husband had important work computers; 4) a January 5, 2015 interview of a neighbor of the Chabot's who saw a dark-skinned jogger wearing boots in the neighborhood at around 2:30 a.m. on December 17, 2014; 5) emails recovered in late December which suggest that Defendant sent email in the early morning hours of December 18, 2014; 6) information about the credibility of the Defendant's business associate who told police that the Defendant had asked him to provide an alibi; 7) an officer's review of video on December 23, 2014 which did not show Defendant's car crossing two bridges into Maine on the night of the shootings; 8) information taken from video surveillance at a convenience store near the crime scene which showed two vehicles near that area at the time of the shooting neither of which were the Defendant's vehicle; and 9) information obtained from the lead investigator for the Saco Police on the morning of December 18th that both victims were expected to survive. Def.'s Suppl. Br. 2-4.

argues that these "facts" should have been included in the affidavits.[16] Def.'s Suppl. Br. 2. The Defendant contends that even though these facts were not known to the affiants, the information should be imputed to them under the collective knowledge doctrine. Def.'s Suppl. Brief 1-2. This doctrine, generally relied on by the prosecution, allows the "'collective knowledge possessed by . . . all the officers involved in the investigation' " to be used in determining whether probable cause or reasonable suspicion exists. *United States v. Brown*, 621 F.3d 48, 57 (1st Cir. 2010) (quoting *United States v. Winchenbach*, 197 F.3d 548, 555 (1st Cir. 1999)). In attempting to use this doctrine against the

[16] In his supplemental brief, the Defendant cites to different video and audio recordings, but he does not offer them as evidence. Despite the Defendant's failure to provide an offer of proof on these additional alleged omissions, I will address the Defendant's arguments on the omissions of information known by other officers under the collective knowledge doctrine.

government, the Defendant contends that exculpatory information in the possession of any officer investigating the crime must be imputed to the affiant.

While it is true that the police cannot "insulate one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity," *Franks,* 438 U.S. at 163 n.6, and while the same principle has also been applied to deliberate omissions, *United States v. DeLeon*, 979 F.2d 761, 764 (9th Cir. 1992), every fact known to any officer involved in an investigation does not have to be imputed to the affiant. Investigations like this one, involving a violent offender, unfold on multiple levels at a rapid pace. "An omission triggers the exclusionary rule only if it is 'designed to mislead, or . . . made in reckless disregard of whether [it] would mislead, the magistrate' in his appraisal of the

affidavit." *Tanguay*, 787 F.3d at 49 (quoting *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990)). Thus, the doctrine recognized in *Franks* and *DeLeon* is wisely limited to *deliberate or reckless* material misrepresentations or omissions by non-affiants. *See, e.g., United States v. Miller*, No. 6:11-cr-00004, 2012 WL 1414853, at *4 (W.D. Va. Apr. 24, 2012), *aff'd*, 534 F. App'x 204 (4th Cir. 2013).

Moreover, "[b]ecause there is no requirement that every shred of known information be included in a warrant affidavit, the omission of a particular detail, without more, is not enough to satisfy the mens rea element of the *Franks* test." *Tanguay*, 787 F.3d at 49. Information that is not within the personal knowledge of the affiant which has only "peripheral relevancy to the showing of probable cause" need not be included in an affidavit. *Rugendorf v. United States*, 376 U.S. 528, 532 (1964).

If the rule were otherwise, law enforcement would be confronted with "endless conjecture about investigative leads, fragments of information, or other matter that might, if included, have redounded to defendant's benefit." *Colkley*, 899 F.2d at 301.

The Defendant has provided the court with a laundry list of "facts" that he claims should have been included in the warrants, but he fails to make the required showing that any of the information was omitted with the requisite intent to mislead or with reckless disregard for whether it would mislead. Even if I were to treat the Defendant's "facts" as intentionally or recklessly omitted, and assumed for the purposes of argument that all of the Defendant's facts were known by the police on December 18, 2014, the inclusion of this information would not have undermined the probable cause in any of the affidavits. The fact that a car different from those

owned by the Defendant was seen in the vicinity of the Chabot house or that the Defendant's cars were not seen on surveillance videos taken from a convenience store and two bridges would not have defeated the probable cause set forth in any of the warrants. If this information had been included in the warrants, it would have been balanced by context. For example, the affiant would have explained that, although the

Defendant's vehicles were not seen in the surveillance videos from the Sarah Long and Memorial Bridges, the police had not reviewed surveillance tapes from any other bridges, including the Interstate 95 bridge into Maine.

Similarly the Rachel Owens interview, in context, would not have undermined a finding of probable cause. Rachel Owens observed an intruder at night. According to Steven Chabot, the intruder

was dressed in dark clothes wearing a dark ski mask. Rachel Owens suffers from early onset dementia. She gave the description shortly after she had been shot in the head and endured hours of surgery. In context, this description has significantly less evidentiary value. Nor would the comment by Carol Chabot regarding jewelry and computers in the house have undermined probable cause, particularly since none of those items was taken.

The alleged emails sent by the Defendant during the early morning hours of December 18, 2014 would not nullify the showing of probable cause either, since an individual does not need to be at his home to send an email. Likewise, inclusion of the Chabot's neighbor's description of a dark-skinned jogger running in the neighborhood 24 hours before the shooting would not have negated probable cause. Even if all of this information had been included in

the warrant affidavits prepared by Sergeant Beaudoin and Detective Williams on December 18, 2014, probable cause to search would still exist.

Finally, the Defendant fails to account for the time the information was learned and the evolving nature of the investigation. For example, the Defendant takes issue with marginally relevant credibility evidence about a co-worker who said that the Defendant had asked him to provide an alibi. But by January 16th, when the co-worker's information was used, Detective Williams's affidavit contained the additional evidence that the police had made a preliminary positive match between the Defendant's DNA and DNA found at the scene of the shooting, had discovered tampering with the clock on the Defendant's computer, and had learned that the Defendant was involved in an extra-marital affair. Assessed against the mounting evidence contained in

the later warrants, the inclusion of these later-learned facts clearly would not have influenced the probable cause analysis.

## CONCLUSION

For the reasons stated above, the Court **DENIES** the Defendant's motion to dismiss (ECF No. 40), **DENIES** the Defendant's motion to suppress search warrants (ECF No. 41), and **DENIES** the Defendant's motion to suppress search of vehicle in driveway (ECF No. 43).

SO ORDERED
/s/ Nancy Torresen
United States Chief District Judge
Dated this 23rd day of October, 2015.

## Appendix C

United States Court of Appeals For the First Circuit

No. 16-1945

UNITED STATES
Appellee

v.

GREGORY OWENS
Defendant - Appellant

Before Howard, Chief Judge, Torruella, Lynch, Thompson, Kayatta and Barron, Circuit Judges.

ORDER OF COURT Entered: March 27, 2019

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having

voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc: Sarah Ann Churchill, Gregory Owens, Renee M. Bunker, Sangita K. Rao, James William, Chapman Jr., Darcie N. McElwee, John Michael Pellettieri, Maine Victim Compensation Fund, Patrons Insurance, NexClaim Recoveries