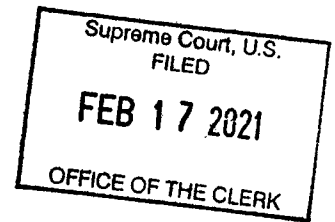


20-7247

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES



Walter Powell — PETITIONER
(Your Name)

vs.

Judge Nalbandian, et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Walter Powell
(Your Name)

P.O. Box 33
(Address)

Terre Haute, IN 47808
(City, State, Zip Code)

N/A
(Phone Number)

Question(s) Presented

- 1) Whether petitioner claims of ineffective assistance of counsel is grounds for new Suppression Hearing.
- 2) Whether petitioner has a reasonable expectation of privacy in his hotel room, where hotel staff enters Mr. Powell's room with a master or duplicate key, subsequently conducts a search therein at the behest of police.

LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Judge Clay
Judge Gibbons
Judge Reeves
Magistrate Stinnett

RELATED CASES

United States District Court for Eastern District of Kentucky
v. Powell No. 5:19-cr-069 Sentenced Dec. 13, 2019.
U.S. v Powell, No. 19-6461, U.S. Court of Appeals for the Sixth
Circuit. Judgment entered Dec 2, 2020.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Dec. 2, 2020.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statement of the Case

On January 25, 2019, Officer Johnson & Officer Hogan of the Lexington Police Department were dispatched to the Wyndham Microtel (the "Microtel") upon a complaint of a marijuana smell in room 122, which was rented to Petitioner Walter Powell ("Mr. Powell"). (Suppression Hearing Transcript, RE 41, Page ID 145). The call, made by Ms. Eugene Zita ("Zita"), included no mention of an eviction. (Id.) Upon arrival, Officer Johnson made non-verbal contact with the front desk clerk, Zita, who gestured toward the room, apparently directing him & Officer Hogan to go to the room without her. (Id., Page ID 145-146). At this point, the officers had no instruction from hotel staff, except to apparently attempt to make contact with the occupant of room 122.

Officers Johnson & Hogan knocked on the door, but nobody answered. (Id.). Officer Johnson then exited the Microtel, & located the room's exterior window to attempt to peer inside. (Id.). The curtains were drawn. (Id.). At this point, Officer Johnson testified that he couldn't smell marijuana coming from the room "because there's a door." (Id., Page ID 156).

Having made no contact with Mr. Powell, the officers returned to Zita at the front desk to see if she requested anything further. (Id., Page ID 147). There, she informed them that she wanted to evict the occupants of room 122. (Id.). Zita made a master key or duplicate room key & escorted the officers to room 122. (Id.).

Upon their arrival, Lita knocked on the door, announced herself, & keyed the room. (Id., Page ID 148). Lita, Officer Johnson, & Officer Hogan all entered the room. (Id.). Officer Johnson testified that he & Officer Hogan performed a protective sweep "to make sure she stays safe" indicating that the officers entered the room closely behind, or alongside of Lita. (Id.).

Officers Johnson & Hogan completed their protective sweep, & then stepped toward the door, still within the room. (Id.). They did not ask Lita to wait in the hallway, or ask her to wait behind them during this protective sweep. In fact, Lita actually walked to the far end of the room without the officers to look between the bed & the back wall. (Id., Page ID 145). The officers remained inside the room during the search. (Id., Page ID 152). According to Officer Johnson they stayed because "it's just a simple her packing the stuff up & taking it & kicking the people out of the room..." (Id., Page ID 152).

Lita testified she was looking for evidence that the occupant of room 122 was smoking. Lita looked in the refrigerator within seconds of her search. Lita informed the officers that she saw something in the refrigerator & asked permission to "take it out." (Id., Page ID 151). Lita testified that from there, she was acting on the direction of the officer.

Q. Okay. So the officer said-- that said you can take it out, you said you just heard him say that. At that point, did you still believe it was your decision

whether to take it out or put it back in the fridge?

A. No, I don't think it was my decision. I gave them the decision.

(Id., Page ID 216). Lita then pulled the bag out of the refrigerator & Officer Hogan walked toward her to inspect (Id., Page ID 162). She handed the bag over to him, & Officer Hogan, apparently recognizing the contents as fentanyl, called Narcotics (Id., Page ID 165).

From there, Lita continued her search, going through Mr. Powell's trash & pulling open drawers, all the while speaking with police. (Id., Page ID 169). During this search, she discovered additional evidence (Id.).

Lita eventually contacted Mr. Powell, providing him with a bogus reason to return to the Microtel. (Id., Page ID 235) ("The Microtel" called Mr. Powell, told them - told him that there was some sort of pipe burst in the room & to come back to the room."). When he arrived, Mr. Powell was arrested & this indictment followed. (Indictment, ME 1, Page ID; Superseding Indictment, RE 29, Page ID 77; Second Superseding Indictment, RE 59, Page ID 298).

Mr. Powell filed a motion to suppress the evidence (Motion to Suppress, ME 24, Page ID 62). After a hearing & supplemental briefing on the same, the magistrate judge issued its Report & Recommendation finding that once Lita used the master key to enter Mr. Powell's hotel room, Mr. Powell was evicted & was concomitantly divested of his expectation of

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privacy. (Report's Recommendation Denying Motion to Suppress
PE 42, Page ID 240). Mr. Powell objected to that Report's
Recommendation. The district court adopted it over Mr. Powell's
objection in its Memorandum Opinion's Order, & agreed that Mr.
Powell lacked standing to challenge the search because he
had been evicted from the Microtel. (Memorandum Opinion's Order
Denying Motion to Suppress PE 44, Page ID 247).

- On 4/24/19 Mr. Powell arraignment met Jeffrey Darling
- On 4/29/19 Motion for Agreed Protective Order granted by Judge Reeves.
- On 5/21/19 Motion to Suppress entered by Darling, on the same day Motion was ordered for 5/24/19 (No idea what Motion contained)
- On 5/24/19 Suppression Hearing. It was ordered that both parties shall submit any additional briefing on Court's question by the close of business 5/31/19
- On 5/31/19 Notice of filing by Darling
- On 6/21/19 Motion to Suppress Denied
- On 7/5/19 Objection to Report's Recommendation
- On 7/8/19 Objection Denied by Judge Reeves
- On 7/10/19 Ives/Benitez Hearing, Darling removed as counsel
- On 7/25/19 Letter from Mr. Powell about Suppression Hearing/video
- On 8/6/19 Motion to Suppress by Mr. Powell, pro se, Magistrate Stinnett
- On 8/7/19 Motion to Suppress Denied by Judge Reeves
- On 8/14/19 Motion to Dismiss under Arizona Youngblood
- On 8/16/19 Letter & Motion to Compel Discovery filed by Court from Mr. Powell, pro se. Mentioning video recordings & Darling's ineffectiveness
- On 8/23/19 Motion to Dismiss under Arizona Youngblood, Denied.

- On 8/30/19 Mr. Powell changed plea

After the district court denied all Motions from Mr. Powell an plea agreement was accepted by Mr. Powell, reserving specifically his right to appeal the motion to suppress, as well as to appeal his sentence. Mr. Powell, filed an timely appeal on December 2, 2020 that appeal was denied by the U.S. Court of Appeals for the Sixth Circuit.

Reasons for granting Petition

I. Mr. Powell's sentence should be vacated, set aside and/or corrected as Darling's conduct was ineffective.

A claim of ineffective assistance of counsel should consist of three elements; 1) you have been deprived of a Constitutional right during a criminal proceeding; 2) It was due to counsel errors that the claim or Constitutional violation, was not perfected for direct appeal; 3) The defendant was prejudiced by the deprivation of the Constitutional right. The defendant must be prepared to identify the Constitutional right he lost, what counsel did to cause it to be unreviewable, the harm the defendant ~~suffered~~ by being deprived of the specified right.

Under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 a defendant who claims ineffective assistance of counsel must prove (1) "that counsel's representation fell below an objective standard of reasonableness" *id.* at 687-688, 104 S. Ct. 2052, 80 L. Ed. 2d 674; (2) that any such deficiency was "prejudicial to the defense." *id.*

In Strickland, *supra*, the Sixth Amendment requires investigation & preparation, not only to exonerate but also to secure & protect the rights of the accused. Such Constitutional rights are granted to the innocent & guilty alike, & failure to investigate, file appropriate motions, is ineffective.

It is a lawyer's responsibility to learn as much as he

can about every case. Counsel must do so as soon as possible, because time is of the essence. The speed or lack thereof to provide a meaningful investigation has an irreversible effect on the outcome of a criminal case. Physical evidence gets misplaced, memories fade & witnesses have been thrown to move away or die. Counsel can never obtain too many details concerning the facts & circumstances in a criminal case. See *Brady v. Maryland*, 373 U.S. 83 (1963) upon request by the defense, prosecution must turn over evidence to the defense if evidence is exculpatory, impeaching, or material. The Brady standard says that the prosecution must disclose evidence that is exculpatory (helps to prove defendant's innocence) or impeaching (shows one of the prosecution's witnesses might have lied).

In the Supreme Court ruling in the case of *Powell v. Alabama*, 287 U.S. 24 (1932), this Court found that the Sixth Amendment guarantee does not apply only to trial. But, this Court noted that the phase of the criminal proceedings where the constitutional right to the effective assistance of counsel is the most critical is, "the time of... arraignment until the beginning of... trial, when consultation, thoroughgoing investigation & preparation [are] vitally important." The Court added that defendants were "as much entitled to such aid during that period as at the trial itself."

A. Darling's representation fell below an objective standard of reasonableness.

On April 24, 2019 Mr. Powell made his initial appearance & arraignment before Magistrate Judge Matthew A. Stinnett. Also Mr. Powell's & his attorney Jeffrey Darling met for the first time. Two weeks later Darling came to visit Mr. Powell at Fayette jail. During that visit Mr. Powell stated to Darling that he wanted him to file a Motion to Suppress. Also, Mr. Powell asked Darling to get & review the hallway videos from the Microtel of the day of his arrest. At the same time Mr. Powell handed Darling 15-20 pages of research & information pertaining to case. After not hearing from Darling & calling trying to see where they were at with the video tapes & Motion, Mr. Powell was taking to court on May 24, 2019. Upon arrival at the court building, Darling told Mr. Powell that there was a Superseding indictment today & a Motion to Suppress hearing. In which came as a shock to Mr. Powell since client's counsel never talked about case in length.

During the hearing Mr. Powell asked Darling to ask Zita some specific questions Darling said "Okay". Moving through the hearing Mr. Powell asked Darling why was using the prosecutor's recording^{is} of the police Body Cam he stated that "his will do the job". Darling was asked again to ask Zita a certain question & once again he said "Okay". At the end of Zita's testimony, lost & not understanding what Zita was let off of the stand without those questions being asked verbalizing this to Co-defendant Elisha Wilson. Mr. Powell stated that he was going to say something & stood. At that time co-defendant attorney Andrew M. Stephens told him not to. At the conclusion of the hearing Magistrate Stinnett

gave the government's defense a week to write a brief on the Spicer Case. Within that week Mr. Powell & Darling never talked after Mr. Powell repeatedly called him. Darling filed a brief all while misspelling words, at one point, mentioning an hospital, when the case took place in a hotel.

After Motion to Suppress & the Objection both being denied (Appendix C Page 3) (Appendix D Page 4). The day before Mr. Powell's arraignment on July 10, 2019, Darling made a visit to see Mr. Powell after several failed phone calls to reach him. During that visit Mr. Powell asked Darling about the video recordings, he stated he had them. Darling went into his pocket & pulled out his cell phone & showed Mr. Powell a 7 second video of him walking into the a hotel room on January 25, 2019. Mr. Powell asked where is the rest of it. Darling told him this was it. The visit ended with Mr. Powell saying some very harsh words to Darling. (Knowing that the video recording of the day of Mr. Powell's arrest will show that Lita lied under oath & the government having this tape in their possession from the beginning) (Appendix B Page 4-5). Three days of video recordings at the Microtel, those recordings is the only investigation. How?

Before arraignment in front of Judge Reeves there was an Illes/Benitez hearing held, outside of the presence of government & co-defendant (Appendix B Page 8). At that time Mr. Powell voiced Darling's ineffectiveness. Judge Reeves appointed new counsel.

B. Darling's such deficiency was "prejudicial to the defense."

On July 25, 2019 a correspondence letter was filed by

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the court, from Mr. Powell asking for another suppression hearing. At the same time mentioning Darling handling of last hearing. (Appendix Page 6) & being denied the video recording of the day of his arrest. Also stating what the video consist of.

The next week a Second Superseding indictment was filed.

Then Mr. Powell filed a motion to Suppress on August 6, 2019 (Appendix Page 7) pro se. Around that same time Mr. Powell new attorney J. Scott Hayworth (Hayworth) came to visit him. Mr. Powell also asked Hayworth about video & seeking another Suppression hearing. Hayworth said "he would look into it." Shortly after Hayworth came to see Mr. Powell & told him that there wasn't any tape anymore. On August 14, 2019 a Motion to Dismiss Under Arizona v. Youngblood (Appendix B Page 9) by Hayworth on the behalf of Mr. Powell. August 16, letter & Motion to Compel Discovery was filed by the court from Mr. Powell pro se. Still asking for video recordings & what is on the tapes (Appendix Page 8). All motions was denied.

All letters & motions filed by Mr. Powell, pro se, in some form stated that the video of his day of arrest shows that Lita testimony was false. The video recording shows Mr. Powell walking out of his room with towels, in his arms (dirty). Walking to end of the hallway all in while looking in rooms looking for housekeeping. The housekeeping cart was in the hallway. When he reached the end, turning around & putting those same dirty towels in the basket & grabbing clean ones. Then returning back to room. Leaving after a short while, to find Lita in the hallway now. Walking to Lita, there was a few minutes conversation, all the time telling

her that he don't need house keeping only had dirty towels & he exchanged them himself. With that he left the Microtel & never returned until his arrest a few hours later. The mishandling, misplacing or concealing of video recording from the Microtel on January 25, 2019, is very damaging to Mr. Powell Fourth Amendment right. Also, Jeffrey Darling ineffectiveness violated Mr. Powell's Fifth & Sixth Amendment.

Mr. Powell has been in custody since the day of his arrest, he wasn't able to gather or preserve evidence, that could very well help or hurt his reasonable expectation of privacy. That in fact was government's plan, Use those types to say that Mr. Powell stayed there (Microtel), walk into a room but there are those same types to help Mr. Powell? Who's been saying "No", that is not what Lita did.

II. All evidence seized pursuant to Lita's search must be excluded as Mr. Powell had an reasonable expectation of privacy in his hotel room when the staff from the Microtel failed to effect an eviction prior to Lita's entry & police intrusion.

The district court erred concluding that Lita

entry into Mr. Powell's room using a master key constituted an "affirmative step" sufficient to constitute an eviction, & justify the subsequent search. To not grant this petition would allow hotel staff to enter a guest's room first, & justify their entry second. This conclusion effectively relies on the subjective intent of the hotel staff, & deprives the occupant of any real expectation of privacy.

Given that Lita's entry into Mr. Powell's hotel room was improper, & her search conducted herein was conducted as a government agent the exclusionary rule requires the exclusion of all the evidence seized therefrom.

The Sixth Circuit erred in concluding that Powell must establish two things: first, that Lita was the government's agent when she searched his room, & second, that the Microtel hadn't evicted him yet, preserving his reasonable expectation of privacy in the room. Because Mr. Powell can't pass the first hurdle, we need not reach the eviction issue. (On Appeal: Opinion RE 38-2 Page ID 5).

Petitioner argues that in order to search his room, the hotel staff & government have to walk through his hotel room door. In order for that search to occur without any constitution violations, an eviction would have to occur first. Not a verbal eviction, but an evictions affirmative act occurred. Lita only stated to officers that she "wanted" to evict the occupants of room 122. The Sixth stated that Microtel have an strict no-smoking policy, that policy.

should have been enforced by the termination of Mr. Powell in the hotel records or by taking an affirmative step toward exercising control or dominion over the hotel room. Before entry into the room.

A. Mr. Powell had a reasonable expectation of privacy in his hotel room.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers & effects, against unreasonable searches & seizures, shall not be violated, & no Warrants shall issue, but upon probable cause, supported by oath or affirmation, & particularly describing the place to be searched, & the persons or things to be seized." *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 473, 142 L. Ed. 2d 373 (1998). It protects persons against unreasonable searches of "their persons [and] houses" & it is therefore a personal right belonging to the individual. *Minnesota v. Carter*, 525 U.S. (at 88); see also *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) ("The Fourth Amendment protects people, not places"). This concept of a reasonable expectation of privacy, as first announced in *Katz*, extends to protect an expectation of privacy in one's rented hotel room. *Katz*, at 358. *Johnson v. United States*, 333 U.S. 10, 17, 68 S. Ct. 367, 92 L. Ed. 436 (1948); see also *Hoffa v. United States*, 385 U.S. 293, 301, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *United States v. Killebrew*, 560 F.2d 129, 133 (6th Cir. 1977) (applying the Fourth Amendment's warrant requirement to searches of motel rooms).

The warrant requirement is of course not without exception. A well-recognized exception to the Fourth Amendment's warrant requirement is a search conducted pursuant to valid consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Valid consent may be provided by third party with authority over property or premises. *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974); *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964). A hotel employee does not generally have authority to consent to a search of a guest's room. *Stoner*, 376 U.S. at 489-90, 84 S. Ct. 889. However, "once a hotel guest's rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room or in any article therein of which the hotel lawfully takes possession." *United States v. Allen*, 106 F.3d 695, 699 (6th Cir. 1997) (internal quotation omitted). It is then, only then, that a hotel employee may consent to search. See *Allen*, *supra*; *Spicer*, 549 Fed. Appx. 376 (Emphasis added).

1. Mr. Powell had not been lawfully evicted, making Lita's entry into his hotel room improper.

Lita had no authority to enter Mr. Powell's hotel room. A hotel employee does not have authority to enter a guest's room, except for housekeeping purposes, unless (1) the guest consented or (2) the tenancy has terminated. *Bass*, 41 Fed. Appx. at 737, citing *United States v. Rahme*, 813 F.2d 31, 34 (2d Cir. 1987). "Once a hotel guest's rental period has expired

or been lawfully terminated, ~~the~~ guest does not have a legitimate expectation of privacy in the hotel room" & both the hotel employee's entry & consent to search are proper. *Allen*, 106 F.3d at 699 (internal quotation omitted). But because she failed to lawfully terminate his rental period, i.e., evict him, Mr. Powell retained a reasonable expectation of privacy in his hotel room, & Lita's entry therein with police was constitutionally unauthorized.

A hotel may lawfully terminate a guest's occupancy for unauthorized activity, including possession of illegal drugs. *Id.*; see also *United States v. Lanier*, 636 F.3d 828, 233 (6th Cir. 2011) (finding it "eminently reasonable" for a hotel to terminate occupancy when it "discovers that the guest has been using the room to peddle drugs"). "A hotel terminates a guest's occupancy by taking 'justifiable affirmative steps to repossess a room... & to assert dominion & control over it,' even if, for some reason, it is unsuccessful in keeping the guest out of the room." *Spicer*, 549 Fed. Appx. at 376 quoting *United States v. Eurnag*, 386 F.3d 888, 890, 895 (9th Cir. 2004) (holding that a hotel successfully terminated the defendant's occupancy where it tried to lock him out after discovering his credit card fraud, but the manager later "discovered to his surprise that someone was in the room" when the manager went back to the room with the police). Once the guest's former room. *Spicer*, 549

Fed. Appx. at 376 quoting Allen, 106 F.3d at 699.

While the district court relied on Spicer for the proposition that the occupant need not be notified of his eviction¹, this case is more akin to Bass, because regardless of whether Mr. Powell was informed of the eviction, Lita failed to take an "affirmative step" to evict Mr. Powell. Bass, 41 Fed. Appx. 735. In Bass, the manager informed no one at the time that the hotel occupant had been evicted, & hotel records showed that he was not formally evicted by the hotel until four hours after the police searched his room. Id. at 738. The manager had police accompany him "to make sure the hotel room was safe & secure." Id. at 736. Although the hotel manager testified that he personally considered the occupant evicted once he had been arrested, the Court noted that "the manager's personal beliefs have no legal import." Id. at 738, quoting Stoner, 376 U.S. at 496 (recognizing that the "constitutional protection against unreasonable searches & seizures... would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel").

¹ Mr. Powell argued in his Objections to the Magistrate Judge's Report & Recommendation (Objection, Doc. 43, Page ID 242) that because he was not notified by the Microtel of his eviction, he retained an expectation of privacy in his hotel room pursuant to more factually similar cases like United States v. Young, 573 F.3d 711 (9th Cir. 2009), which was cited in Mr. Powell's Supplemental Memorandum. (Supplemental Memorandum, Doc. 39, Page ID 118).

Meanwhile, in *Spicer*, a hotel employee, believing Spicer's room to be vacant, entered for housekeeping. Spicer, 549 Fed. Appx. at 377. The employee, having seen & smelled marijuana, called her supervisor who discovered cocaine in a backpack left in the room. Id. The hotel then lawfully terminated Spicer's occupancy of the room. After having discovered evidence of drugs, he then took affirmative steps to repossess the room & assert dominion & control over it—hotel personnel attempted to lock Spicer out of the room before management notified police. Hotel staff informed police that the hotel had taken repossession of the room & they were therefore authorized to search.

Similarly, in *Allen*, the motel manager took affirmative steps to repossess the room. Upon learning that Allen was keeping contraband within the motel, the motel manager locked Allen out of his room. Allen, 106 F.3d at 1699-700. With this action, the motel manager divested Allen of his status as an occupant of the room, & concomitantly terminated his privacy interest in its contents.

Here, Lita failed to take an affirmative step to exercise control over Mr. Powell's room to effect an eviction before she entered Mr. Powell's room. When Lita called police complaining of a smell of marijuana, she did not mention anything about evicting the occupant. (Suppression Hearing Transcript, RE 40, Page ID

145) (Q: "What was the crux of the message that day?" A: "They said there was a smell of marijuana coming from 122.") Upon arrival, Lita was too busy to make contact with police, & so she "just kind of directed [them] towards the hotel room." (Id.). Again, Lita mentioned nothing about an eviction. Police returned to the front desk & for the first time only then Lita mentioned wanting to evict the occupant. Lita only informed police that she "wanted" to evict the occupant - not that he was already evicted. Lita then either made a copy of a room key or grabbed a master key & accompanied police to room 122. (Id., Page ID 147). When she arrived at room 122, Lita knocked, announced herself, & opened the door. (Id., Page ID 174).

Contrary to the district court's conclusion, Lita's entry into the room, alone is insufficient to constitute an "affirmative step" toward "asserting control." To assert control, one must take an affirmative step to exercise dominion over the space. Said another way, an affirmative step by the hotel staff to assert control is one that divests control from the occupant. Affirmative steps include locking the occupant out of his room (Spicer), engaging a separate deadbolt locked & controlled by hotel management (Allen), or recording the eviction in the hotel's records (Allen). Each of these "affirmative steps" not only gave the

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hotel staff control of the occupant's room, but gave them exclusive control - & divested such control from the occupant. Lita took none of these actions.

To accept that Lita's entry into the room with a master key or a copy of the room key constitutes an "affirmative step," would be to rely on the subjective intent of hotel staff. But this Court has made clear that the personal belief of the hotel staff has no legal significance. *Bass*, 41 Fed. Appx. 735; see also *Stoner*, 376 U.S. at 490 (recognizing that the "constitutional protection against unreasonable searches & seizures... would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel"). Thus, whatever Lita wanted to do, or thought she was doing when she entered Mr. Powell's room, is irrelevant.

Moreover, Lita's testimony clearly demonstrates that she had not effected the eviction prior to entering the room. While she may have **wanted** to evict Mr. Powell, she testified that she was searching his room for evidence to justify the eviction.

Q. Were you looking for evidence of smoking?

A. Yes.

Q. If you had found no evidence of smoking, would you have just left the room or what would you have done?

A Left. I would have left the room.

(Suppression Hearing Transcript, ME 41, Page ID 191).
When asked if she would have evicted him anyway, she testified "if there's no physical evidence, but there is a strong smell" (Id.) But Officer Johnson testified that, that while in the hallway, "you couldn't smell [marijuana] from the room because there's a door." (Id., Page ID 156). What's more, she called police to "confirm the smell of marijuana" because "they have more authority in that area." (Id., Page ID 192). Thus, the only strong smell Lita would have sensed was inside room 21 after she entered the room.

Lita entered the room with either a master key or a copy of the room key, which employees would use to permissibly service the room if this were to constitute an affirmative step toward exercising control over the hotel room, an occupant could be evicted by the mere act of hotel staff entering the room - regardless as to whether they entered to replace towels or tidy the room. To consider the act of opening the guest's door using a duplicate key or a master key an "affirmative step" of an eviction, would effectively allow any suspicious hotel employee to enter a guest's room first & justify an eviction second. It would allow hotel staff unbridled discretion to unfairly screen guests by snooping through their belongings, the same

leading to rampant police intrusion.

Lita took no affirmative steps to assert control over the hotel room in advance of her entry. Accordingly, Lita did not terminate Mr. Powell's tenancy. Having failed to eject Mr. Powell prior to entering his room, Mr. Powell retained a reasonable expectation of privacy in his hotel room, & therefore has standing to challenge the search of the same.

B. Lita's search, as a government agent, was in contravention of the Fourth Amendment, & the evidence obtained therefrom should be excluded.

Lita improperly served as a government agent when she conducted a search with the permission of police. "The Fourth Amendment proscribes only governmental action & does not apply to a search or seizure conducted by a private individual no matter how unreasonable - unless that individual is acting as an agent of the government. United States v. Jacobson, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 U. Ed. 2d 85 (1984)." Whether a private person's conduct is attributable to the government "turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circum-

stances." *Shinner v. N.Y. Labor Execs. Ass'n*, 489 U.S. 602, 614, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

The Sixth Circuit employs a two-step test to determine if a private citizen is acting as a police agent for Fourth Amendment purposes. But this not the only way to determine if there is an Fourth Amendment violation. "First, the police must have instigated, encouraged, or participated in the search. Second, the individual must have engaged in the search with the intent of assisting the police in their investigative efforts." *United States v. Lambert*, 771 F.2d 83, 89 (6th Cir.) (citations omitted). Here, police encouraged & instigated Zita's search, & she did so with the intent of assisting police.

1. Officers Johnson & Hogan instigated, encouraged, & participated in the search.

Police were dispatched due to a marijuana complaint at the Microtel. (Suppression Hearing Transcript, ME 44, Page ID 145). They were directed to the room of the apparently offending smell but did not report smelling marijuana in the room of the apparently offending smell but did not report smelling marijuana in the hallway at the time. (Id., Page ID 146). There was no answer. (Id.). They peered through the

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windows from the exterior of the building, but their view was obstructed by curtains. (Id.). At this point, I under these circumstances, police could take no action.

So, they made contact with hotel management, I again returned to the room. This time, the officers conducted a safety sweep, entering the room along-side Zita. While Officer Johnson testified that they only accompanied Zita to perform a safety sweep for her protection, they did not enter before her, I it was Zita who walked alone to the far side of the room to look between the bed I the back wall. (Id., Page ID 165). Then, despite that the sweep for safety was complete, the officers remained in the room ... (Id.). But that's not what happened.

Instead as officers stood inside the room, holding the door Zita began her search. (Id., Page ID 162). Within seconds, Zita ~~opened~~ ^{P. 162} the refrigerator. She informed the officers (I that saw something in the refrigerator, I asked permission to "take it out." (Id., Page ID 151). Zita testified that from there, she was acting on the direction of the officer.

Q. Okay. So the officer said--that said you can take it out, you said you just heard him say that. At that point, did you still believe it was your decision whether to take it out or put it back in the fridge?

A. No, I don't think it was my decision. I gave them the decision.

(Id., Page ID 216). Lita then pulled the bag out of the refrigerator & Officer Hogan walked toward her to inspect.

(Id., Page ID 162). She handed the bag over to him, & Officer Johnson, apparently recognizing the contents as fentanyl, called "Narcotics" (Id., Page ID 165).

From there, Lita continued her search, going through Mr. Powell's trash & pulling open drawers all the while speaking with police (Id., Page ID 169). During this search she discovered additional evidence which she turned over to the officers. (Id.)

2. Lita's intent was to assist police in their investigative efforts.

As Lita's testimony made clear, she entered Mr. Powell's room to try to find a reason to evict him. She undoubtedly wasn't only looking for evidence that Mr. Powell was smoking in his room. She was, as she testified, looking for "evidence of illegal activity." (Id., Page ID 189). Moreover, in fact, all she was looking for was evidence that Mr. Powell was smoking, she would have started her search by looking through his trash bin, or trash bin in the bathroom - not the refrigerator. All along, Lita was ready to assist police.

Even if Lita had reason to inspect the hotel room, she had no reason to search the refrigerator, nor continue searching after she (allegedly) observed the pipe on the table of the room. As the Court observed in both *Howard* & *Harlin*, "where, as here, the intent of the private party conducting the

search is entirely independent of the government's intent to collect evidence for use in a criminal prosecution, we held that the private party is not an agent of the government." *United States v. Hardin*, 539 F.3d 404, 418 (6th Cir. 2008) (emphasis added) quoting *United States v. Howard*, 752 F.2d 220, 227 (6th Cir. 1985) vacated on other grounds, 770 F.2d 57, 62 (6th Cir. 1985). It cannot be said that Zita's search of Mr. Powell's room was entirely independent of the government's intent to collect evidence for use in a criminal prosecution.

Once Zita saw the bag in the refrigerator, she realized that it could be something useful to police - and from there began to work at the direction of police. In addition to her testimony that she "gave them the decision" she also testified that she was doing what she was told to do.

Q. If they said no, don't take it out -

A. Uh-huh.

Q. - you would have left it right where it is, right?

A. Right.

(Suppression) Hearing Transcript, RE 41, Page ID 208-209). After she found the bag, she immediately gave it to Officer Hogan. She continued her search all the while speaking with police.

3. The evidence obtained from Zita's search should be excluded.

All evidence obtained from Mr. Powell's hotel room should be excluded. The exclusionary rule requires the suppression of any evidence that is the direct or

indirect result of illegal or unconstitutional police conduct. *Murray v. U.S.*, 487 U.S. 533, 101 L. Ed. 2d 472 (1988). The doctrine known as "fruit of the poisonous tree" precludes not only the admission of direct evidence wrongfully obtained, but any evidence subsequently found & seized as a result of the unconstitutional conduct. *United States v. AKridge*, 346 F.3d 618, 623 (6th Cir. 2003).

As established above, Zita failed to evict Mr. Powell before she entered his hotel room with police. Therefore, Zita's entry, & consequently, the police's entry, was unlawful. Zita's subsequent search, conducted at the behest of, & to assist police, was unconstitutional. The evidence seized from the unconstitutional search must be excluded as a matter of law.

Conclusion

Mr. Powell respectfully requests that this Court reverse the decision of the district⁴³ find Mr. Powell should have a Suppression Hearing due to ineffective assistance of counsel. Mr. Powell further requests that this Court reverse the Sixth Circuit's find Mr. Powell does have standing to challenge the search conducted in his hotel room by Zita, acting as a government agent. The petition for a writ of certiorari should be granted.

Respectfully submitted,
Walter Powell 22609-032

~~W P~~
Date: 2/17/21