No. _____

In the
SUPREME COURT OF THE UNITED STATES

SENECAL LOYAL NEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Appendix in support of Petition for Writ of Certiorari

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Index of Cert Appendix

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SENECA LOYAL NEAL, Defendant-Appellant.	No. 21-35452 D.C. Nos. 4:19-cv-00021-RRB 4:14-cr-00027-RRB-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Submitted June 8, 2022**
Anchorage, Alaska

Before: HURWITZ, BRESS, and H. THOMAS, Circuit Judges.

Seneca Neal was convicted of multiple offenses related to heroin trafficking. He filed a 28 U.S.C. § 2255 motion, arguing that trial counsel was ineffective for failing to use a recording of an encounter with the arresting officers in support of his motions to suppress certain evidence. The district court found that Neal was not

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

prejudiced by any deficient performance. We affirm.

1. While executing a search warrant, police officers found heroin in Neal's apartment. Among other things, the application for that warrant contained an officer's observations, while the officer was in a common area in the apartment building, that Neal was leaving the apartment for which the warrant was sought. The district court found that the officer's observation of Neal violated the Fourth Amendment, but that probable cause for the warrant remained after excising that tainted evidence. On direct appeal, we affirmed. *United States v. Neal*, 747 F. App'x 501 (9th Cir. 2018).

2. To prevail on a claim of ineffective assistance of counsel, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Neal contends that, had trial counsel used a recording of Neal's encounter with the officers at the hearing on his suppression motions, it would have shown that Neal's phone was illegally searched and his statements connecting him to the unit were also improperly obtained. The district court, however, correctly held that there was no reasonable probability that introduction of the recording would have changed the outcome of the suppression hearing. Even assuming the cell phone was improperly searched and Neal's statements were improperly obtained, more than ample probable cause for the warrant remained, including

statements from two witnesses that Neal was selling heroin, police observations of Neal repeatedly arriving at and leaving the apartment building, and confirmation from the property manager and tenants that Neal was the occupant of the searched unit. The district court reasonably found that the officers would have questioned the manager and tenants in any event, and the warrant application did not rely on information from Neal's phone. Accordingly, Neal was not prejudiced by any deficient performance, and his ineffective assistance claim fails.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. SENECA LOYAL NEAL, Defendant.	Case No. 4:14-cr-00027-1 RRB **ORDER REGARDING MOTION TO VACATE UNDER 28 U.S.C. § 2255**

Defendant, Seneca Loyal Neal, proceeding *pro se*, filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct his sentence of 264 months in prison for conspiracy, possession, and distribution of heroin.[1] Pursuant to the Court's request, the Government also provided the Court with a copy of the audio recordings from Defendant's initial contact with officers.[2] After the matter was fully briefed,[3] the Court reviewed the matter and appointed counsel to further brief Defendant's claim of ineffective assistance of trial counsel.[4] Counsel filed a Supplemental Motion to Vacate under 28 U.S.C. § 2255, which, again, has been fully briefed.[5]

[1] Docket 270.
[2] Docket 288.
[3] Dockets 282, 285, 287, 289.
[4] Docket 290.
[5] Dockets 309, 312, 314, 315.

I. ISSUES PRECLUDED

Defendant's Supplemental Motion to Vacate under 18 U.S.C. § 2255 indicates that Defendant "does not agree to waive any arguments set forth in his initial, *pro se* 2255 motion."[6] But many of the arguments Defendant raised in the original Petition were raised and disposed of on direct appeal.[7] The Ninth Circuit's memorandum on appeal found:

- There was probable cause for the GPS tracking warrant placed on Defendant's car;
- There was probable cause for a search warrant even after tainted evidence was excised;[8]
- Defendant's initial contact with officers did not clearly amount to an arrest or a custodial interrogation requiring *Miranda* warnings;
- Defendant had not shown that his substantial rights were affected by the admission of the body recording and the cell phone; and
- The government adequately showed that the recordings had been timely disclosed to defense counsel, therefore no remand for an evidentiary hearing was warranted.[9]

"Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case."[10] "For the doctrine to apply, the issue in question must have been 'decided explicitly or by

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[6] Docket 309.

[7] Docket 282 at 4. Indeed, a review of Defendant's brief on appeal reveals that Defendant raised the issues of **the GPS monitor, the body recording, the arrest, the cell phone, and the warrant** in his Opening Brief to the Ninth Circuit. Docket 282-2.

[8] The Court notes that Defendant's § 2255 Petition argues that even more evidence would have been deemed "tainted" were it not for the ineffective assistance of counsel.

[9] Docket 282-3. Moreover, even if the Ninth Circuit had not already addressed the timeliness of the disclosure, the government has provided evidence that the recordings were disclosed to his attorney months ahead of the evidentiary hearings. Docket 289; *see also* Docket 287-3.

[10] *Richardson v. United States,* 841 F.2d 993, 996 (9th Cir. 1988).

necessary implication in [the] previous disposition,'" and "[a] collateral attack is the 'same case' as the direct appeal proceedings for purposes of the law of the case doctrine."[11] This Court cannot, therefore, revisit the merits of the foregoing issues in this § 2255 Petition.

II. FACTS

The parties are familiar with the facts, summarized briefly here.

A. The Investigation

The investigation of Defendant's alleged drug activity led law enforcement to suspect that Defendant was keeping drugs in an apartment, separate from his residence, in a five-unit building.[12] Units 1 through 4 were accessible through a locked red door inside an arctic entry that had an unlocked screen door to the outside, while Unit 5 had an alternative entrance.[13] The officers arrived at the location with a warrant to search Unit 5, and observed Defendant arrive and enter the screen door, apparently accessing Unit 1, 2, 3, or 4, rather than Unit 5, rendering their warrant invalid. The Troopers nevertheless entered the arctic entry, and then the red door, and confronted Defendant inside the building. The Troopers recorded their activity from their approach to the building until they questioned Defendant. They then obtained a warrant for Unit 3 and found heroin in a backpack in the unit. They later recorded Defendant's arrest.

[11] *United States v. Jingles*, 702 F.3d 494, 499–500 (9th Cir. 2012) (internal citations omitted).
[12] Docket 159.
[13] *Id.* at 7–8.

B. The Recording

The Court has reviewed the recording.[14] When listening to the recording, it sounds like the Troopers were not able to access the building because they lacked a passcode to the red door. But Trooper Calt testified at trial that he asked someone for the door code when he saw the keypad, assuming they would need it, but it turned out the door was unlocked.[15] Trooper Calt testified that he entered the arctic entry, and then entered the red door which was unlocked or ajar.[16] Trooper Calt testified that after taking a look around inside the red door, he returned to the arctic entry to wait for Neal to come out.[17] Trooper Calt testified that he was able to see Neal come out of Unit 3 from his location in the arctic entry, through a crack in the red door.

The audio then recorded Defendant stating that he was checking on the Unit for "Shawn," who worked on the Slope. The officers asked for "Shawn's" phone number, ostensibly because they were trying to reach someone in Unit 3. They inquired why Defendant visited Unit 3, and why he parked in different locations each time. They asked Defendant for the code to the door, but he declined unless they had a warrant. At this point the recording ends.[18]

The Magistrate did not hear this recording, relying only on the testimony of the Troopers. He nevertheless concluded that because Trooper Calt entered the residence without a proper warrant, his observation of Neal leaving Unit 3 must be excised from the

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[14] Docket 288.
[15] Docket 314 at 11, citing Docket 254 at 18.
[16] Docket 159 at 8.
[17] *Id.*
[18] Docket 288.

affidavit supporting the subsequent search warrant for Unit 3, but that the remaining non-tainted evidence still supported a warrant to search that Unit.[19]

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. The *Strickland* Standard

A claim of ineffective assistance of counsel is best addressed via § 2255.[20] The standard to prevail on an ineffective assistance of counsel claim requires that the defendant:

> Must show both that counsel's representation fell below an objective standard of reasonableness, . . . ***and*** that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[21]

Defendant's Supplemental § 2255 Petition alleges that trial counsel did not effectively use Sergeant Nelson's audio recording of the warrantless arrest and seizure in crafting a defense. Defendant argues that his "trial counsel failed to review (in a timely manner) and then effectively use the audio recording to challenge the warrantless arrest, seizures and searches inside the apartment building and to suppress evidence seized from apartment #3."[22] Defendant maintains that the audio recording was "potentially exculpatory,"[23] and that "had the audio been effectively utilized and the evidence suppressed, . . . [Defendant] likely would not have been found guilty."[24] But the

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[19] Docket 159 at 27.
[20] *See Massaro v. United States*, 538 U.S. 500, 504 (2003).
[21] *Kimmelman v. Morrison*, 477 U.S. 365, 374–75 (1986) (emphasis added), citing *Strickland v. Washington,* 466 U.S. 668, 688 (1984).
[22] Docket 309 at 2.
[23] Docket 285 at 4; *see also* Docket 270-2.
[24] Docket 309 at 2.

government argues that "the contents of the recordings were insignificant, so [Defendant] cannot show that his attorney made an 'unprofessional error' or that the error affected the outcome."[25]

The Court will presume, for purposes of this Order, satisfaction of the first prong of the *Strickland* analysis. The recordings at issue were timely disclosed, but the record suggests that defense counsel did not review them in a timely manner and seek an evidentiary hearing. The Court, therefore, focuses on *Strickland's* second prong: whether "there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[26]

B. Defendant's Arguments Regarding Ineffective Assistance of Counsel

Defendant argues that his attorney's failure to review the Trooper's body recording until just before trial resulted in counsel's failure to (1) challenge the search warrant to suppress fruits of his "warrantless arrest, search, and seizure," and (2) challenge evidence not subject to inevitable discovery. These failures, he argues, render his counsel ineffective at the trial level.[27]

Defendant argues that the recording reveals that the encounter between the Troopers and Defendant differed from Trooper Calt's evidentiary hearing testimony in at least five ways: (1) Trooper Calt testified that he went inside while Sergeant Nelson waited outside, but the audio reveals the Troopers talking as they entered the apartment building;

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[25] Docket 287 at 4.

[26] *Kimmelman v. Morrison*, 477 U.S. 365, 374–75 (1986) (emphasis added), citing *Strickland v. Washington,* 466 U.S. 668, 688 (1984).

[27] Docket 309.

(2) Trooper Calt testified that they had "no problem" getting into the red interior door, but the audio reveals that the Troopers asked two people for the code to enter the red door; (3) Trooper Calt testified—and the Magistrate found—that neither Trooper looked through Defendant's phone, but "multiple beeps can be heard in the audio that would be consistent with Trooper Nelson looking through the phone"; (4) Trooper Calt indicated that they conversed with Defendant before detaining him, but Defendant alleges that the Troopers "stopped and arrested [him] almost immediately upon seeing [him] exit apartment number 3"; and (5) the statements connecting Defendant to Unit 3, which were used to obtain the search warrant for Unit 3, were made by Defendant while being detained and before being *Mirandized*.[28]

Although the Magistrate excised Trooper Calt's statement that he saw Defendant exit Unit 3, Defendant argues that his own statements connecting him to Unit 3 also should have been excised. Defendant argues that trial counsel could have used the recording to show that the key reasons Troopers determined Unit 3 was Neal's apartment were because they observed him exiting Unit 3 from an illegal vantage point, and because he made statements linking himself to Unit 3 without the benefit of *Miranda* warnings.[29] Defendant believes that because Trooper Calt's testimony would have been contradicted by the audio recordings, that Defendant's pre-*Miranda* statements also would have been suppressed. It follows, he reasons, that without his statements linking him to Unit 3, law enforcement would not have had enough evidence to establish probable cause to obtain a

[28] *Id.* at 2–5.
[29] *Id.* at 6.

warrant for Unit 3 before the end of the day, and that by the next day all items would have been removed from the Unit because his lease was ending. Without the evidence from the search of Unit 3, Defendant believes that he would have prevailed at trial.

IV. ANALYSIS

In order to prevail on an ineffective assistance of counsel claim, Defendant must show a reasonable probability that, had his attorney requested an evidentiary hearing regarding the body recording, the result of his trial would have been different.[30]

Even without the benefit of the recording, the Magistrate found fault with the Troopers' actions. He determined that "the Troopers should have been aware they had the wrong apartment listed in their search warrant when they saw Neal enter the lower level and Trooper Calt should have obtained a new warrant before entering the interior common area the first time."[31] Accordingly, the Magistrate found that the Trooper's observation of Defendant exiting Unit 3 was tainted, and his "ability to see Neal exit his apartment through the crack he left himself in the [red] door was a fruit of the unlawful search insofar as it was used as probable cause in obtaining the warrant."[32] Ultimately, however, the Magistrate concluded that even without Trooper Calt's observation of Neal exiting Unit 3, there was probable cause for the Magistrate to issue the second search warrant to search Unit 3 based upon all of the observations and information about Neal obtained ***prior to the unlawful search***.[33] The Ninth Circuit agreed, using a different rationale. It concluded that

[30] *Strickland,* 466 U.S. at 688.
[31] Docket 159 at 11.
[32] *Id.* at 22.
[33] *Id.* at 22–24.

"[e]ven if the officers had not observed Neal exit unit #3, routine police procedures would have inevitably revealed Neal's connection to unit #3 based on information from the property manager and Neal's neighbors."[34]

Defendant now asks this Court to presume a perfect storm of events to defeat the Magistrate's and the Ninth Circuit's reasoning. His argument hinges on the assertion that because only "hours remained on the month-long lease" on Unit 3, the discovery of evidence in Unit 3 was "far from 'inevitable'" following normal police procedures.[35] He reasons that any of the cooperating witnesses could have tipped off Defendant at any moment, and that without his own statements connecting him to Unit 3 it would have taken authorities much longer to obtain a warrant to Unit 3. He asserts that had it taken longer to obtain a warrant, all "portable personal items" would have been removed from Unit 3 in light of the imminent termination of his lease.

This Court is not persuaded.

The officers initially observed Defendant enter the red door from well outside the building. Having thus ruled out Unit 5 as his apartment, one conversation with virtually anyone in the building would have revealed that Defendant occupied Unit 3, and law enforcement could have obtained a warrant for Unit 3 without ever confronting Defendant. Defendant's self-incriminating statements regarding his connection to Unit 3 were not necessary to secure a warrant. Indeed, the Magistrate found that "in addition to all of the

[34] Docket 282-3 at 3, citing *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399 (9th Cir. 1989) (stating that if "by following routine procedures, the police would inevitably have uncovered the evidence," then the evidence will not be suppressed despite a constitutional violation).

[35] Docket 309 at 10.

other evidence supporting probable cause for the first warrant, Calt obtained and verified Neal's *correct* apartment number from two other sources,"[36] including information from the property manager that Neal frequented Unit 3, and a description of Neal by the tenants of Unit 2.[37]

Nothing about the audio recording would have changed the Magistrate's findings with respect to suppression. And the Court is not persuaded that the possible termination of Defendant's lease later that day would have prevented law enforcement from discovering the drugs following normal police procedures. Finally, with respect to Defendant's argument that the officers looked through his phone before securing a warrant, there is no evidence that the officers relied upon anything in Defendant's phone to get a warrant to search Unit 3.

V. CONCLUSION

In light of the foregoing, Defendant's Motion for relief pursuant to § 2255 is DENIED.

IT IS SO ORDERED this 26th day of May, 2021, at Anchorage, Alaska.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
Senior United States District Judge

[36] Docket 159 at 27 (emphasis original).
[37] *Id.* at 26.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. SENECA LOYAL NEAL, Defendant.	4:14-cr-00027-RRB-SAO **FINAL REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTIONS TO SUPPRESS EVIDENCE** **(Dkts. 66 and 68)**

INTRODUCTION

Defendant Seneca Loyal Neal (Neal) filed two motions to suppress evidence at Dkts. 66 and 68.[1] This Final Report and Recommendation addresses both motions and recommends DENIAL of both motions.

Neal moved to suppress the evidence obtained as the result of Alaska search warrant 3AN-14-02308SW at Dkt. 66 with a memorandum supporting that motion at Dkt. 67. The United States filed an opposition at Dkt. 85 and Neal replied at Dkt. 90. Neal moved the court to suppress and exclude all evidence, physical and testimonial, obtained or derived from, through or as a result of an unlawful search and seizure of private cellular phone text messages belonging to Christina Solomon and Seneca Loyal Neal at Dkt. 68. The United States filed an opposition at Dkt. 85 and Neal replied at Dkt. 91.

[1] Neal also filed a Motion to Suppress Evidence at Dkt. 64 alleging incriminating evidence seized resulted from an illegal tracking/surveillance warrant issued on November 4, 2014. Neal's Motion to Suppress Evidence at Dkt. 64 is addressed in a separate Report and Recommendation.

The court held an evidentiary hearing on both motions on February 26, 2016.[2] At the evidentiary hearing, Alaska State Trooper Shayne Calt (Trooper Calt) testified for the United States and the defense did not present any witnesses. The court considered photographs of 5402 Arctic Boulevard (Defense Exs. A-3, A-5, A-6, A-7, A-8, A-10, A-11, and A-15) and an advertisement for a unit at 5402 Arctic Boulevard (Defense Ex. B). The court also considered the Affidavit for Search Warrant 3AN-14-02308SW, the search warrant for 5402 Arctic Boulevard, Unit #3.

The court issued an Initial Report and Recommendation at Dkt. 144. Neal filed objections to the Initial Report and Recommendation regarding Dkt. 66 and the United States filed a response to the objections; those are addressed in the Conclusions of Law.

ISSUES PRESENTED

In Neal's Motion to Suppress Evidence Resulting from Unlawful Entry (Dkt. 66), he argues search warrant 3AN-14-02308SW from the state of Alaska should not have been granted because it was based on evidence from law enforcement's unlawful entry into the common area of Neal's residence without warrant authorization. Neal contends law enforcement's actions violated Neal's rights under Article I, Section 14 of the Alaska Constitution and Neal's rights under the Fourth Amendment of the United States Constitution to be free from an unlawful search. The United

[2] Neal did not originally request an evidentiary hearing and the United States opposed an evidentiary hearing on each motion. The court heard from the parties and requested additional briefing on the need for evidentiary hearings. Neal requested evidentiary hearings on all the motions, the United States opposed. This court granted Neal's request for an evidentiary hearing on Motions to Suppress at Dkts. 66 and 68, but denied the request for evidentiary hearing on the Motion to Suppress at Dkt. 64. The United States subsequently filed a Motion for Clarification of Issues for the Evidentiary Hearing, which this court treated as a motion for reconsideration of its ruling on evidentiary hearings and ordered additional briefing. The court issued a reasoned order granting and denying in part the defense request at Dkt. 102.

States argues the motion is meritless because Neal did not have a constitutionally protected expectation of privacy in the common area, and even if Neal had such an expectation the Affidavit supporting the warrant did not contain evidence resulting from an unlawful entry.[3]

In Neal's Motion to Suppress Evidence resulting from unlawful search of cellular phones (Dkt. 68), he argues his cellular phone and the cellular phone of Christina Solomon (Solomon) were searched without a warrant violating his rights and Solomon's. Neal argues use of the incriminating text messages discovered during the search of the phones violated both Neal and Solomon's expectation of privacy. The United States argues Solomon consented to the search: Neal does not have standing to assert vicariously a violation of Solomon's rights, if her rights were violated; Neal's phone was only searched under the authority of a warrant; and Neal does not have a right of privacy in the text messages he sent to Solomon.

FINDINGS OF FACT

In September and October of 2014, the Alaska State Troopers, including Investigator Shayne Calt (Trooper Calt), concluded an investigation of several individuals in Anchorage, Alaska for illegal drug activity that led investigators to contact Mr. Strom and obtain additional state search warrants.[4] The investigation incriminated Neal, the defendant in this case, and led Trooper Calt to seek and obtain a state search warrant for a GPS tracking device on November 2,

[3] Government further argues no evidence showed the officer found any evidence while in or if they were in the common area so it is unnecessary for the court to determine whether the common area was constitutionally protected.

[4] Despite discussion with federal agents regarding the case, it remained a "state-run" investigation. Trooper Calt was familiar with the procedures for obtaining a state search warrant.

2014.[5] Trooper Calt, assisted by other law enforcement officers, tracked Neal's movements with the GPS tracking device from the beginning of November 2014 through the end of November 2014 when Neal was arrested. Neal visited the structure at 5402 Arctic Boulevard several times while being tracked in November 2014. He typically drove to the structure at 5402 Arctic Boulevard, went inside, then departed in his vehicle between five to twelve minutes later. After November 12, on several occasions, Neal parked some distance away and walked to 5402 Arctic Boulevard. On November 25, 2014 Neal traveled to 5402 Arctic Boulevard and then returned to his residence at 1204 West 45th Street in Anchorage, Alaska (residence).

After Neal arrived at his residence, Solomon drove up to his residence, went inside, and then left shortly thereafter. Solomon drove away from Neal's residence and parked in a nearby lot. During the next twenty minutes, law enforcement officers, including Alaska State Trooper Miner (Trooper Miner), saw Solomon smoking what appeared to be heroin. Trooper Miner approached the van and contacted the driver and passenger. Trooper Miner questioned Solomon about illegal drug activity and then arrested her. Trooper Miner seized a cellular phone from her person; Solomon gave her verbal consent to look through the contents of her phone. Trooper Miner then browsed through its contents including a 'contacts' list and text messages contained on the phone.[6] Trooper Miner viewed at least three text messages either to or from a person who appeared to be identified as Neal, then Trooper Miner read Solomon her Miranda warnings and

[5] Neal moved for suppression of evidence obtained from the GPS tracking warrant in the Motion to Suppress at Dkt. 64.

[6] Trooper Miner did not seek a warrant before viewing the contents of the phone.

asked her about the text messages. Solomon waived her Miranda rights and told Trooper Miner she had sent three text messages to Neal.[7]

On November 30, 2014 Alaska State Troopers obtained a search warrant for two locations: the first at 1204 W. 45th Avenue in Anchorage, Alaska (Neal's residence) and a second apartment also in Anchorage located at 5402 Arctic Boulevard (Neal's apartment). Solomon's text messages and subsequent statements implicated Neal and were used as a basis for probable cause in an affidavit for a search of his apartment and residence. Trooper Calt obtained a state search warrant, for 5402 Arctic Boulevard ultimately based in part on Neal's trips to the apartment at 5402 Arctic Boulevard.[8] The warrant sought search and seizure of apartment (unit) #5 at 5402 Arctic Boulevard. However, Neal had actually been going back and forth to apartment (unit) #3, not apartment (unit) #5.[9]

The building at 5402 Arctic Boulevard appeared to originally be a house converted into multi-unit apartments. The apartments were mostly rented or leased to individuals with some of the rooms being self-contained units; having a bathroom and kitchen inside, and with an entrance

[7] Solomon stated that she sent the text messages on October 26, November 15, and November 22. Solomon also made additional statements incriminating Neal in illegal drug activity in part based on the information Trooper Miner viewed. Trooper Miner did not seek a warrant to search the digital contents of Solomon's cellular phone either before or after looking at her phone.

[8] 3AN-14-02308SW. Investigators believed Neal used the apartment as a "drug stash house' and that he was not residing there.

[9] The terms 'apartment' and 'unit' are used interchangeably throughout this Report and Recommendation, as they were throughout the pleadings, supporting evidence, and testimony. For purposes of this Report and Recommendation, for instance apartment #3 means unit #3 and vice versa. The term 'apartment' or 'unit' can have legal consequence as explained later, however, this case turns on the layout, function, structure of 5402 Arctic Boulevard, and case law rather than one party's use of the term 'apartment' or 'unit.'

directly to the outside.[10] The self-contained units were only accessible from an exterior entrance. unit #5 was one of the self-contained units accessible solely on a different side of the building at 5402 Arctic Boulevard.[11]

In contrast to the self-contained units, four basic studio apartments (units #1-#4) shared a common kitchen area located in the interior of 5402 Arctic Boulevard and those units were only accessible to the outside through a common hallway with a shared entrance. While all the residents had access to the common hallway and common kitchen areas, individual renters did not have access to each other's individual units.[12]

Two doors separated the individual doors to the units from the outside, a red door with frosted glass on the upper half separated the entrance to the hallway from the arctic entryway and a white screen door separated the arctic entryway from the outside.[13] The white screen door was kept unlocked routinely. In contrast, unit #5 had its own separate entry around the back of the building, on a different side of the building as unit #3.

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[10] 5402 Arctic Boulevard was operated like an apartment building allowing the general public could rent units for a month or a week.

[11] When the search warrant was issued, fresh, undisturbed snow covered the entrance path to apartment #5.

[12] Defense Ex. B was an advertisement for a unit at 5402 Arctic Boulevard, probably the same Unit #3 Neal exited, though not established at the evidentiary hearing.

[13] Defense Ex. A-11 shows the exterior of 5402 Arctic Boulevard and the white screen door. Defense Ex. A-3 shows a closer view of the white screen door. An arctic entryway is an additional room or area intended to serve as a buffer between the entrance of a structure and the actual outside to limit the draft or entry of cold air into the main living area. Arctic entryways can vary from a formal foyer with heating, light, and furnishings to simply an overhang with plywood walls. In this case, the arctic entryway was not heated, while the common area (the area between the red door and units #1 - #4) was heated.

The white screen door on the right hand side of the structure accessed the small arctic entryway at 5402 Arctic Boulevard, pictured in Defense Ex. A-11. The interior of the arctic entryway can be seen, taken from the inside of the interior hallway, in Defense Exs. A-10 and A-8. The small arctic entryway was walled with white painted plywood on the inside and had a roof of translucent fiberglass. A red door with frosted glass (red door) on its upper half separated the arctic entryway from the interior common hallway. The handle of the red door contained ten buttons as part of its locking mechanism.[14] The red door accessed the common hallway shared between units #1 - #4 and the kitchen.[15] Defense Ex. A-8 shows the common hallway as taken by someone who just opened the red door and walked into the common hallway, with the shared kitchen on the right side of the photograph. Once entering the common hallway, the entrance to unit #1 is immediately behind the red door with frosted glass, as seen in Defense Ex. A-5. Defense Ex. A-6 shows the common hallway area and entrance to #3 as taken from the common hallway adjacent to the shared kitchen. unit #3 was at the end of the hallway furthest from the red door.

On November 30, 2014, Trooper Calt and Sergeant Nelson, of the Alaska State Troopers, watched the property at 5402 Arctic Boulevard.[16] Trooper Calt saw Neal pull up to the apartment building, exit his vehicle, open the white screen door, and proceed inside the structure.[17] Once

[14] Defense Ex. A-5 shows the red door when opened.

[15] Each of the doors to units #1-#4 also has a similar door handled with buttons, best seen in Defense Ex. A-5.

[16] Trooper Calt had obtained a search warrant for 5402 Arctic Boulevard, unit #5, believing it to be Neal's apartment and had that in hand on November 30, 2014. Officers received a search warrant for Unit #3 once Neal was detained as later explained.

[17] Trooper Calt vaguely knew the interior layout from his research on the internet, for instance Defense Ex. B. Additionally, Sergeant Nelson had contacted the landlord and walked through

Neal was inside, Trooper Calt exited his vehicle, walked to the same entrance he saw Neal enter, opened the white screen door, and proceeded into the arctic entryway.[18] Standing in the Arctic entryway, Trooper Calt could not see Neal nor which unit Neal entered from the common hallway, but it had to be either unit #1, #2, #3, or #4. Trooper Calt then opened the red door and walked into the common hallway. The red door was either unlocked or slightly ajar, as it did not require Trooper Calt to take any additional steps, such as inserting a key or punching in a code, to open it. Trooper Calt walked a few steps in and saw the shared kitchen, depicted in Defense Ex.A-7, and stood in front of the entrance to unit #1. Trooper Calt did not know which unit Neal was in and did not want to be discovered, so, after "taking a quick look around," Trooper Calt went back into the arctic entryway to wait for Neal to come out.[19] He intended to arrest Neal. Trooper Calt pulled the red door with frosted glass mostly shut, but left it slightly ajar to allow him to see which unit Neal would exit.[20]

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the common areas on or about November 20, 2014 to get a better idea of the inside of the building. However, Sergeant Nelson did not ask the landlord which unit Neal had rented because doing so could have alerted Neal to the investigation resulting in loss or destruction of evidence. Accordingly, Trooper Calt and Sergeant Nelson were uncertain about what unit Neal actually rented and had possession of until they saw him exit Unit #3 on November 30, 2014.

[18] At that time, Trooper Calt believed he had probable cause to arrest Neal, seize whatever apartment Neal exited, and apply for a search warrant, all based on the illegal drug sales to Ms. Solomon and Brendan Strom.

[19] Transcript at 72. Sergeant Nelson was outside of the arctic entryway to ensure Neal did not depart the premises because Trooper Calt and Sergeant Nelson remained unsure of the exact layout of the entire structure even at that time. Trooper Calt and Sergeant Nelson believed Unit #1 to be vacant based on Sergeant Nelson's prior visit to the premises on or about November 28, 2014, so they did not believe Neal utilized unit #1.

[20] Defense Ex. A-6 is taken from inside the hallway, but generally shows the view Trooper Calt had of the entrances of the other units while standing in the arctic entryway.

Trooper Calt waited in the arctic entryway approximately five minutes when he saw Neal emerge from unit #3 and pull the door to unit #3 closed behind him.[21] Trooper Calt then opened the red door fully and walked through and met Neal in the common hallway. Trooper Calt asked Neal whose apartment he had just exited and Neal said the apartment was owned by his buddy named 'Shawn' and he said he was just checking on it, or words to that effect.[22] Once Trooper Calt contacted Neal, Sergeant Nelson joined Trooper Calt in the common hallway and the two detained Neal. Trooper Calt and Sergeant Nelson conducted a "pat-search" of Neal in the common hallway. Sergeant Nelson removed Neal's wallet and a cell phone from Neal's pockets for placing into evidence.

Trooper Calt did not press any buttons on Neal's phone or otherwise try to turn it on, instead he obtained a search warrant from the state of Alaska and sent the phone to the Technical Crimes Unit for examination as authorized by the warrant.[23] Trooper Calt did not see anyone else, including Sergeant Nelson, look at the contents of the phone prior to committing the phone to their evidence holding facility.

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[21] It is uncertain whether Trooper Calt saw Neal exit Unit #3 through the frosted glass in the red door or through the space where the door was left ajar after Trooper Calt's entry into the hallway. Trooper Calt testified it was more than possible to see a figure coming down the hall looking through the glass, but he did not recall whether he saw Neal exit Unit #3 through the frosted glass or through the crack in the door.

[22] Sergeant Nelson identified the name "Seth Hogan" in his report as the name of the owner of the apartment. Trooper Calt did not believe Neal and paid little attention to the name at the time. Later, after executing the search warrant for Unit #3, officers found the lease signed by Neal.

[23] It was Trooper Calt's common practice not to look at a suspect's phone "by the side of the road", but instead just to let their Technical Crimes Unit retrieve the information.

With Neal detained, Trooper Calt contacted Neal's property manager via phone. The property manager described Neal's physical appearance and his behavior, including that he always walked to the apartment and occasionally stayed away for lengthy periods of time. The property manager could not recall Neal's name, but her physical description of Neal was accurate and her description of his behaviors matched the behaviors Trooper Calt and other officers observed during their weeks of surveillance. The property manager identified that the individual matching these descriptions resided in unit #3. Once officers detained Neal, they spoke to the tenants in unit #2. The tenant in unit #2 described Neal as the person residing in unit #3 to Sergeant Nelson and explained how they had observed that Neal was only rarely at his apartment and usually for about five minutes at a time. Officers waited to ask the property manager or other tenants about Neal's location until after his arrest because they did not want to alert Neal to the investigation.

Trooper Calt included this additional information in an affidavit, and then received a state search warrant for unit #3. Then they searched unit #3 pursuant to the terms of the search warrant.[24] No law enforcement officers entered unit #3 until after the search warrant for unit #3 had been issued.[25] Trooper Calt or Sergeant Nelson contacted the landlord to obtain the code for entering unit #3 after Neal was detained. Neal was read his Miranda rights and was placed in the back of a patrol car and taken to the Anchorage Jail. At 6:25 pm, Alaska State Troopers left the apartment on Arctic Blvd and went to search Neal's residence at 1204 W. 45th Ave. After Neal was in custody, officers received a search warrant for the person of Neal and found another cell phone on Neal's person during the search.

[24] The search warrant affidavit is at Dkt. 85-1.

[25] Heroin and bath salts were found during the search of unit #3.

DISCUSSION

I. Motion to Suppress Evidence resulting from unlawful entry (Dkt. 66)

Trooper Calt's entry into the hallway of 5402 Arctic Boulevard constituted both a trespass and an impermissible search under the Fourth Amendment to the U.S. Constitution; the evidence obtained from the search was then wrongfully used in the magistrate's determination of probable cause for a subsequent search warrant. Nonetheless, probable cause for the warrant remained after excising the tainted evidence from the warrant, considering the remaining information and the additional information discovered after Neal's lawful arrest.

Trooper Calt and Sergeant Nelson arrived at the Arctic Boulevard building with a search warrant for apartment #5, which they believed was Neal's apartment. Trooper Calt and Sergeant Nelson watched Neal enter the lower level of the building through an entrance which could only access apartments #1, #2, #3, or #4; the entryway for apartment #5 was located on a different side of the building. Sergeant Nelson had toured the building with the landlord on or about ten days prior and the Troopers had been conducting visual surveillance of Neal's activities there for several weeks. Therefore, law enforcement officers should have known that the common interior hallway did not provide access to apartment #5. The Troopers should have been aware they had the wrong apartment listed in their search warrant when they saw Neal enter the lower level and Trooper Calt should have obtained a new warrant before entering the interior common area the first time. Regardless, Trooper Calt prudently sought and obtained a new search warrant for apartment #3 prior to searching that apartment.[26]

[26] Trooper Calt's realization is evident based on his decision to not search apartment #3 after he saw Neal come out of it, even after confirming Neal's true apartment number with the property manager, neighbors, and Neal, himself.

When Trooper Calt entered the interior of Neal's building, he took several steps in, looked around, then retreated to the arctic entryway. Once he was back in the arctic entryway, Trooper Calt left the interior door partially open so he could see into the interior hallway; approximately five minutes later he saw Neal exit unit #3 through the opening in the door. Trooper Calt's observations through that opening, which he had created by being in the common hallway unlawfully, constituted an unlawful search. Trooper Calt's methods for identifying the apartment and the use of that information as a basis for probable cause in the affidavit for the second warrant are discussed first in this Report and Recommendation. Because Trooper Calt's search produced tainted evidence, the second part of this discussion is an analysis of whether the warrant survives excising the unlawfully obtained evidence identifying Neal's apartment.

a. The Search, Entry Into the Common Area, Was Unlawful and the Evidence Obtained is Tainted.

Whenever the police enter private property to gather information, they are presumptively conducting a search which requires a warrant.[27] Similarly, when police wrongfully "trespass on property to carry out a search, a defendant has standing to raise the Fourth Amendment only if it was his person, house, paper, or effect searched."[28] Even when the police do not trespass, the Fourth Amendment is triggered if they violate a subjective expectation of privacy that society recognizes as reasonable."[29] Even though not the owner of the building, Neal as a tenant had

[27] Lyall v. City of Los Angeles, 807 F.3d 1178, 1186 (9th Cir. 2015) (citing United States v. Jones, 132 S. Ct. 945, 949 (2012)).

[28] Lyall at 1186.

[29] United States v. Jones, 132 S. Ct. 945, 954-55 (2012) (Sotomayor, S., concurring).

possessory rights because "[t]he Fourth Amendment shields not only actual owners, but also anyone with sufficient possessory rights over the property searched."[30]

The government's opposition is based primarily on cases involving apartment buildings and roadways as analogous authority. While Neal's building was not situated as a single family house, it was not situated as a typical apartment building. Government relies on United States v. Nohara, 3 F.3d 1239 (9th Cir. 1993), where the court concluded that an "apartment dweller has no reasonable expectation of privacy in the common areas of the building . . ."[31] The building in Nohara was called "The Craigside Condominium" which was a twenty-seven story apartment building with 189 individual apartments.[32] These apartments or condos were self-contained living spaces as are most apartments and condos in high rise buildings.

Based on tips from an informant that Nohara was selling methamphetamine, the police followed the informant to Nohara's building. Once there, the informant went inside the building alone, via the main guest entrance, while a security guard let the officers in via a separate entrance. The officers followed the informant to Nohara's twenty-fifth floor apartment and hid in the hallway around the corner and just out of sight of the apartment's entryway. When the informant knocked on the door and Nohara opened it to greet him, officers peered around the corner and saw Nohara standing in his apartment's entryway holding a glass pipe, butane torch, and black bag. Officers arrested Nohara and upon immediately searching the black bag they found what they believed to be methamphetamine. The officers then did a protective sweep of the apartment and

[30] Jones at 954.

[31] United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir. 1993).

[32] Nohara at 1242.

discovered other contraband in plain view. Based on the contents of the black bag and the plain view discoveries, the officers requested and obtained a search warrant for the apartment which yielded additional evidence of criminal activity.[33] Nohara sought suppression of the evidence on the basis that officers violated his Fourth Amendment privacy when, in the hallway outside his apartment, they peered around the corner and saw him holding the pipe, torch, and black bag. Relying on authority from other circuits, the Nohara court found to the contrary and denied suppression after it found apartment dwellers to lack Fourth Amendment privacy protection in apartment building hallways.[34]

Neal's facts are distinguishable from Nohara chiefly because Neal's building was not a large apartment building. The type of building and its layout are relevant considerations in this court's analysis.[35] Finding no expectation of privacy in an apartment building hallway, the Nohara court relied on its earlier case which found such a hallway to be analogous to the exterior threshold of a dwelling, thus construing it as a public space.[36]

The same cannot be said of Neal's case. Different from a high-rise apartment building where each of over one-hundred apartments is its own self-contained "dwelling," with the hallway constituting what Nohara might consider a house's front porch, Trooper Calt permitted himself

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[33] Nohara at 1242.

[34] Nohara at 1242.

[35] See 1 Search & Seizure § 2.3(b) (5th ed.) ("[i]t must be kept in mind that not all multiple-occupancy buildings should be treated in like fashion").

[36] United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir. 1993) (citing United States v. Calhoun, 542 F.2d 1094, 1100 (9th Cir.1976) (dictum) ("The hallway of an apartment building, as with the threshold of one's dwelling, is a 'public' place for purposes of interpreting the Fourth Amendment."), *cert. denied,* 429 U.S. 1064 (1977).).

beyond the front door of the building, and beyond the front arctic entryway. Beyond the arctic entryway, each of the four units had their own locked door, living space, and bathroom, but they shared a small hallway and a kitchen. When Trooper Calt, standing in the front arctic entryway, proceeded further into the building by opening the interior red door and walking inside, he entered what must be considered a dwelling, itself. Immediately upon entering, the floorplan is small enough that when he opened the red door and stepped into the interior hallway, another door leading to one of the units was directly behind the red door. Moreover, after taking only a few steps, Trooper Calt was nearly standing in the kitchen. While each of the only four units had its own lockable door, it simply cannot be said that the small interior hallway adjoining the unit doors, the kitchen, and front entryway door is analogous to Nohara's hallway. Perhaps the arctic entryway is public, but not the common hallway.

The facts in the instant case are more analogous to those in United States v. Fluker, 543 F.2d 709 (9th Cir. 1976), cited by defense counsel. The building in that case had two levels with the landlord living in the upper level and two fully contained basement units in the lower level, one of which belonged to the defendant. To access the basement apartments, there was an exterior stairway which led to a locked door. Inside the locked door was a small corridor which led directly to a locked door for each of the two units.

The question before the court was whether Fluker had a reasonable Fourth Amendment expectation of privacy in the corridor area when police entered that corridor area by knocking down its exterior door.[37] In finding such an expectation of privacy did exist, the court considered

[37] United States v. Fluker, 543 F.2d 709, 716 (9th Cir. 1976) (The Fluker court's Fourth Amendment inquiry was undertaken as an element of determining the applicability of the knock and announce requirement for serving the warrant under 18 U.S.C. § 3109. While Neal's case

several factors specific to the layout of the building. First, they noted that the small nature of the building "was not one containing many individual apartment units."[38] Second, in considering the layout of the building and that the corridor's exterior door was kept locked, the court concluded that the corridor was "clearly limited as a matter of right to the occupants of the two basement apartments[.]"[39] Finally, the court took note of the close proximity between the two units' doors and the exterior door.

When these considerations are applied to the building in Neal's case, the findings are quite similar. As in Fluker, the building had an upper level with a completely separate unit and a lower level which contained the four units with a shared kitchen and hallway. This similarity is distinguished from the "apartment building" in Nohara. The interior red door connecting the interior of the building to the arctic entryway had a keypad on its handle, a locking mechanism. At the evidentiary hearing, Trooper Calt was unable to remember whether the red door was unlocked or ajar or whether he grabbed the door and prevented it from closing and locking immediately after Neal entered.[40] In any event, the keypad on the door handle was presumably to restrict access to the few tenants residing in that level of the building. In Nohara, the exterior doors to the apartment building were very secure and kept locked, but only to keep out trespassers and not to keep out the

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does not turn on such a broader knock and announce inquiry, it does turn on the portion of that inquiry which determines whether the defendant had a reasonable expectation of privacy for Fourth Amendment purposes.).

[38] Fluker at 716.

[39] Fluker at 716.

[40] Dkt. 132 at 80.

dozens of residents, deliverymen, and others seeking to use the hallways to get to a specific self-contained apartment. Finally, the red door was extremely close to the units, with at least one of them located within the door's swing-path and the others just a few steps down the interior hallway. This closely nestled floorplan is vastly dissimilar from that of Nohara where hallways spanned the massive building and served only to connect other apartments that were otherwise fully self-sufficient and independent from the rest of the building.

In applying Fluker to the facts in Neal's case, the court pays careful attention to the analysis the Nohara court undertook in deciding not to extend Fluker to the facts before it. In Nohara, the Ninth Circuit cautioned that Fluker must be read narrowly, especially since the opinion contained language expressly limiting the privacy finding to the facts in that case.[41] Yet, because the facts in this case are so dissimilar from the facts in Nohara, and strikingly similar to the facts in Fluker, the latter is considered as persuasive authority by this court.

The authorities cited by the Nohara court are instructive to the analysis in Neal's case. For instance, the Nohara court identified United States v. Roberts, 747 F.2d 537 (9th Cir. 1984), as a case where they had declined to extend Fluker. Without question, the facts in Roberts, where the defendant argued that he had a reasonable expectation of privacy on the private road that his house shared with five other houses, were certainly incompatible with those in Fluker.[42] In dismissing

[41] *See* United States v. Fluker, 543 F.2d 709, 716 (9th Cir. 1976) ("Measured by the standard announced in Katz, we find that under the narrow set of facts in this case, appellant Young had a reasonable expectation of privacy as to the hallway separating his apartment door from the outer, locked door . . . we note that we are not intimating that a similar result would obtain in circumstances other than the one before us; our holding is confined to the facts of this case.").

[42] United States v. Roberts, 747 F.2d 539 (9th Cir. 1984).

the fairly tenuous argument, the Nohara court explained how a road lacks the "setting for intimate activities of home life."[43] Notably, in examining the Fluker holding, the court distinguished the roadway from Fluker's corridor by noting that the latter was controlled "by a very limited number of co-tenants,"[44] whereas the roadway was in no way secured from public or other use by non-residents.[45]

The road in Roberts is an apt analogy for the hallway in Nohara, as both are merely a means of getting from one place to another, and both are categorically places where the intimacies of life tend not to take place. While the common hallway shared by apartments #1 - #4 of course allowed transit, it also contained a shared kitchen – a living space integral to nearly any dwelling. A kitchen situated in such a fashion, albeit shared with three co-tenants[46], is hardly akin to the doorstep of an apartment or home. While Trooper Calt stopped a couple steps short from actually entering the kitchen, the tightly-situated layout of that floor of the building renders the interior hallway a private space for Fourth Amendment purposes. When Trooper Calt entered that hallway, retreated to the arctic entryway, but left the door open so he could peer inside to see Neal come out of his unit, he ran afoul of the Fourth Amendment.

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[43] United States v. Roberts at 541.

[44] United States v. Roberts at 542.

[45] United States v. Roberts at 542. ("Thus, even if we considered the private road in this case analogous to a hallway in an apartment building, precedent would not support finding Roberts's expectation of privacy reasonable because (1) there was no locked gate at the intersection . . . and (2) the residents of the five other homes . . . shared access to the road. Any person passing by could have easily driven up [the road]. Moreover, Roberts had no control over the five other homeowners: they could have invited anyone, including police officers, to drive up the road.").

[46] At the time in question, the area was actually only shared by Neal and two co-tenants, as one of the four units was vacant.

Nohara cited with approval United States v. Anderson, 533 F.2d 1210 (D.C. Cir. 1976), a case involving a rooming house with at least eight separate units and multiple corridors.[47] In deciding that those corridors lacked Fourth Amendment protection, the court noted how they were accessible to "people making deliveries, and others who had a legitimate reason to be on the premises."[48] In contrast, Neal's building had a lock on the interior door, only one small hallway, four closely situated unit doors, and a kitchen adjoining the small hallway. While it might be expected that a mail delivery person, for example, will traverse a private road in Roberts to get to a resident's house, or proceed through a series of hallways to the doorstep of an apartment in a high-rise building in Nohara, the same is not true in Neal's building. It is unreasonable to expect that a mailperson would open the arctic entryway's screen door, enter that covered arctic entryway, spot the red door with the keypad right on its handle, open that door, and then walk down the hall past the kitchen to get to one of the unit's doors. At one of those points, a reasonable mailperson would realize they were in a private place, absent some arrangement with the residents otherwise.

More than twenty years after the D.C. Circuit's Anderson opinion, at least one state has rejected Anderson. In State v. Titus, 707 So. 2d 706 (Fla. 1998), the court squarely decided the question of privacy in rooming houses in favor of a Fourth Amendment protection for common spaces that are reasonably considered as closed to the public.[49] The core distinction, they wrote, is

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[47] United States v. Anderson, 533 F.2d 1210 (D.C. Cir. 1976).

[48] Anderson at 1214.

[49] State v. Titus, 707 So. 2d 706, 711, 1998 WL 91096 (Fla. 1998) ("This holding does *not* extend to common hallways in unlocked apartment buildings, which generally serve only to connect separate, self-contained living units typically complete with all of the traditional living areas (i.e., bathrooms, dining rooms, living rooms, kitchens, etc.). Interior hallways in rooming houses are protected only by virtue of linking such traditional rooms within the house-they

that apartments are "self-contained living units typically complete with all of the traditional living areas (i.e., bathrooms, dining rooms, living rooms, kitchens, etc.)."[50] The court noted that on the other hand, of course, rooms or assigned units in rooming houses by definition are not self-contained, and often share living rooms, dining rooms, or, as in the case of Neal's building – a kitchen.[51] For these reasons, the apartments or units #1-#4 in Neal's case fit the definition of 'unit', rather than 'apartment.' In contrast, the self-contained "apartment #5" with its own entrance and own kitchen fits the characteristics of the term 'apartment.'

The Nohara court also cites a First Circuit case which finds a lack of Fourth Amendment privacy rights in an apartment's garage, in furtherance of its holding that apartment building hallways also lack protection.[52] The First Circuit, though, without running counter to Nohara, recently adopted the reasoning in Titus with regard to rooming houses. In United States v. Werra, 638 F.3d 326, 332 (1st Cir. 2011), the court noted that while the building was a "single-family structure," despite the fact that "the residents were not a traditional single family occupying the house together . . . as other courts have held with respect to rooming houses and fraternities . . . an unconventional household does not necessarily diminish the protection afforded the residents of

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provide rooming house residents with the only means of access to these rooms, and are an inseparable feature of their "home." In other words, it is not any inherent nature of a hallway that controls, but rather what the hallway links (i.e., individual self-contained living units versus shared traditional living areas.)").

[50] State v. Titus at 711.

[51] State v. Titus at 711.

[52] United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir. 1993) (citing United States v. Cruz Pagan, 537 F.2d 554, 558 (1st Cir.1976)).

the house."[53] The Seventh Circuit has also observed a similar grant of Fourth Amendment protection in rooming houses and fraternity houses.[54] The principle in Nohara regarding apartment hallways is undisturbed by the above and other cases finding an expectation of privacy in rooming houses and similar house-share layouts. In fact, each of the cases is very careful to draw a distinction between a Nohara-like apartment building hallway and a shared-house hallway and common spaces.[55][56]

The government also argues that no evidence was obtained from Trooper Calt's entry into the dwelling, but the court disagrees. In the affidavit of probable cause for the search warrant for "apartment #3," Trooper Calt averred that he watched Neal come out of apartment #3. Regardless of the fact Trooper Calt had a search warrant for unit (apartment) #5 with a separate entrance, Trooper Calt entered the arctic entryway and then common area. When Trooper Calt entered the common area beyond the arctic entryway and then left, he intentionally left the door open so he could see Neal come out of his apartment; those actions constituted an unlawful search of Neal's (and his co-tenants') dwelling. Trooper Calt's ability to see Neal exit his apartment through the

[53] United States v. Werra, 638 F.3d 326, 332 (1st Cir. 2011).

[54] *See, e.g.* Reardon v. Wroan, 811 F.2d 1025, 1026 (7th Cir. 1987).

[55] *See* State v. Titus, 707 So. 2d 706, 711 (Fla. 1998) ("This holding does *not* extend to common hallways in unlocked apartment buildings, which generally serve only to connect separate, self-contained living units typically complete with all of the traditional living areas (i.e., bathrooms, dining rooms, living rooms, kitchens, etc.).")

[56] United States v. Werra, 638 F.3d 326, 332 (1st Cir. 2011) (" . . . we must conduct a broader examination of Werra's and the other tenants' living arrangements throughout [the building]. If they lived separately—like apartment dwellers—they could not claim the common areas of the house, including the foyer, as their private space vis-a-vis outsiders. However, if they did not live in individualized "residences" within the house—and were thus more like the occupants of a single-family home—their right to privacy vis-a-vis outsiders would begin at [the] front door.").

crack he left himself in the door was a fruit of the unlawful search insofar as it was used as probable cause in obtaining the warrant.[57]

For the foregoing reasons, the court finds that Neal had a subjective expectation of privacy inside the hallway and kitchen spaces beyond the arctic entryway at 5402 Arctic Boulevard, and that his expectation of privacy was objectively reasonable under the circumstances presented. Accordingly, Trooper Calt's entry into that interior space beyond the arctic entryway, followed by his leaving the interior door cracked from which to peer in when he retreated to the entryway, constituted a violation of Neal's right to be free of unreasonable search under the Fourth Amendment. Trooper Calt's observation of Neal exiting unit #3 constitutes tainted evidence which was, but should not have been, included in the affidavit for the search warrant.

b. The Untainted Evidence Presented to the Magistrate is Substantial and Clearly Supported Probable Cause for the Magistrate to Issue the Second Search Warrant.

Because Trooper Calt's observations of Neal were obtained unlawfully, those observations are tainted. "Nonetheless, the mere inclusion of tainted evidence in an affidavit does not, by itself, taint the warrant or the evidence seized pursuant to the warrant."[58] Indeed, "Once the district court determine[s] that the search warrant include[s] illegally obtained information, it . . . purge[s] the

[57] In their Objection to the Initial R & R, The United States contends "The officer testified that Neal coming out of #3 was visible to him both through the crack where the door was ajar (which the R & R held unconstitutional) and through the glass of that same door regardless of whether or not the door was ajar" citing the Hearing Transcript, dkt. 132 at 74, 75. Trooper Calt most certain testimony on this point stated "it's more than possible to see through that (glass in the door) and see a figure coming down the hallway" at the Hearing Transcript, however he did not recall whether he observed Neal through the frosted glass or the opening in the door.

[58] United States v. Deeks, 303 F. App'x 507, 509 (9th Cir. 2008) (citing United States v. Vasey, 834 F.2d 782, 788 (9th Cir.1987).).

affidavit of the offending facts and examine[s] whether the remaining facts still afford[] a substantial basis for concluding that the search warrant [is] supported by probable cause."[59] In order to determine whether the warrant and its fruits were ultimately valid, this court must "excise the tainted evidence and determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to issue a warrant."[60]

As a preliminary consideration, on the day Trooper Calt arrested Neal he already had a warrant to search Neal's apartment – it simply listed the wrong apartment number. Indeed, the affidavit contains nearly five single-spaced pages chronicling evidence obtained throughout the course of Trooper Calt's investigation of Neal, including extensive testimony from a police informant, as well as nearly four weeks' worth of surveillance by officers via foot, car, and plane. During that time, officers watched Neal make multiple visits to the apartment building while engaging in behaviors collectively consistent with illicit drug activity. Likewise, the informant provided detailed information, corroborated by police, which suggested Neal was in the business of selling heroin. This included that the informant purchased large amounts of heroin from Neal at his house on a weekly basis, sufficiently describing Neal, Neal's house, Neal's SUV, and Neal's criminal history.

Also the affidavit contains significant detail of Trooper Calt's observations of Neal on the day he was ultimately arrested *before* he exited unit #3. Notably, even as Trooper Calt waited for Neal to come out of his apartment and without any regard to searching that apartment, Trooper

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[59] United States v. Bishop, 264 F.3d 919, 924 (9th Cir. 2001), *See also* United States v. Barajas-Avalos, 377 F.3d 1040, 1058 (9th Cir. 2004) (held a warrant still established probable cause after excising offending portions).

[60] United States v. Deeks, 303 F. App'x 507, 509.

Calt had determined that he had probable cause to effect a warrantless arrest of Neal based on his personal observations. Trooper Calt had observed Neal leave his residence on W. 45th Avenue, arrive at the apartment, stay for about ten minutes, then return to his house. At that point, a woman entered Neal's house and left after only a few minutes. Trooper Calt believed that these behaviors taken together suggested that Neal went to his apartment to get drugs and then returned to his house to sell them to the woman. When the woman drove off, Trooper Calt followed her vehicle and then observed her smoking heroin. Pursuant to a verbal search authorization from the woman, Trooper Calt searched her phone and found incriminating text messages with Neal suggesting drug activity.

Finally, the affidavit supporting the warrant for unit #3 contained new information law enforcement learned *after* Neal's arrest. In the affidavit, Trooper Calt notes how immediately after detaining Neal he contacted Neal's property manager via phone. While the manager could not recall Neal's name, she described Neal's physical appearance and his behavior, including that he always walked to the apartment and was away from it for long periods of time. The manager's description of Neal was correct as was her description of Neal's behaviors as had been meticulously observed by Trooper Calt and other officers for several weeks during close surveillance. Neal's co-tenants in apartment #2 described Neal to Sergeant Nelson, and they also explained their observations of Neal as only rarely at his apartment and only for about five minutes at a time. All of the information obtained from the property manager and co-tenants only further corroborated the Troopers' evidence pertaining to Neal, and all of that information was added to the affidavit before applying for an additional warrant; this one for apartment #3 at 5402 Arctic Boulevard.

Trooper Calt followed Neal to 5401 Arctic Boulevard on November 30, 2014 to arrest him. Trooper Calt had sufficient probable cause to arrest Neal based on his personal observations and knowledge of the matter. As Trooper Calt stood in the arctic entryway waiting for Neal to emerge from his unit, he planned on arresting Neal regardless of which unit from which Neal emerged. This court found Trooper Calt's observation of Neal exiting unit #3 to be tainted evidence which was, but should not have been, included in the affidavit for the search warrant of unit #3. However, the court did not consider the results of Neal's arrest and subsequent law enforcement corroboration of Neal's occupancy of unit #3 as tainted evidence.

The additional evidence obtained following Neal's arrest was not tainted by the unlawful search. The troopers' decisions to question the property manager, neighbors, and Neal immediately following Neal's detention would have ensued regardless of Trooper Calt's search, and that evidence is thus derived from sources completely independent of the 4th Amendment violation. Even if those new pieces of evidence were resultant of the unlawful search, though they are not, they were obtained independent from it and are thus untainted.

Evidence "initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality"[61] will not be considered fruit of the poisonous tree. Furthermore, evidence will not be prevented from introduction if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.[62] If "by

[61] Murray v. U.S., 108 S.Ct. 2529, 2533, 487 U.S. 533, 537 (U.S.Mass.,1988)

[62] Nix v. Williams, 467 U.S. 431 at 444 (1984)

following routine procedures, the police would inevitably have uncovered the evidence"[63] and the "fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search,"[64] then the evidence will not be suppressed despite any constitutional violation. Analysis of inevitable discovery is conducted on a case by case basis.[65] Relevantly, "[c]ircumstances justifying application of the "inevitable discovery" rule are most likely to be present if these investigative procedures were already in progress prior to the discovery via illegal means, as in Nix v. Williams."[66]

Here, Trooper Calt planned to arrest Neal when Neal exited from his apartment at 5402 Arctic Boulevard based on the probable cause described above. When Neal exited unit #3 he walked toward the exterior entrance through the common hallway and arctic entryway using the only exit from the structure. Trooper Calt contacted Neal inside the common hallway and arrested him, instead of contacting Neal on the exterior of the structure and arresting him outside. After contacting Neal, Trooper Calt gained several important pieces of corroboration which he included with his request for a search warrant for unit #3: corroboration from the property manager that Neal frequented unit #3, Neal's co-tenants in apartment #2 described Neal and his behaviors to Sergeant Nelson, and finally the admissions from Neal regarding his presence in unit #3. Routine police procedure here would have been for law enforcement to arrest Neal once

[63] United States v. Ramirez-Sandoval, 872 F.2d 1392, 1399 (9th Cir. 1989) cited by United States v. Young, 573 F.3d 711 at 721 (9th Cir. 2009)

[64] United States v. Boatwright, 822 F.2d 862, 864–65 (C.A.9 (Cal.),1987)

[65] Boatwright at 864-865.

[66] 6 Search & Seizure § 11.4(a) (5th ed.)

he exited the building. Once this occurred, law enforcement would have undoubtedly taken the same corroborative steps to establish Neal's relationship with unit #3.

When the court purged Trooper Calt's affidavit of the offending facts related to his search of Neal's building from the probable cause analysis, an examination of the remaining evidence still affords a substantial basis for concluding that the search warrant is supported by probable cause. In addition to all of the other evidence supporting probable cause for the first warrant, Calt obtained and verified Neal's *correct* apartment number from two other sources, in addition to Neal's admission of the same. The remaining untainted evidence, from both the original warrant and the new, subsequent evidence, was clearly sufficient for a neutral magistrate to find probable cause to issue an updated warrant reflecting Neal's correct apartment number. Because the warrant was supported by probable cause, even after excising the tainted evidence, it was lawfully issued, served, and executed. Accordingly, the evidence obtained from execution of the warrant was obtained lawfully and is admissible as evidence against Neal.

II. Motion to Suppress Evidence Resulting From Searches of Cellular Phones (Dkt. 68).

a. Neal lacks the standing to vicariously assert Solomon's rights with regard to the contents of her text messages stored on her cell phone.

Neal presented separate arguments pertaining to the seizures and searches of both the cell phone of Ms. Solomon and his own cell phones; the court considers those arguments in turn. Ms. Solomon's phone was seized by Trooper Miner subsequent to a search incident to her arrest under suspicion of illegal drug activity. Solomon gave Trooper Miner her verbal consent to search her phone at the time of her arrest. Neal posits Solomon's consent was defective because of her recent Heroin use. Regardless, Neal lacks the requisite standing to raise those issues. Any allegations of

legal harm done to Solomon raises questions about *her* constitutional rights, not Neal's, because "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted."[67]

Assuming *arguendo*, the search of Solomon's phone violated her 4th Amendment rights, Neal suffered no such violation since "[n]o rights of the victim of an illegal search are at stake when the evidence is offered against some other party."[68] While Solomon's rights are not in the scope of this court's inquiry, she "can and very probably will object for [her]self when and if it becomes important for [her] to do so [in a prosecution brought against *her*]."[69] For these reasons, the court looks only to see if Neal had a 4th Amendment privacy right related to Trooper Miner's search of Solomon's phone and, if so, whether that right was violated.

b. Neal also lacks a reasonable expectation of privacy for text messages he sent to Solomon and were contained on her phone.

Reviewing the available case law regarding the specific question of a sender's privacy rights in his text messages received and stored on a recipient's personal phone, this court finds no such right for Neal with regard to the search of Solomon's phone. This court examined cases analyzing a sender's privacy rights in analogous methods of communication, as well as decisions

[67] Plumhoff v. Rickard, 134 S. Ct. 2012, 2022, (2014) (quoting Alderman v. United States, 394 U.S. 165, (1969)) (internal quotation marks omitted).

[68] Alderman v. U.S., 394 U.S. 165, 174, (1969). See also United States v. Padilla, 508 U.S. 77, 82, (1993) ("The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators . . . have been accorded no special standing.") (quoting Alderman v. United States, 394 U.S. 165, 171–172 (1969)). *See also, e.g.*, United States v. Lingenfelter, 997 F.2d 632, 636, (9th Cir. 1993).

[69] Alderman v. United States at 174.

squarely addressing the electronic message question in other district courts in this Circuit, other Circuits, and state courts.

Whether Neal had a privacy interest in the messages on Solomon's phone, like other privacy inquiries, "turns on whether [Neal]'s subjective expectation of privacy was objectively reasonable."[70] In Lopez-Cruz, the Ninth Circuit identified some factors relevant to the inquiry of reasonableness, those factors include: whether Neal had a property or possessory interest in the text messages or Solomon's phone; whether Neal had a right to exclude others from the messages on Solomon's phone; whether Neal took normal precautions to maintain his privacy; whether Neal exhibited a subjective expectation of privacy that the messages would remain free from governmental intrusion; and whether Neal was still in possession of the text messages.[71] Analysis of Neal's circumstances indicates his expectation of privacy was not reasonable.

Neal did not have a property or possessory interest neither in Solomon's phone nor in the text messages which became hers when Neal sent them to her. Similarly, Neal did not have legal title whatsoever to Solomon's phone, the messages, nor the content of the messages once they were received on Solomon's phone. It follows, then, he also lacked any right to exclude Solomon from disclosing the content of the messages he sent her, to law enforcement or anyone else. The government here did not intrude on Neal's texts; rather, the owner of the phone and thus of the messages, Solomon, gave express consent for the Trooper to examine the phone and its contents.

[70] United States v. Lopez-Cruz, 730 F.3d 803, 807 (9th Cir. 2013).

[71] Lopez-Cruz at 808.

Neal abandoned his expectation of privacy regarding the content of the messages he sent to Solomon once they were received on Solomon's phone. To be sure, "the touchstone of abandonment is a question of intent."[72] In determining whether someone has abandoned their privacy interest, the court conducts a "totality of the circumstances inquiry that focuses on whether, through words, acts or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure."[73] As two other courts in this circuit have recently observed, a sender of a cellular text message abandons his privacy interests once the recipient receives[74] the message. In Fetsch v. City of Roseburg, the court was explicit: "[w]hen plaintiff transmitted messages and photos to a device—[recipient]'s cell phone—over which he had no control, he voluntarily ran the risk that his messages . . . once delivered . . . would be viewed by whomever had access to [recipient]'s phone."[75] In Sunbelt Rentals, Inc. v. Victor, another court in this circuit recently found that an employee lacked an objectively reasonable expectation of privacy in his text messages when he "personally caused the transmission of his text messages" to a new company-owned phone."[76] The court in this case

[72] Lopez-Cruz at 808.

[73] Lopez-Cruz at 808.

[74] To be clear, this court is not addressing the separate legal issues related to interception or in-transit seizure of cellular text messages, nor is the Court addressing the separate questions arising when the recipient of the messages lacks ownership of the receiving phone. These issues have their own distinct body of law which is not relevant to the instant motion.

[75] Fetsch v. City of Roseburg, No. 6:11-CV-6343-TC, 2012 WL 6742665, at *10 (D. Or. Dec. 31, 2012).

[76] Sunbelt Rentals, Inc. v. Victor, 43 F. Supp. 3d 1026, 1032, 2014 WL 4274313 (N.D. Cal. 2014) (noting district court precedent in the Ninth Circuit for finding the sender of a text

adopts the same conclusion in finding that Neal lacked an objectively reasonable expectation of privacy in the text messages he transmitted to Solomon's cellular phone.

Several federal circuits and state courts addressing this privacy question have found the sender of a text message to abandon her privacy rights upon transmission.[77] In State v. Carle, the Oregon state courts recently analyzed and decided the question as a matter of first impression. [78] The defendant was charged with conspiring to deliver methamphetamine after police officers found text messages incriminating her of that crime.[79] After applying substantively the same analyses as above, the court concluded: "[w]e can think of no media more susceptible to sharing or dissemination than a digital message, such as a text message . . . which vests in the recipient a digital copy of the message that can be forwarded to or shared with others at the mere click of a button."[80] This observation is also appropriate for the facts in Neal's case. For these reasons, this court concludes that Neal lacked any expectation of privacy in the text messages stored on Solomon's phone.

c. Neal's cell phone was searched only after a valid warrant issued.

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message to have abandoned his privacy rights (citing with approval Fetsch v. City of Roseburg, No. 6:11-CV-6343-TC, 2012 WL 6742665, at *10 (D. Or. Dec. 31, 2012))).

[77] State v. Tentoni, 2015 WI App 77, 871 N.W.2d 285 (Ct. App. 2015); Yu v. U.S., 1997 WL 423070 (S.D. N.Y. 1997); U.S. v. Meriwether, 917 F.2d 955 (6th Cir. 1990); U.S. v. Jones, 149 Fed. Appx. 954 (11th Cir. 2005), cert. denied, 126 S. Ct. 1373 (U.S. 2006), cert. denied, 126 S. Ct. 1373 (U.S. 2006), cert. denied, 126 S. Ct. 2019 (U.S. 2006).

[78] State v. Carle, 266 Or. App. 102, 104, 337 P.3d 904, 905, *review denied*, 356 Or. 767, 345 P.3d 456 (2015) (quoting State v. Patino, 93 A.3d 40, 56 n. 21 (R.I.2014)).

[79] State v. Carle at 104.

[80] State v. Carle at 110.

While Neal's memorandum at Dkt. 69 alleged that the contents of Neal's cell phone were searched without a warrant, this court did not find evidence to support that contention. Alaska Search Warrant number 3PA14501, dated December 4, 2014 (four days after Neal's arrest), lists Neal's three cell phones as being the target of the warrant, in addition to listing Solomon's phone. At the evidentiary hearing on this motion, Trooper Calt, upon examination by the parties, testified to the satisfaction of this court that he did not conduct any pre-warrant inspection of any of the cell phones' contents, including the Galaxy phone seized from Neal at the time of his arrest.[81] Similarly, Trooper Calt testified that he did not observe Sergeant Nelson or any other law enforcement officers conduct any sort of inspection of the phone's contents at the time of Neal's arrest or thereafter, until they had a search warrant. With no evidence in the record to the contrary, this court finds that Neal's phones were not searched prior to the issuance of a properly issued and duly signed warrant.

OBJECTIONS TO THE INITIAL REPORT AND RECOMMENDATION

On May 26, 2016, this court issued its Initial Report and Recommendation (Initial R & R) at Dkt. 144 regarding Plaintiff's Motions to Suppress Evidence at Dkts. 66 and 68. Both parties objected to the Initial R & R regarding Dkt. 66; neither party objected to the court's recommendation regarding Dkt. 68. The court addresses pertinent objections here.

I. The United States asserted additional facts in its objections to the Initial R & R; the Final R & R reflects two modifications based on these references.

a. The court supplemented the Findings of Fact to further explain whether Trooper Calt could see Neal exit unit #3 through the frosted glass or just through the space in the doorway

[81] Dkt. 132 at 49-53.

where the officer had left the door ajar after he entered. The revision is reflected in the body of the document but has no bearing on the court's determination of the issue.

b. The court supplemented the Findings of Fact to include law enforcement's rationale for failing to ask Neal's property manager or neighbors the exact location of Neal's unit prior to his arrest.

II. Neal's objections.

a. Neal argued the magistrate lacked probable cause to issue the search warrant for unit #3 (second warrant) based on information in the affidavit supporting the warrant for unit #5 (original warrant) because this material failed to satisfy the particularity requirement of the Fourth Amendment.

The affidavit supporting the warrant for unit #3 (second warrant) contained much of the material from the affidavit supporting the warrant for unit #5 (original warrant). However, the affidavit supporting the second warrant also contained several items of information connecting Neal to unit #3. The magistrate is not barred from considering the vast quantity of information connecting Neal to the drug trade detailed in the first affidavit merely because law enforcement requested a second warrant. Only the tainted evidence, Trooper Calt's observation of Neal leaving unit #3, must be excised. The magistrate properly considered the substantial non-tainted evidence contained in the affidavit supporting the search warrant for unit #3 (second warrant).

b. Neal argues that the subsequent warrant cannot be based on information gained after Neal's arrest, if that arrest is based on tainted evidence and further that officers would not have known of Neal's relationship with unit #3 but for the unlawful activity. The Conclusions of Law

section was revised to provide greater clarity on this issue, but did not change the court's recommendation.

III. United States' objections.

a. The United States disagrees with the court's finding that Neal had a subjective expectation of privacy inside the hallway and kitchen spaces and that Neal's expectation of privacy was objectively reasonable; the United States argues that United States v. Nohara controls and disagrees with the court's reliance on United States v. Fluker.

The court acknowledges the case law and our Circuit's holding, as aptly stated by the government, "that a tenant does not have a reasonable expectation of privacy in the common areas of an apartment building[.]"[82] However, as exhaustively analyzed in the above conclusions, the Arctic Boulevard structure was not an apartment building[83] as in and for the purposes of Nohara, is thus not analogously on point with Nohara, and deserves a deeper inquiry into the living arrangements on par with the inquiries in Fluker and Werra. Insofar as Fluker has not been extended by the Ninth Circuit, the Circuit has not squarely addressed living arrangements such as the one in question. Accordingly, in keeping with the authorities cited and the principles discussed above, the court finds that Neal had a Fourth Amendment expectation of privacy in his shared hallway and kitchen, that his expectation was reasonable, that Trooper Calt violated that expectation, and that the violation constituted an unlawful search.

[82] Govt's Response to Objections to Report & Recommendation, 5.

[83] The term "apartment building" as used in Nohara has a specific factual and legal meaning distinct from the nuanced references to the Arctic Boulevard structure as being an apartment building. See footnote 9.

b. The United States requests the court clarify its analyses and conclusions related to the evidence which survived the Deeks excision, further authoritatively grounded in the doctrines of independent source and inevitable discovery. The court revised the Conclusions of Law to include these analyses.

CONCLUSION

Neal asked the court to suppress all evidence derived from search warrant 3AN-14-02308SW (Dkt. 66) and to suppress all evidence resulting from an unlawful search and seizure of private cellular phone text messages belonging to Solomon and Neal (Dkt. 68). For the reasons stated above, these motions to suppress evidence should be DENIED.

IT IS SO RECOMMENDED.

DATED this 28th day of July 2016 at Fairbanks, Alaska.

__s/_SCOTT A. ORAVEC___
SCOTT A. ORAVEC
United States Magistrate Judge