NO. _____

In The
Supreme Court of the United States

RICKY D. RUNNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Dated: November 2, 2022

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I. QUESTION PRESENTED

Whether the district court violated Ricky Runner's rights secured under the Fourth Amendment to the United States Constitution by concluding that the plain view doctrine applied to justify a search by law enforcement officers of Runner's vehicle when the same was self-admittedly predicated on the officers' observation of a stem pipe in the console of his vehicle, stem pipes have common lawful uses, including to smoke lawfully dispensed CBD oils, and the innocent facts supplied by the anonymous informant were squarely contradicted in every material term.

II. STATEMENT OF RELATED CASES

Counsel in unaware of any cases related to this petition.

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V. OPINION BELOW

The decision of the United States Court of Appeals for the Fourth Circuit in *United States v. Ricky D. Runner*, ___ F.4th ___, 21-4085 (4th Cir., August 8, 2022), is a published opinion and is attached to this Petition as Appendix 1a at pp. 1-12.

VI. JURISDICTION

The Court of Appeals rendered its opinion on August 8, 2022. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Sup. Ct. R. 13.1, this petition is filed within ninety (90) days of said denial.

VII. RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

VIII. STATEMENT OF THE CASE

A. Investigation and Arrest.

On October 11, 2018, Moundsville West Virginia Police Officer Zachary Mucheck ("Officer Mucheck") was dispatched to the parking lot of a Wal-Mart store located in Moundsville in response to an anonymous call that indicated a female in a blue Volkswagon was "shooting up," *i.e.,* actively injecting drugs. J.A. 21-22. The identity of the caller was never established. J.A. 29-30. Officer Mucheck arrived and observed a female exiting a blue Volkswagon and making her way toward the doors of the Wal-Mart. J.A. 23. Mucheck stopped the female and notified her that he had received information that she was injecting drugs. *Id.*

The female, identified as Stacy Garloch ("Ms. Garloch"), laughed when confronted with the allegation and denied having injected narcotics, stating "Hell, no!" when advised of the same. J.A. 30; J.A. Vol. II, Clip 1 at 0:00:04-0:00:10. She was not evasive and answered Officer Mucheck's questions forthrightly. J.A. 30. Her responses were logical relative to Officer Mucheck's questions. J.A. 31.

Ms. Garloch offered to display her arms to Officer Mucheck, and he observed no track marks on her arms. J.A. 32. Shortly after Officer Mucheck initiated his encounter with Ms. Garloch, Officer Robert Shilling ("Officer Shilling") arrived. J.A. 65. Officer Shilling conducted his own independent investigation of Ms. Garloch's arms, and while he identified "scars" from apparent prior intravenous drug use, he noted no evidence of fresh use. J.A. Vol. II, Clip 1 at 0:07:15-0:07:25. Ms. Garloch again informed the officers that she no longer used drugs and that the scars were

from her use of drugs "years ago" and. Ms. Garloch even offered to allow the officers to check her feet. J.A. Vol. II, Clip 1 at 0:05:42-0:05:56; 0:06:52-0:06:55.

Either Officer Mucheck or Officer Shilling asked for permission to search Ms. Garloch's purse, and she freely consented to the request. J.A. 33. No contraband was identified in her purse. *Id.* By way of explanation as to what she was doing in the car, she repeatedly advised the officers that she merely had been applying make-up. J.A. 23, 32; J.A. Vol. II, Clip 1 at 0:00:15-0:00:22; 0:02:22-0:02:25; 0:07:51-0:07:53. Officer Mucheck agreed that Ms. Garloch was made up. J.A. 32-33.

Upon conducting a visual inspection of the interior of the car through its windows, Officer Mucheck identified no contraband, although he did observe several make-up bags in the pocket of the passenger side door. J.A. 23, 33. Officer Mucheck acknowledged that this fact corroborated Ms. Garloch's statements that she was, indeed, applying make-up in the car. J.A. 33. He also conceded, based upon the information in his possession, Ms. Garloch was telling the truth about what she had been doing. J.A. 35-36.

In addition to repeatedly, affirmatively denying being "high," Ms. Garloch did not exhibit any symptoms of impairment, including slurred speech, disorientation, or difficulty ambulating or standing. J.A. Vol. II, Clip 1 at 0:03:23-0:03:24; 0;07:36-0:07:39; J.A. 30-31. Officer Mucheck agreed that Ms. Garloch did not appear to be impaired or under the influence. J.A. 31. He also noted that her behavior did not change during the hours of his ensuing interactions with her in a manner that would lead him to believe that she was impaired. J.A. 31.

In light of the facts recounted above, Officer Mucheck acknowledged that not only was the anonymous caller's information regarding drug use by the female not corroborated concerning her alleged use of drugs, the caller's allegation was actually contradicted by what he had observed. J.A. 33-35. Nevertheless, Officer Mucheck asked for permission to search the vehicle, and Ms. Garloch declined the request, noting that it was not her vehicle and that she did not believe that she had authority to consent to the search. J.A. 36. She advised that her companion, Petitioner, Ricky D. Runner, was in the store and that he had been driving. J.A. Vol. II, Clip 1 at 0:05:06-0:05:26.

Afterwards, Officers Mucheck and Shilling conferred privately, and Officer Mucheck proposed "might as well wait for homeboy to come out [of Wal-Mart] and try to get consent." J.A. Vol. II, Clip 1 at 0:07:15-0:07:25. However, before Mr. Runner exited the store, Officer Shilling, who was conducting his own visual inspection of the vehicle's interior through the windows, identified a glass pipe in the center console of the vehicle. J.A. Vol. II, Clip 1 at 0:10:28-0:10:35. Officer Shilling noted that from his visual inspection, he could not discern whether the pipe had ever been used, or, if it had been used, what had been used in it. J.A. 70.

After obtaining a description of Mr. Runner from Ms. Garloch, Officer Mucheck proceeded to enter the Wal-Mart to find Mr. Runner. J.A. Vol. II, Clip 1 at 0:10:50-0:11:11. As he entered the store, he disabled his body camera. J.A. Vol. II, Clip 1 at 0:11:31-0:11:47. The body camera video resumes upon his exit from Wal-Mart with Mr. Runner in tow. J.A. Vol. II, Clip 2 at 0:00:01. Although most evasive in

furnishing an explanation over why he disabled the body camera, Officer Mucheck ultimately acknowledged that doing so (and failing to document doing so in any report) represented three (3) separate violations of the City of Moundsville's general orders to officers concerning body-worn cameras. J.A. 47-55.[1] Thus, no body-worn camera evidence exists to substantiate what transpired between Officer Mucheck and Mr. Runner inside the Wal-Mart, and here their accounts differ.

Officer Mucheck stated that, once he identified Mr. Runner, he simply advised Mr. Runner to come with him outside. J.A. 55. He noted that he did not frame the command to come outside as a request. J.A. 55. Mr. Runner stated that he was shopping when he heard the name "Ricky," but he did not respond, as everyone he knows has referred to him by his nickname, "Stick" or "Stickman," since the age of three. J.A. 75, 77-78. When he heard the name "Ricky" being called a second time more loudly, he looked up to see Officer Mucheck. J.A. 76. Mr. Runner stated that he asked Officer Mucheck what the emergency was, and Officer Mucheck responded by stating, "Just come now, it's an emergency." J.A. 76-77.[2] Officer Mucheck conceded that at that point, Mr. Runner was not free to leave and that his Fourth Amendment rights were triggered. J.A. 57-58.[3] By the time that Mr. Runner and Officer Mucheck exited the Wal-Mart, more law enforcement officers had arrived, including Marshall

[1] In explaining why he turned the body-worn camera off upon entering Wal-Mart, Officer Mucheck eventually stated that it was to conserve the battery. J.A. 54.

[2] After initially professing not to recall having said anything about an emergency in the parking lot, Officer Mucheck denied having stated so. J.A. 55-56.

[3] Officer Mucheck noted that Mr. Runner was not impaired in any manner and he neither observed nor smelled evidence of drug use on Mr. Runner's person. J.A. 56.

County Sheriff's Deputy McClelland, and the lights on all of the cruisers in the parking lot were activated. J.A. 59.

Officer Shilling asked Mr. Runner for permission to search the vehicle. J.A. 59-60. Mr. Runner declined to give permission. J.A. 60. Officer Shilling and Officer Mucheck then advised Mr. Runner that the officers did not need permission to search the vehicle, as the pipe observed in the vehicle furnished them with probable cause to search the same. J.A. Vol. II, Clip 2 at 0:02:10-0:02:25. Advised that his consent was irrelevant, Mr. Runner unlocked car. J.A. 72; J.A. Vol. II, Clip 2 at 0:02:18-0:02:27. An ensuing search of the vehicle yielded contraband drugs and a firearm, and Mr. Runner was consequently arrested. J.A. 67.

B. District Court Proceedings.

Mr. Runner was charged in a single count indictment with unlawful possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1)(9) and 924(a)(2). J.A. 8-9. He filed a motion to suppress evidence and statements on August 20, 2020, challenging, *inter alia*, the search of the vehicle. J.A. 10-15. The United States responded on August 26, 2020. J.A. 16-17. An evidentiary hearing on the motion to suppress was held on September 11, 2020. J.A. 18-89.

In addition to the evidence referenced above, Officers Mucheck and Shilling testified. Officer Mucheck advised that the pipe the officers observed was drug paraphernalia, and that the search of the vehicle was based entirely on the presence of the pipe. J.A. 61-62. Officer Shilling also characterized the pipe as drug paraphernalia used to "either smoke like crystal meth, crack cocaine, stuff like that."

J.A. 66. He also acknowledged that the one and only basis upon which he based a finding of probable cause was the presence of the pipe. J.A. 72.

Both officers were questioned on the extent of their knowledge regarding the use of pipes to smoke legal hemp and cannabidiol ("CBD") oil. J.A. 61, 70-71. Officer Mucheck noted that pipes are used to smoke both legal hemp and illegal narcotics. J.A. 61-62. Officer Shilling agreed that individuals smoke legal hemp, but he professed not to have heard of anyone smoking CBD oils in a pipe, although he was aware that some individuals do, indeed, smoke CBD oils through glass bongs. J.A. 70-71.[4]

In addition to Mr. Runner, himself, the defense called Mr. William T. Schmitt, Jr. as a witness. J.A. 79. Mr. Schmitt is the proprietor of Holistic Cloud, a Bellaire, Ohio-based CBD store. J.A. 79.[5]

Holistic Cloud sells CBD products, including hemp, oil, and pipes for smoking the same.[6] Mr. Schmitt testified that his store sells, in addition to hemp and CBD oil, glass pipes used for smoking both hemp and CBD oil. J.A. 80. He noted that between January, 2020, and the date of the suppression hearing at which he was

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[4] Note that, while the pipe had apparently been taken into evidence, this fact was discovered only at the suppression hearing. J.A. 41-42. Moreover, the pipe was never tested to confirm whether it had ever been used or to discern if it had been used, what had been used in it. J.A. 43.

[5] Bellaire, Ohio is located less than ten miles from Moundsville, West Virginia, across the Ohio River.

[6] According to the National Institutes of Health, CBD is one of two cannabinoids. The other is tetrahydrocannabinol ("THC"). *See* National Institutes of Health's National Center for Complementary and Integrative Health, *Cannabis (Marijuana) and Cannabinoids: What You Need to Know*, https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know (last updated, November, 2019). Simply stated, the sale and possession of marijuana containing a certain limit of THC is proscribed under federal law, whereas the sale of hemp and its by-products, including CDB products, is not. *See* 21 U.S.C. §§ 802(16)(A) and (B). Similar to federal law, under West Virginia law, hemp and CBD are legal provided that the same do not include THC in any amount greater than three tenths of a percent (0.3%). W. Va. Code § 19-12E-6(a)(1).

testifying (September 11, 2020), his store alone had sold approximately one thousand (1,000) pipes. *Id.* He also noted that his store furnished service to somewhere between thirty (30) and forty (40) customers per day. *Id.*

Mr. Schmitt testified that he is an activist in the area of promoting the use of hemp and CBD products as an effective means to treat a myriad of ailments, including headaches, muscle aches, and bi-polar disorder. J.A. 81. He further noted that the prolificacy of CBD stores has recently become extensive. *Id.* He also testified as to the extensive nature of CBD stores in multiple states, including West Virginia, and noted that stem pipes, which his store sells, and which Officer Shilling characterized the pipe identified in Mr. Runner's vehicle as being (J.A. 49), are used by some in the CBD consuming public to smoke CBD oils. J.A. 83-84.

At the conclusion of the hearing, the United States requested additional time to file a supplemental brief, and the Court acceded to the same. J.A. 87-88. The government filed its supplementation on September 17, 2020. J.A. 102-104. Mr. Runner filed his supplementation on September 18, 2020, arguing that the mere presence of the pipe in the vehicle, without more, violated Mr. Runner's right secured under the Fourth Amendment to be free from unreasonable searches and seizures. J.A. 105-111. On September 28, 2020, the Magistrate Judge, Honorable James P. Mazzone, issued his report and recommendation ("R&R") recommending that the motion to suppress be denied. Appx. 26a (J.A. 113-135). On October 13, 2020, Mr. Runner filed his objections to the R&R. Appx. 49a (J.A. 136-148). On October 27, 2020, the district court, Honorable John P. Bailey, issued his Order adopting the R&R

for the reasons more fully stated in the magistrate judge's report and denying the motion to suppress. Appx. 21a (J.A. 149-153).

On November 2, 2020, Mr. Runner entered into a conditional plea agreement with the United States pursuant to Rule 11(a)(2), Fed. R. Crim. P., the terms of which included, *inter alia*, his agreement to change his plea to the offense charged in the single count indictment but reserving to him the right to appeal the district court's determination that his suppression motion be denied. J.A. 154-159. On November 24, 2020, Mr. Runner entered a change of plea before Magistrate Judge Mazzone. J.A. 160-164. On February 24, 2021, the district court entered judgment and sentenced Mr. Runner to a term of fifty-one (51) months. Appx. 14a (J.A. 165-171).

C. Appeal to the United States Court of Appeals for the Fourth Circuit.

On February 26, 2021, Mr. Runner timely gave notice of his appeal to the United States Court of Appeals. The matter was argued on May 5, 2022, and the court of appeals issued a published opinion affirming the district court on August 8, 2022. App. 1a. Specifically, the Court, noting that "[a] pipe alone would not necessarily trigger the plain view exception" and that "this case still presents a close question," held that "even though a glass stem pipe may be put to innocent uses – uses that continue to expand and should be taken into consideration – here, viewing the evidence in the light most favorable to the government and in its totality, the plain view exception applies, and the search of the vehicle was lawful." App. 1a.

IX. REASONS FOR GRANTING THE WRIT

The Fourth Circuit misapplied the plain view exception to the Fourth Amendment's warrant requirement to find that probable cause existed justifying a warrantless search of Runner's automobile by: (1) improperly crediting an anonymous informant's tip that was corroborated in only the most generic terms, but was otherwise squarely contradicted in every material respect; and (2) by otherwise imputing a nefarious purpose to a stem pipe, which is commonly used to smoke lawful CBD oils.

Runner disagrees with the circuit court's ruling. This case implicates the plain view exception to the warrant requirement and the undue weight that the Fourth Circuit credited to an anonymous informant's materially contradicted tip to justify a warrantless search of Runner's automobile.[7] As well, this case involves the question of whether the observation of a glass pipe, in and of itself, meets the plain view exception to the warrant requirement, furnishing officers with probable cause to search.

Runner argued below that the search of his automobile was predicated solely on the officers' observation of a glass stem pipe in the center console, which, without more, would not give rise to a finding of probable cause justifying the search of his automobile. The Fourth Circuit appeared to agree that with this latter proposition, noting that "[a] pipe alone would not necessarily trigger the plain view exception." App. 1a at p. 11. However, the circuit court found that information supplied by the anonymous informant, information that was contradicted in material terms, justified the search.

[7] The district court did not factor in the informant's tip in its analysis upholding the search.

To reiterate, the tip of the anonymous informant claimed that a woman in a blue Volkswagon with Ohio tags located in a fairly empty parking lot of a Wal-Mart was "shooting up," *i.e.*, injecting drugs. The court of appeals, after noting that "this case still presents a close question[,]" disagreed with the manner in which Runner framed the issue and found that more than the mere observation of the stem pipe in plain view justified the search of the vehicle, namely, the anonymous informant's tip that a woman was present in the car and at the location described, facts that were indeed corroborated by the officers' observations. App. 1a at pp. 11-12. The appeals court found that that information, coupled with the so-called "drug recognition expertise" of Officer Shilling, was sufficient to furnish the officers with probable cause to search. Appx. at p. 12.[8]

This Court has held that "[p]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n. 13 (1983). This Court further noted in *Gates* that

> an informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case . . . . Rather, . . . they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

462 U.S. at 230.

[8] While Shilling claimed to be a "drug recognition expert" during his direct examination testimony, J.A. 64-65, the government never offered him as an expert and the district court never qualified him as being such.

While this Court has long noted that corroboration of innocent activity furnished by an informant may give rise to probable cause, *see, e.g.*, *Draper v. United States*, 358 U.S. 307 (1959), employment of a totality of circumstances analysis suggests "a balanced assessment of the relative weights of all the various indicia of reliability (*and unreliability*) attending an informant's tip . . . ." *Gates,* 462 U.S. at 234. (Emphasis added). In this respect, the information in the officers' possession failed to meet even this relatively minimal standard, particularly with regard to the contradictions in the informant's report. Both the quality and the quantum of information in the officers' possession is central to reaching this conclusion.

The circuit court noted that the informant's information concerning the means of Garloch's alleged ingestion of drugs was *inaccurate* to the extent that the tip reported that the woman was injecting drugs, yet all the officers observed was a mere pipe; however, it then proceeded to discount entirely the significance of this material contradiction. App. 1a at p. 11. Injecting narcotics and smoking something from a pipe are entirely different means of taking drugs. Coupled with the fact that Garloch was indisputably *not* under the influence of drugs when the officer's encountered her or at any time in the hours thereafter and there existed zero evidence of drug use by Garloch or Runner, the reliability of the anonymous informant's information was at least suspect and failed the "flexible, common-sense standard" necessary for a finding of probable cause. *Texas v. Brown,* 460 U.S. 730, 741 (1983). In applying the totality of the circumstances test, the Fourth Circuit credited the portions of the informant's

information that was corroborated yet ignored the information that was contradicted in the most material respect.

In a similar fashion, the Fourth Circuit placed significant weight on the testimony of Officer Shilling regarding his so-called "expertise" as a drug recognition expert and testimony that the pipe he observed was drug paraphernalia used to smoke illegal drugs like "crystal meth, crack cocaine, stuff like that." J.A. 66. Again, the government did not offer Shilling as an expert, and the district court never qualified him as one.

However, the circuit court, while noting in passing that "even though a glass stem pipe may be put to innocent uses – uses that continue to expand and should be taken into consideration" App. 1a at p. 12, otherwise completely ignored in its conclusions the testimony of William Schmitt, who testified that glass pipes are commonly used to smoke legal hemp and CDB oil, thus indicating that they no longer can be regarded as *per se* contraband. Although the circuit court noted that a "search conducted under the plain view doctrine 'is presumptively reasonable, assuming there is probable cause to associate the property with criminal activity,'" App. 1a at p. 8, *quoting Payton v. New York*, 445 U.S. 573, 587 (1980), when Schmitt's evidence is factored into the analysis, it becomes plain that "plain view" was not implicated, and the officers lacked probable cause to enter the vehicle. Indeed, outside of the anonymous tipster's report of innocent facts, facts which were in large part contradicted by the officers' investigation, the pipe – and the pipe alone – constituted the sole basis of the search.

For the foregoing reasons, the district court erred in failing to grant Runner's motion to suppress requiring that his conviction be set aside.

IX. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

RICKY D. RUNNER,
Petitioner.

By: /s/ Robert G. McCoid
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4085

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICKY D. RUNNER,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:19-cr-00024-JPB-JPM-1)

Argued: May 5, 2022 Decided: August 8, 2022

Before WILKINSON and AGEE, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Floyd wrote the opinion in which Judge Wilkinson and Judge Agee joined.

ARGUED: Robert G. McCoid, MCCOID LAW OFFICES, P.L.L.C., Wheeling, West Virginia, for Appellant. Lynette Danae DeMasi-Lemon, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee. **ON BRIEF:** Randolph J. Bernard, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

FLOYD, Senior Circuit Judge:

Appellant Ricky Runner pleaded guilty to one charge of being a felon in unlawful possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), but reserved his right to appeal the district court's denial of his motion to suppress evidence seized during a warrantless search of his vehicle after officers visually observed a glass stem pipe in the console of his car. Runner now makes that appeal, arguing the stem pipe was insufficient to trigger the plain view exception to the Fourth Amendment's protection from unreasonable searches. Finding neither clear factual error nor an error of law in the district court's reasoning, we affirm.

I.

A.

On October 11, 2018, in Moundsville, West Virginia, city police officer Zachary Mucheck responded to an anonymous tip received at approximately 1:45 a.m. The tipster reported that a woman was "shooting up," J.A. 21, in a "blue Volkswagen with Ohio tags" parked in a Wal-Mart parking lot, J.A. 29. Upon arrival, Officer Mucheck observed a woman exiting the passenger's side of a blue Volkswagen with Ohio tags in what he described as a "pretty empty" parking lot. J.A. 22. He stopped and confronted her, notifying her of the received tip. The woman, identified as Stacy Garloch, adamantly denied having injected narcotics. She was not evasive and answered Mucheck's questions in a straightforward and logical manner. She exhibited no symptoms of impairment, i.e., slurred speech, disorientation, or difficulty standing. Garloch offered to show Mucheck

her arms. He observed no fresh track marks.

Shortly after Mucheck initiated this encounter, Officer Robert Shilling, a trained drug recognition expert, arrived on the scene. He conducted his own investigation of Garloch's arms, identifying scars from prior intravenous drug use but noting no evidence of fresh use. Garloch explained that she had been applying makeup in the car, and Mucheck noted that Garloch was indeed wearing makeup. She reiterated that she no longer used drugs and offered to allow the officers to check her feet for signs of recent injection as well. She granted the officers' request to search her purse. They found no contraband.

Mucheck conducted an initial visual inspection of the interior of the car through its windows. He spotted several make-up bags in the passenger side door but nothing suggesting illegal activity. Although Mucheck acknowledged that the information provided by the anonymous caller was not fully corroborated in so much as the officers did not find evidence of someone "shooting up," he nevertheless asked for permission to search the vehicle. J.A. 31–35. Garloch declined the request, stating that since it was not her vehicle, she did not believe that she had authority to consent to the search. She advised the officers that the driver, Ricky Runner, was in the store.

The officers conferred, and Mucheck proposed that they "might as well wait for homeboy to come out [of Wal-Mart] and try to get consent." J.A. Clip 1 at 0:07:15. Before Runner had emerged from the store, however, Shilling conducted his own visual inspection of the vehicle's interior and identified a glass stem pipe in the center console of the vehicle. According to Shilling's testimony, he believed the pipe had a "frosted tint" to it, indicating prior use. J.A. 70. But he could not discern with certainty, from his inspection outside the

vehicle, whether the pipe had ever been used or, if used, what substance had been used in it.

After obtaining a physical description of Runner from Garloch, Mucheck entered Wal-Mart. As he entered, he disabled his body camera, as he claimed, to conserve the battery. According to Mucheck's testimony, once he identified Runner, he insisted Runner come outside with him. Runner did not exhibit any signs of impairment. Mucheck acknowledged that, at that point, Runner was not free to leave and that his Fourth Amendment rights were triggered. By the time Runner and Mucheck exited the store, more law enforcement officers had arrived.

Shilling asked Runner for permission to search the vehicle, but Runner declined. Mucheck and Shilling then advised Runner that they did not need his permission to search because the pipe furnished them with probable cause. Thus advised, Runner unlocked the car. The resulting search of the car's interior, which began at 2:14 a.m., yielded marijuana, as well as suspected crystal methamphetamine and Xanax pills in Garloch's make-up bag. Neither Runner nor Garloch had active, valid driver's licenses.

During a safety pat-down, Mucheck asked Runner if there were any firearms in the car. Runner indicated he did not know but acknowledged it was possible because his cousin, the owner of the vehicle, owned firearms. He also advised officers that he was a convicted felon and could not "be around" any firearms. J.A. 25. Searching the trunk, officers found ammunition, a magazine with ammunition, and a Hi-Point .40 caliber firearm, as well as additional crystal methamphetamine and a needle. Garloch and Runner were both arrested.

B.

On June 4, 2019, a grand jury returned a one-count indictment against Runner, charging him with being a felon in unlawful possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

On August 20, 2020, Runner filed a motion to suppress the evidence seized during the vehicle search, arguing that the officers lacked probable cause for the plain view search because the incriminating character of the stem pipe was not immediately apparent. A magistrate judge held an evidentiary hearing on September 11, 2020, during which Mucheck and Shilling testified, recounting their investigation and rationale for the search. Mucheck identified the pipe as drug paraphernalia and stated that the search of the vehicle was entirely predicated on the presence of the pipe. Shilling also characterized the pipe as drug paraphernalia used to "either smoke like crystal meth, crack cocaine, stuff like that." J.A. 66. Both officers were questioned about their knowledge regarding the use of pipes to smoke legal hemp and cannabidiol (CBD) oil. Mucheck noted that pipes are used to smoke both legal hemp and illegal narcotics. Shilling agreed that individuals smoke legal hemp but stated he was not aware of anyone doing so in a stem pipe.

Also during the hearing, William Schmitt—the owner of a shop selling CBD products, pipes, and other related items—testified as a witness for Runner. Schmitt identified himself as an activist in the area of promoting the use of legal hemp and CBD products as an effective means to treat pain and other health issues. He testified that the use of CBD products has expanded rapidly, recently becoming "quite a big thing." J.A.

81. Although he acknowledged that the most traditional way to ingest CBD oil is by oral drops, he stated that stem pipes, which his store sells, are used by some to smoke hemp and CBD oils.

The government filed supplemental briefing on September 17, 2020, to more fully address the issue of whether drug paraphernalia is sufficient for probable cause. On September 18, 2020, Runner filed supplemental briefing to argue that glass pipes no longer signal unlawful contraband because of their expanded commercial use for smoking hemp or CBD oil.

On September 28, 2020, the magistrate judge issued his report and recommendation (R&R), advising that the motion to suppress be denied. The judge found, given the circumstances surrounding the search and Shilling's specialized drug detection training, that it was reasonable for the officers to "believe that the pipe in the console of Defendant's vehicle was used to smoke illegal substances, and therefore, the criminal nature of the pipe was immediately apparent." *United States v. Runner*, No. 5:19CR24, 2020 WL 7093403, at *8 (N.D.W. Va. Sept. 28, 2020), *adopted*, No. 5:19-CR-24, 2020 WL 6285206 (N.D.W. Va. Oct. 27, 2020). The magistrate judge believed that the officers' conclusions were not vitiated "simply because pipes of this nature can and apparently have been used more recently to smoke legal substances . . . ." *Id.* at *9. Runner filed objections to the magistrate judge's R&R on October 13, 2020.

On October 27, 2020, the district court entered its opinion and order adopting the R&R, overruling Runner's objections, and denying the motion to suppress. The district court upheld the plain view search because "both officers were lawfully in a place from

which the glass pipe was plainly viewed." *Runner*, 2020 WL 6285206, at *2. It further held that the officers had probable cause to believe the glass pipe constituted contraband or evidence of a crime because it was "immediately apparent" the stem pipe could facilitate "criminal activity." *Id.*

Following the district court's denial of his motion to suppress, Runner entered into a plea agreement on November 2, 2020, reserving his right to appeal the denial of his motion to suppress. On February 24, 2021, Runner was sentenced to 51 months' incarceration and 3 years' supervised release. This timely appeal of the denied motion to suppress followed.

II.

When examining the denial of a motion to suppress, this Court "reviews the district court's legal determinations de novo and its factual conclusions for clear error." *United States v. Shrader*, 675 F.3d 300, 306 (4th Cir. 2012) (citation omitted). In conducting this review, the Court evaluates the evidence "in the light most favorable to the government." *United States v. Green*, 599 F.3d 360, 375 (4th Cir. 2010) (citations omitted).

The Fourth Amendment's protection against unreasonable searches is not implicated when the plain view doctrine applies. This Court has held that "[v]iewing an article that is already in plain view does not involve an invasion of privacy and, consequently, does not constitute a search implicating the Fourth Amendment . . . ." *United States v. Jackson*, 131 F.3d 1105, 1108 (4th Cir. 1997). However, "[n]ot everything in plain view . . . may be seized—only those items that are perceived to be contraband, stolen

property, or incriminating in character." *Id.*

So for the plain view exception to apply, the government must show that: "(1) the officer [was] lawfully in a place from which the object [could] be plainly viewed; (2) the officer ha[d] a lawful right of access to the object itself; and (3) the object's incriminating character [wa]s immediately apparent." *Id.* at 1109 (citations omitted). There is no question that the first two prongs are satisfied, and they are not contested by Runner. So the sole question in this case is whether the incriminating character of the visible glass stem pipe was immediately apparent to Shilling.

The Supreme Court has indicated that "the use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." *Texas v. Brown*, 460 U.S. 730, 741 (1983). Relevant case law has elsewhere articulated that a search conducted under the plain view doctrine "is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Id.* at 738 (quoting *Payton v. New York*, 445 U.S. 573, 587 (1980)). Probable cause is a "flexible, common-sense standard" that "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." *Id.* at 742 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

Runner argues that the presence of a glass pipe, which could be drug paraphernalia, in plain view *alone* and without more, does not give rise to a finding of probable cause.

This court has not addressed that question. And this case does not directly present it. Here, officers were called to the scene by an anonymous tip reporting intravenous drug use. One of those officers believed, based on his experience and training as a drug recognition expert, that the glass pipe in question was contraband. On its face, that evaluation meets the admittedly low standard: that the facts available warrant that items *may be* contraband or stolen property. *See Brown*, 460 U.S. at 742.

Resting on the notion that the pipe alone justified the search, Runner points to two cases in which the Sixth Circuit defined "immediately apparent," arguing the intrinsic nature of the pipe did not provide probable cause because the pipe could be used to smoke legal hemp and CBD oil. *See United States v. Beal*, 810 F.2d 574, 576–77 (6th Cir. 1987); *United States v. McLevain*, 310 F.3d 434, 441 (6th Cir. 2002). But those cases differ on their facts, in that the evidence in question consisted of objects the courts determined to be intrinsically innocent.

In *Beal*, the government unsuccessfully appealed the district court's order granting the defendant's suppression motion. 810 F.2d at 575. Searching the defendant's room pursuant to a warrant for stolen furniture, officers came across two items that appeared to be fountain pens, which the officers noted were "suspicious" because they were "extremely heavy." *Id.* at 575–76. The pens were seized and later determined to be able to expel .22 caliber projectiles. *Id.* at 576. The defendant was charged with possession of an unregistered firearm. *Id.* Affirming the district court, the Sixth Circuit reiterated factors that help determine whether the incriminating nature of an object is immediately apparent, including the "intrinsic nature" or "appearance" of the seized object. *Id.* at 576–77

(citations omitted). The court concluded that the pens were "intrinsically innocent" objects that could not immediately have been perceived as incriminating. *Id.* at 577.

In *McLevain*, the Sixth Circuit reversed the district court's denial of the defendant's motion to suppress evidence of a twist tie, cigarette filter, spoon with residue, and unlabeled prescription bottle that were found in various locations, purportedly in plain view, during a search of the defendant's residence. 310 F.3d at 441–43. The Sixth Circuit recognized that it was the officers' experiences as law enforcement agents that led them to believe that these everyday objects were drug paraphernalia but held that "[t]he connection between these items and illegal activities . . . is not enough to render these items intrinsically incriminating" or "to make their intrinsic nature such that their mere appearance gives rise to an association with criminal activity." *Id.* at 442.

The items that the Sixth Circuit found did not provide a basis for probable cause in *Beal* and *McLevain* were everyday objects that *could be* put to illegal ends. A stem pipe is not such an object. Rather, as confirmed by Shilling's experience as a drug recognition expert, the *predominate* purpose of stem pipes has been—and continues to be—to smoke illegal substances. Despite the increased use of glass pipes to ingest legal substances such as CBD oil, it is still reasonable that a police officer would reach the belief that a glass pipe was evidence of a crime supporting probable cause.

It is important to reiterate that cases from this Circuit upholding plain view searches based on pipes and paraphernalia have involved the presence of additional evidence or indicators that contributed to a finding of probable cause. *See, e.g.*, *United States v. Jones*, 667 F.3d 477, 480, 485 (4th Cir. 2012) (plain view observations of precursors to the

manufacture of methamphetamine, coupled with the strong odor of chemicals associated with methamphetamine production a pipe containing marijuana, and a pill crushed into powder); *United States v. Bullard*, 645 F.3d 237, 241, 243–45 (4th Cir. 2011) (plain view of both cocaine residue and paraphernalia coupled with odor of narcotics); *Jackson*, 131 F.3d at 1107, 1109 (plain view of scale, sifter, plastic bags, numerous gelatin capsules, some white powder, and Isotol, an agent used to cut drugs); *United States v. Turner*, 933 F.2d 240, 244 (4th Cir. 1991) (cocaine along with drug paraphernalia in plain view between the seats of the defendant's vehicle); *United States v. Halvorsen*, No. 88-5805, 1988 WL 60907, at *1 (4th Cir. June 6, 1988) (observation of a pipe coupled with information from a local police officer that he had observed the defendant smoking and had detected the odor of burnt marijuana); *United States v. Chulengarian*, 538 F.2d 553, 554–55 (4th Cir. 1976) (plain view of pipe alongside two bags of marijuana and a marijuana cigarette).[*]

This case similarly involves something more than a mere pipe. A pipe alone would not necessarily trigger the plain view exception. However, this case still presents a close question. In this instance, the officers were responding to an anonymous tip. Admittedly, that tip reported a method of ingesting illegal drugs different from intake via a pipe. Neither Garloch nor Runner appeared under the influence, and Garloch had no new track marks on her arms. Shilling could not tell *immediately* whether the glass pipe had been

[*] For an out-of-circuit case addressing similar facts, see *United States v. Van Zee*, 380 F.3d 342, 343–44 (8th Cir. 2004), in which the Eighth Circuit declined to suppress a law enforcement officer's search of a vehicle after the officer observed erratic driving, and then upon the stop, viewed one to one-and-one half inches of glass tubing, presumed to be a stem pipe, through an open car door, because the officer had past "experience as a narcotics investigator" and previously "had been told about [the subject's] drug activities."

used or, if so, what had been smoked in it. Nevertheless, the anonymous tip that initiated the officers' investigation was corroborated to the extent that they found a woman exiting a "blue Volkswagen with Ohio tags," J.A. 29, in an otherwise "pretty empty" Wal-Mart parking lot, J.A. 22.

That initial corroboration of the anonymous tip, alongside Shilling's drug recognition expertise, is sufficient. "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). And the Supreme Court has noted that "innocent behavior frequently will provide the basis for a showing of probable cause," pushing back against lower courts attempting to "impose a drastically more rigorous definition of probable cause" or "a too rigid classification of the types of conduct that may be relied upon in seeking to demonstrate probable cause." *Id.*

Thus, even though a glass stem pipe may be put to innocent uses—uses that continue to expand and should be taken into consideration—here, viewing the evidence in the light most favorable to the government and in its totality, the plain view exception applies, and the search of the vehicle was lawful.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

FILED: August 8, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4085
(5:19-cr-00024-JPB-JPM-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICKY D. RUNNER

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
v.
RICKY D. RUNNER

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:19CR24

USM Number: 02904-509

Robert G. McCoid
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Unlawful Possession of a Firearm	10/11/2018	1

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) _____ is/are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 24, 2021
Date of Imposition of Judgment

Signature of Judge

Honorable John Preston Bailey, United States District Judge
Name and Title of Judge

Date 2-24-2021

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: RICKY D. RUNNER
CASE NUMBER: 5:19CR24

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 51 months to be served concurrently to the undischarged term of imprisonment the defendant is currently serving relative to Belmont County Court of Common Pleas, St. Clairsville, OH, Docket Nos.: 19CR158 and 19CR60.

☑ The court makes the following recommendations to the Bureau of Prisons:

☑ That the defendant be incarcerated at an FCI or a facility as close to Martins Ferry, Ohio as possible;

☑ and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;

☑ including the 500-Hour Residential Drug Abuse Treatment Program.

☐ That the defendant be incarcerated at _____ or a facility as close to his/her home in _____ as possible;

☐ and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;

☐ including the 500-Hour Residential Drug Abuse Treatment Program.

☑ Jail Credit: None

☑ That the defendant be allowed to participate in any mental health treatment while incarcerated, as determined by the Bureau of Prisons.

☑ That the defendant be allowed to participate in any educational or vocational opportunities while incarcerated, as determined by the Bureau of Prisons.

☑ Pursuant to 42 U.S.C. § 14135A, the defendant shall submit to DNA collection while incarcerated in the Bureau of Prisons, or at the direction of the Probation Officer.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 12:00 pm (noon) on .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

☐ on _____, as directed by the United States Marshals Service.

☐

RETURN

I have executed this judgment as follows:

Defendant delivered on to

at , with a certified copy of this judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

DEFENDANT: RICKY D. RUNNER
CASE NUMBER: 5:19CR24

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 3 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the probation officer.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: RICKY D. RUNNER
CASE NUMBER: 5:19CR24

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You shall not commit another federal, state or local crime.
4. You shall not unlawfully possess a controlled substance. You shall refrain from any unlawful use of a controlled substance. You shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the probation officer.
5. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
6. You must answer truthfully the questions asked by your probation officer.
7. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
9. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
10. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
11. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
12. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
13. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
14. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
15. You shall not purchase, possess or consume any organic or synthetic intoxicants, including bath salts, synthetic cannabinoids or other designer stimulants.
16. You shall not frequent places that sell or distribute synthetic cannabinoids or other designer stimulants.
17. Upon reasonable suspicion by the probation officer, you shall submit your person, property, house, residence, vehicle, papers, computers, or other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
18. You are prohibited from possessing a potentially vicious or dangerous animal or residing with anyone who possess a potentially vicious or dangerous animal. The probation officer has sole authority to determine what animals are considered to be potentially vicious or dangerous.
19. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature Date

DEFENDANT: RICKY D. RUNNER
CASE NUMBER: 5:19CR24

SPECIAL CONDITIONS OF SUPERVISION

1) You must participate in substance abuse treatment. The probation officer will supervise your participation in the program.

2) You must submit to substance abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with the testing methods.

3) You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

4) You must take all mental health medications that are prescribed by your treating physician.

5) You must comply with the Offender Employment Program which may include participation in training, counseling, and/or daily job search as directed by the probation officer. Unless excused for legitimate reasons, if not in compliance with the condition of supervision requiring full-time employment at a lawful occupation, you may be required to perform up to 20 hours of community service per week until employed, as approved by the probation officer.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: RICKY D. RUNNER
CASE NUMBER: 5:19CR24

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$	$	$	$

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

The victim's recovery is limited to the amount of their loss and the defendant's liability for restitution ceases if and when the victim receives full restitution.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ $

☐ See Statement of Reasons for Victim Information

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: RICKY D. RUNNER
CASE NUMBER: 5:19CR24

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100 due immediately, balance due

☐ not later than , or
☐ in accordance with ☐ C ☐ D, ☐ E, ☑ F, or ☐ G below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F, or ☐ G below); or

C ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:
Financial obligations ordered are to be paid while the defendant is incarcerated, and if payment is not completed during incarceration, it is to be completed by the end of the term of supervised release; or

G ☐ Special instructions regarding the payment of criminal monetary penalties:
The defendant shall immediately begin making restitution and/or fine payments of $_____ per month, due on the first of each month. These payments shall be made during incarceration, and if necessary, during supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to Clerk, U. S. District Court, Northern District of West Virginia, P.O. Box 1518, Elkins, WV 26241.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
High Point .40 caliber, serial number X7280000, seized during a search on or about October 11, 2018.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

UNITED STATES OF AMERICA,

Plaintiff,

v. **CRIM. ACTION NO. 5:19-CR-24**
Judge Bailey

RICKY D. RUNNER,

Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATION

The above-styled matter came before this Court for consideration of the Report and Recommendation of United States Magistrate Judge Mazzone [Doc. 33]. Pursuant to this Court's Local Rules, this action was referred to Magistrate Judge Mazzone for submission of a proposed report and a recommendation ("R&R"). Magistrate Judge Mazzone filed his R&R on September 28, 2020, wherein he recommends that defendant's Motion to Suppress Evidence and Statements [Doc. 21] and Supplemental Motion to Suppress [Doc. 32] be denied. For the reasons that follow, this Court will adopt the R&R.

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. ***Thomas v. Arn***, 474 U.S. 140, 150 (1985). Nor is this Court required to conduct a *de novo* review when the party makes

only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." ***Orpiano v. Johnson***, 687 F.2d 44, 47 (4th Cir. 1982).

In addition, failure to file timely objections constitutes a waiver of *de novo* review and the right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); ***Snyder v. Ridenour***, 889 F.2d 1363, 1366 (4th Cir. 1989); ***United States v. Schronce***, 727 F.2d 91, 94 (4th Cir. 1984).

Here, objections to Magistrate Judge Mazzone's R&R were due within fourteen (14) days of receipt of the R&R, pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure. Defendant filed Defendant's Objections to Magistrate Judge's Report and Recommendation to the District Judge Recommending That Defendant's Motion to Suppress and Supplemental Motion to Suppress Be Denied [Doc. 35] on October 13, 2020. Accordingly, this Court will conduct a *de novo* review only as to the portions of the report and recommendation to which defendant objected. The remaining portions of the report and recommendation will be reviewed for clear error. For the reasons contained herein, this Court will adopt the R&R.

DISCUSSION

This case involves whether a glass pipe, which was in plain view, was "immediately apparent" to the officers as being drug paraphernalia and could therefore give the police officers probable cause to conduct a search of defendant's vehicle. The United States Supreme Court has stated that the phrase "immediately apparent" was "very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of

certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." ***Texas v. Brown***, 460 U.S. 730, 741 (1983). The Supreme Court asserts that the "immediately apparent" language does not require that a police officer "know" that certain items are contraband or evidence of a crime. ***Id.*** at 741. The standard that is consistent with the Fourth Amendment, the ***Texas*** Court held, is: "[t]he seizure of property in plain view involves no invasion of privacy and *is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.*" ***Id.*** at 741–742 (quoting ***Payton v. New York***, 445 U.S. 573, 587 (1980)). Probable cause is a "flexible, common-sense standard," and it only requires:

> facts available to [an] officer that would "warrant a man of reasonable caution in the belief" . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

Id. at 742.

In this case, Defendant asserts three objections to the R&R. First, defendant argues that there are "zero facts in the record substantiating that Stacey Garloch deceived officers, exhibited 'suspicious behavior, or did or said anything that would contribute to a finding of probable cause." [Doc. 35 at 2]. Second, defendant argues that nothing he did or said contributed to a finding of probable cause by the officers. [Id. at 7]. Third, defendant argues that the presence of the glass pipe in the center console did not give the

officers probable cause to search the vehicle. [Id. at 7]. With the above considerations in mind, this Court will overrule defendant's objections.

As it pertains to defendant's first and second objections, an officer is permitted to do a plain-view search of his or her surroundings. ***United States v. Jackson***, 131 F.3d 1105, 1108 (4th Cir. 1997). Even if Ms. Garloch or defendant did not deceive officers, exhibit "suspicious" behavior, or do or say anything to contribute to a finding of probable cause, it is not a violation of one's invasion of privacy right when an officer sees an article in plain view. ***Id.*** at 1108. In this case, both officers were lawfully in a place from which the glass pipe was plainly viewed.

Finally, it is plain that Cpl. Shilling possessed probable cause to believe that the glass pipe in defendant's vehicle constituted contraband or evidence of a crime. Cpl. Mucheck testified that a glass pipe is frequently used to smoke illegal substances. [Doc. 33 at 4, 6]. This testimony was corroborated by Cpl. Shilling, who is trained and has experience as a drug recognition expert with the State of West Virginia. [Id. at 5]. During his testimony, Cpl. Shilling stated that he saw a "stem", which is drug paraphernalia and is used to smoke substances like crystal methamphetamine and crack cocaine. Therefore, probable cause existed because it was "immediately apparent" to Cpl. Shilling that the "stem" sitting above the shifter on the console could be associated with criminal activity.

CONCLUSION

Upon careful review of the record before this Court and the aforementioned applicable law, it is the opinion of this Court that the Report and Recommendation **[Doc. 33]** should be, and is, hereby **ORDERED ADOPTED** for the reasons more fully

stated in the magistrate judge's report. Accordingly, defendant's Motion to Suppress [**Doc. 21**] and Supplemental Motion to Suppress Evidence and Statements [**Doc. 32**] are hereby **DENIED**. Furthermore, Defendant's Objections to Magistrate Judge's Report and Recommendation to the District Judge Recommending That Defendant's Motion to Suppress and Supplemental Motion to Suppress Be Denied [**Doc. 35**] are hereby **OVERRULED**.

It is so **ORDERED.**

The Clerk is directed to mail a copy of this Order to the defendant and to transmit copies to all counsel of record herein.

DATED: October 27, 2020.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICKY D. RUNNER,

Defendant.

CRIM. ACTION NO.: 5:19CR24
(BAILEY)

REPORT AND RECOMMENDATION TO THE DISTRICT JUDGE RECOMMENDING THAT DEFENDANT'S MOTION [21] TO SUPPRESS AND SUPPLEMENTAL MOTION [32] TO SUPPRESS BE DENIED

Currently pending before the Court is Defendant's Motion to Suppress Evidence and Statements [ECF No. 21], filed August 20, 2020. Also pending is Defendant's Supplemental Motion [ECF No. 32] to Suppress, filed September 18, 2020. Defendant's original Motion was referred to the undersigned by Order of Referral [ECF No. 23], filed August 24, 2020. The Government filed its Response [ECF No. 26] on August 26, 2020. An Evidentiary and Oral Argument Hearing took place on September 11, 2020. At the conclusion of the hearing, the parties requested one week within which to file additional briefing. This request was granted. Supplemental briefing was completed by September 18, 2020. After considering the parties' arguments, the applicable law, and the Court file, and after considering the evidence submitted during the September 11, 2020 hearing, the undersigned is prepared to issue a decision.

I.
FACTUAL/PROCEDURAL HISTORY

A. General

Defendant stands charged with one count of Unlawful Possession of a Firearm. A Forfeiture Allegation is contained within the Indictment, which was returned against Defendant on June 4, 2019. ECF No. 1. The firearm which forms the basis of this Indictment was found on October 11, 2018 during a warrantless search of a vehicle which was in Defendant's care, custody, and control. The search was conducted in a Walmart parking lot located in Moundsville, WV. Police were called to the parking lot by an anonymous 911 caller who reported seeing a female "shooting up" in the passenger seat of a blue Volkswagen. Police arrived at the parking lot at approximately 1:45 a.m. on October 11, 2018. The events which form the basis of this Motion took place during these early morning hours.

As a result of the events which will be described more fully below, Defendant seeks the suppression of the firearm mentioned in the Indictment, as well as any statements made by Defendant after he was detained, and any on-scene, post-search statements made by Defendant regardless of whether *Miranda* warnings were given prior to the same.

During the Evidentiary and Oral Argument hearing on September 11, 2020, the parties presented evidence and witness testimony. A summary of said evidence is provided below.

B. Testimony of Zachary Mucheck

Corporal Mucheck is an officer with the Moundsville Police Department. He has been with the Moundsville Police Department for five (5) years. He was the first officer on the scene at the Moundsville, Walmart parking lot on the night of this incident, October 11, 2018. He responded to an anonymous 911 call regarding a female in a blue Volkswagen that was actively "shooting up," i.e. injecting drugs, in the passenger seat of the vehicle. He claims to have arrived

at the Walmart parking lot between 12:45am and 2:00am.[1] Corporal Shilling (also with the Moundsville Police Department) arrived moments later.

The parking lot was empty and it was easy to spot the blue Volkswagen identified in the 911 call. As he approached the blue Volkswagen, he saw a female (later identified as Stacie Garloch) exit the subject vehicle and begin to walk towards the Walmart entrance. He stopped Ms. Garloch and asked her about the allegations of the 911 complaint, i.e. whether she was shooting up or injecting drugs in the car. She laughed and denied the claim. Upon request, she showed her arms to Cpl. Mucheck. He did not see track marks. She said that she was doing her makeup in the passenger seat. Cpl. Shilling began speaking to Ms. Garloch. At that point, Cpl. Mucheck conducted a visual inspection of the blue Volkswagen using a flashlight. He did not see anything of note at that time and returned to Cpl. Shilling and Ms. Garloch.

Ms. Garloch was cooperative and was not evasive during the encounter. Ms. Garloch never exhibited symptoms or signs of drug intoxication during the encounter, including during the latter portion after her arrest and during processing. Ms. Garloch was clearly made-up (with make-up) during the encounter, and Cpl. Mucheck observed makeup bags in the passenger side door. Officers requested permission to search Ms. Garloch's purse, which Ms. Garloch granted. No contraband was found in the purse.

Based upon everything officers knew before entering the Walmart to retrieve Ricky Runner, nothing corroborated the allegations of the anonymous caller.

Cpl. Mucheck requested permission from Ms. Garloch to search the vehicle. She declined because she did not own the vehicle. At some point thereafter, Cpl. Shilling advised that he found

[1] According to the body camera video submitted as evidence, it appears that Officer Mucheck arrived at the parking lot at approximately 1:45 a.m.

what looked to be a glass pipe in the middle console of the type commonly used to smoke narcotics. This pipe was located during a visual search conducted by Cpl. Shilling from outside of the vehicle. They could not tell if the pipe had recently been used. It was taken into evidence but was not field tested. The contents of the pipe have never been tested. Cpl. Mucheck agrees that it is possible the pipe was used or could have been used to smoke hemp but does not believe it is likely.

Cpl. Mucheck entered the Walmart to locate Defendant. Although Cpl. Mucheck's body camera was operational and recording before he entered Walmart, his interaction with Defendant inside of the Walmart is not captured on the video. Nor is it recounted in the report Cpl. Mucheck prepared after this incident. According to Cpl. Mucheck's recollection, he found Defendant by the watch counter and advised that Defendant needed to go outside with Cpl. Mucheck. Defendant complied. Cpl. Mucheck denies telling Defendant that there was an emergency outside involving his girlfriend.

During his interactions with Defendant, Defendant did not appear to be impaired in any way. Defendant did not exhibit symptoms or signs of someone who was intoxicated with drugs or alcohol. Cpl. Mucheck did not detect the odor of alcohol in the air around either Defendant or Ms. Garloch, or around the area of the car.

Once outside of the Walmart, Cpl. Mucheck advised Defendant what was found in the car (the pipe), and that he had been identified as the person driving the car and further as the person in control of the car. At this point, Defendant was not free to leave. Cpl. Mucheck was aware that Defendant's driver's license and Ms. Garloch's driver's licenses had been previously suspended. Officers requested permission to search the vehicle. Defendant declined. Cpl. Mucheck and Cpl. Shilling told Defendant that they did not need his permission, that they had probable cause to

search the car. Cpl. Mucheck sat with Defendant and Ms. Garloch while Cpl. Shilling physically searched the vehicle.

Defendant advised that he was a convicted felon and that he could not be around any firearms. Both Defendant and Ms. Garloch were arrested for drug possession, and Defendant was arrested for being a felon in possession of a firearm.

The pipe provided the entire basis for officers to enter Defendant's vehicle[2] and conduct a search. Cpl. Mucheck agrees that the pipe seen in Defendant's vehicle could be used for things other than illegal narcotics, but he believed it to be drug paraphernalia.

C. Testimony of Corporal Robert Shilling

Robert Shilling is a Corporal with the Moundsville Police Department. He has been there for five and a half (5 ½) years. Cpl. Shilling is a drug recognition expert with the state of West Virginia. He responded with Cpl. Mucheck to the Walmart parking lot after receiving a call about a female possibly shooting up.

Once they arrived, Cpl. Mucheck began speaking with Ms. Garloch. At some point thereafter, he conducted a visual inspection of the blue Volkswagen. He walked around the passenger side and saw a couple of makeup bags in the passenger side door. He then walked around the driver's side and from the driver's side window he could see a "stem" – a glass pipe sitting above the shifter on the console. He concluded they had probable cause to search the vehicle because the stem is drug paraphernalia – it is used to smoke substances like crystal methamphetamine and crack cocaine.

[2] The Court acknowledges Defendant's position that the vehicle involved in this case was owned by his cousin. However, for ease of reference, the Court will refer to the vehicle, the blue Volkswagen, as the "Defendant's vehicle."

Nothing about the pipe's appearance showed him definitively that the pipe had been used. A visual inspection would likewise not tell him what the pipe had been used for. He is not aware of anyone smoking CBD oil with a glass pipe. He has received training on people smoking CBD oil through a bong, but not a glass pipe.

After Cpl. Mucheck located Defendant in the Walmart and escorted him outside, they searched the vehicle. Cpl. Mucheck and Cpl. Shilling indicated to Defendant that they did not need his permission to search the vehicle. During their search, they located the pipe, 40 caliber ammunition (including a magazine), and a high point 40 caliber firearm in the trunk. Crystal methamphetamine and pills were also located.

D. Testimony of Defendant, Ricky Runner

Defendant first encountered Cpl. Mucheck at the watch counter inside of the Walmart. Cpl. Mucheck addressed him as "Ricky" twice before Defendant responded. Defendant did not respond initially because no one calls him "Ricky" – they call him "Stick." When he turned to look at Cpl. Mucheck, he noticed that Cpl. Mucheck was wearing a police uniform. Cpl. Mucheck advised Defendant that Defendant needed to go outside with him because there was an emergency involving his girlfriend. Defendant asked what the emergency was. Cpl. Mucheck did not elaborate – he simply advised that Defendant needed to go outside, that it was an emergency. Once outside, Defendant saw Ms. Garloch standing with multiple cop cars around her, lights flashing.

E. Testimony of William Schmitt

William Schmitt lives in Bellaire, Ohio. He is the proprietor of a business referred to as the Holistic Cloud, which is a CBD shop that sells cannabidiol products, pipes, and things of that nature. His store also sells hemp, which is marijuana that contains a noncriminal amount of THC. He sells oils and smoking devices, including glass pipes. He has sold approximately 1,000 pipes

this year. People use those pipes to smoke both hemp and oil. His store services approximately 30 to 40 people per day.

Mr. Schmitt has been involved in CBD for approximately seven (7) years. He considers himself an activist in this area. He has advocated for CBD as a therapeutic means of addressing a myriad of ailments, including headaches or muscle aches, and bipolar disorder, among others. The sale of CBD has become popular in the last ten (10) years.

In his firsthand knowledge, individuals smoke CBD oil in pipes. That is something which is done with frequency in the CBD world. The most traditional way for people to ingest CBD oil is oral drops.

He is not aware of any studies which show the frequency with which people smoke CBD oil using a pipe. He is also not aware of research that shows pipes are used more often to smoke illicit substances such as methamphetamine or crack cocaine. He is similarly not aware of how many of his customers are buying pipes to smoke illegal substances.

Mr. Schmitt is not aware of criminal case reports which find that items like a pipe which can be used for something legal can still provide probable cause for a search.

F. Body Camera Video from Cpl. Mucheck

At approximately 1:48:06 a.m. on October 11, 2018, Cpl. Mucheck approaches a female who has just exited what appears to be a dark blue Volkswagen and asks whether she is shooting up. He advises that they received a 911 call regarding someone shooting up in the Walmart parking lot in Moundsville. She denies the claim and states that she was doing her makeup. Cpl. Mucheck asks her to show her arms. She complies. She pulls up the sleeves on her sweatshirt to display the insides of her arms.

Cpl. Shilling asks for consent to search her purse. Ms. Garloch grants consent. Ms. Garloch continues to deny shooting up. She explains that she was putting on makeup. She does not have ID on her but identifies herself as Stacie Garloch.

Ms. Garloch continues to deny the 911 caller's allegation. She displays the pockets of her jeans to show that nothing is in her pockets.

At approximately 1:51:37 a.m., Cpl. Mucheck begins a visual inspection of the interior of the Volkswagen. He conducts the visual inspection by shining a light on the interior of the vehicle. He searches both the passenger side and the driver's side. He finds nothing and returns to Cpl. Shilling and Ms. Garloch at approximately 1:52:53 a.m.

No contraband was found in Ms. Garloch's purse. Cpl. Shilling and Ms. Garloch discuss whether Ms. Garloch was shooting up and the 911 call. Ms. Garloch admits that she used to 'do that,' but states that she does not 'do that' anymore. Scars from old track marks are visible on her arms. She discusses the old track marks with Cpl. Shilling.

Cpl. Shilling and Cpl. Mucheck next discuss going into the Walmart to locate Defendant to see if they could get consent to search the car. At approximately 1:56:32, Cpl. Shilling begins his visual inspection of the interior of the vehicle. He sees a container with powder in it on the floor of the front passenger side. Cpl. Shilling questions Ms. Garloch regarding the contents of her makeup bag in the passenger side of the door. She advises that it is makeup. At approximately 1:58:35 a.m., Cpl. Shilling points out to Cpl. Mucheck that a pipe is in the center of the console. Cpl. Shilling believes it to be either a "crack pipe" or a "meth pipe." Ms. Garloch disclaims knowledge of the pipe. Cpl. Mucheck requests a description of Defendant. Ms. Garloch provides one. At approximately 1:59:17, Cpl. Mucheck walks toward Walmart to locate Defendant. At

approximately 1:59:50 a.m., the body camera video stops when Cpl. Mucheck is just inside the Walmart near the Subway (the logo is pictured in the top left of the screen).

At approximately 2:02:14 a.m., the video resumes. Defendant is pictured walking outside with Cpl. Mucheck. Cpl. Shilling asks Defendant if he has an ID. Defendant confirms he has an ID but no driver's license. Defendant advises that the vehicle is not his. Defendant advises that when he left Ms. Garloch, she was doing her makeup.

Defendant declines to give permission to search the car. Ms. Garloch previously declined permission to search the car (according to officers). Cpl. Shilling advises that they do not need permission to search the vehicle because they have probable cause to search the vehicle as a result of the pipe located in the center console. The search commences at approximately 2:04:51 a.m.

Cpl. Mucheck contacts the station with Defendant's name and date of birth and eventually his social security number. His license comes back as suspended.

Marijuana is located in the car. (Defendant admits that it is likely in the car and seems to assist the officers in locating it.) At approximately 2:14:45 a.m., Cpl. Mucheck pats down Defendant. He asks Defendant if a gun is in the car. Defendant does not know but indicates that it is possible because his cousin owns firearms. On Defendant's person, Cpl. Mucheck finds items that belong to the store. Defendant advises that he put the items (jewelry) in his pocket because he did not have a buggy. Defendant is formally detained and handcuffed at approximately 2:17:30 a.m. Cpl. Mucheck advises that in the state of West Virginia, if you put an item in your pocket, you are shoplifting.

At approximately 2:20:18 a.m., Cpl. Shilling locates Xanax in a makeup bag. At approximately 2:21:51 a.m., Cpl. Shilling locates crystal methamphetamine in a makeup bag. At

approximately 2:25:00 a.m., Defendant offers to work with the Drug Task Force if Cpl. Mucheck will let them leave without proceeding further.

At approximately 2:27:10 a.m., Defendant advises Cpl. Mucheck that his cousin collects firearms and they may be in the car. The car involved is Defendant's cousin's car.

At approximately 2:31:46 a.m., Cpl. Shilling advises Cpl. Mucheck that crystal methamphetamine was located in the black bag in the trunk where the firearms were located. At approximately 2:33:00 a.m., Cpl. Shilling locates a needle in the trunk. At approximately 2:37:47 a.m. officers request a firearm check from the station for a high point firearm. No identifying information came back for the gun. At approximately 2:44:55 a.m., Cpl. Shilling and Cpl. Mucheck discuss the ammunition found in the vehicle.[3] [4]

II.
ARGUMENTS OF THE PARTIES

A. Defendant's Arguments

Defendant argues that the presence in Defendant's vehicle of a glass pipe such as the one at issue in this case, without more, does not establish probable cause to search because possession of drug paraphernalia is not a criminal offense in West Virginia, according to W. Va. Code § 60A-4-403a [1980]. Even if such an item did historically provide probable cause to conduct a search, it no longer can do so given the recent development of the CBD market, and the sale of items

[3] The body camera video is from the camera that Cpl. Mucheck was wearing on the night of this arrest. Because Cpl. Mucheck walks back and forth between Cpl. Shilling, who is searching the blue Volkswagen, and Defendant, who is some distance away from the Volkswagen and near one of the police cruisers, it is difficult to hear Cpl. Shilling's entire account of the items found. During the hearing, Cpl. Shilling testified he found ammunition and a high point 40 caliber firearm in the trunk of the Volkswagen. Crystal methamphetamine and pills (Xanax) were also found in the car.

[4] The entire body camera video is not summarized here. The video extends beyond the arrest of Ms. Garloch and Defendant and includes processing at the police station. Because the only issue before the Court is whether officers had probable cause to search the vehicle, the summary includes the events leading up to the search and the search only.

ancillary to CBD, such as the glass pipe at issue. The pipe on which Moundsville police officers relied to gain entry to Defendant's vehicle, therefore, was not in "plain view" within the meaning of the term as provided in *United States v. Jackson*, 131 F.3d 1105, 1109 (4th Cir. 1997) because it was not "immediately apparent" that the pipe constituted contraband.

Defendant argues that any and all statements made by Defendant after he was detained should be suppressed because they were custodial statements made in derogation of his Fifth Amendment rights. Finally, Defendant argues that any statements he made after the search should be suppressed because the search was unconstitutional.

B. Government's Arguments

The Government contends that officers had probable cause to search the Defendant's vehicle on the day in question because of the presence of the pipe, which was in plain view in Defendant's vehicle, and the nature of the same was immediately apparent to officers. Simply because such an item may be used for a legal purpose, i.e. to smoke hemp or CBD oil, does not mean that this item cannot support probable cause. Accordingly, the Government argues that Defendant's Motion should be denied.

III.
STANDARDS

The burden of proof for a Motion to Suppress is on the party seeking to suppress the evidence. *United States v. Gualtero*, 62 F.Supp.3d 479, 482 (E.D. Va. 2014) ("[t]he legal standards governing a motion to suppress are clear....[t]he burden of proof is on the party who seeks to suppress the evidence") (citing *United States v. Dickerson*, 655 F.2d 559, 561 (4th Cir. 1981)). Once the defendant establishes a basis for his Motion, the burden shifts to the Government to prove by a preponderance of the evidence that the challenged evidence is admissible. *Id.* (citing *United States v. Matlock*, 415 U.S.

164, 177 n. 14 (1974) ("the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence").

With these standards in mind, the undersigned will turn to the substance of the arguments raised vis-à-vis Defendant's Motion to Suppress and Supplemental Motion to Suppress.

IV.
DISCUSSION

As the parties have made clear, the central issue in this case is whether the nature of the pipe at issue was immediately apparent and justified the subsequent search of the vehicle, which search uncovered the firearm that forms the basis of instant Indictment (among other things). For the reasons set forth below, the undersigned would conclude that the nature of the pipe at issue was immediately apparent and therefore justified the subsequent search of Defendant's vehicle.

A. Plain View, "Immediately Apparent," and Seizure of the Pipe

"The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. v. Jackson*, 131 F.3d 1105, 1108 (4th Cir. 1997) (citing U.S. Const. Amend. IV). "The constitutional protection against an unreasonable search is distinct from the protection against an unreasonable seizure. A search compromises the individual interest in privacy; a seizure compromises the individual of dominion over his or her person or property." *Jackson*, 131 at 1108 (citing *Horton v. California*, 496 U.S. 128, 133, 110 S.Ct. 2301, 2305 (1990).

"The 'plain-view' doctrine provides an exception to the warrant requirement for the seizure of property, but it does not provide an exception for a search." *Jackson*, 131 F.3d at 1108. When an article is viewed in plain view, the viewing does not involve an invasion of privacy and, as a result, does not constitute a search implicating the Fourth Amendment. *Id.*

"It is…an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California*, 496 U.S. 128, 136, 110 S.Ct. 2301, 2308 (1990). Additionally, the item must be in plain view, and its incriminating character must be immediately apparent. *Id.* In other words, "the plain-view doctrine authorizes warrantless seizures of incriminating evidence when (1) the officer is lawfully in a place from which the object may be plainly viewed; (2) the officer has a lawful right of access to the object itself; and (3) the object's incriminating character is immediately apparent." *United States v. Jackson*, 131 F.3d 1105, 1109 (4th Cir. 1997). No arguments have been made concerning the first two prongs of the plain-view doctrine, so the undersigned will not address the same here. The parties, instead, have focused on the third prong, which mandates that the object's incriminating character be immediately apparent to law enforcement. The undersigned will turn to those arguments.

Defendant argues that the incriminating character of the pipe at issue could not have been immediately apparent to officers because pipes such as the one at issue can be used to smoke legal materials, such as CBD oil and hemp. Defendant presented evidence in the form of Mr. Schmitt's testimony to support this argument. Defendant also cross-examined Cpl. Mucheck and Cpl. Shilling regarding whether the officers tested the pipe to determine if it had been used and, if so, what substance had been consumed in it. The thrust of this evidence and the arguments it supports seems to be that officers were not possessed of the requisite amount of certainty that the pipe in question was used to smoke illegal substances when they seized it and when they began their search of Defendant's vehicle. As a result, the "immediately apparent" prong of the "plain view" standard is not met in this case. The undersigned is not persuaded by this argument.

As the Supreme Court explained in *Texas v. Brown*, the phrase "immediately apparent" was "very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." *Texas v. Brown*, 460 U.S. 730, 741, 103 S.Ct. 1535, 1543 (1983), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990)). To the contrary, the "immediately apparent" language was not meant to and did not establish any requirement that a police officer "know" that certain items are contraband or evidence of a crime. *Brown*, 460 U.S. at 741. Rather, the appropriate standard is as follows: "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming there is probable cause to associate the property with criminal activity." *Id.* at 738, 741-42 (quoting *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371 (1980) (internal citations and quotations omitted)).

> [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.

Brown, 460 U.S. at 742 (internal citations and quotations omitted). For the reasons that follow, the undersigned believes that probable cause existed for officers to believe that the pipe in question constituted contraband or evidence of a crime.

On the night in question, officers received a 911 call about a woman "shooting up" in the passenger side of a blue Volkswagen in the Walmart parking lot in Moundsville, WV. When officers arrived at the Walmart, they easily located the vehicle implicated by the 911 call and witnessed a female exit the passenger side of said vehicle. Officers arrived at the Walmart at approximately 1:45 a.m.

Officers approached the female, later identified as Ms. Garloch, and questioned her regarding the 911 caller's assertions. Ms. Garloch denied shooting up and stated that she had been doing her makeup. Defendant's position regarding Ms. Garloch's demeanor (i.e. no visible evidence of intoxication) is well-taken. However, for obvious reasons, whether someone is "shooting up" is not something a person readily admits when questioned by an officer.

Defendant contends that no track marks were visible on Ms. Garloch's arms, but this assertion is not entirely accurate. Ms. Garloch, by her own admission, had at least 'old' track marks on her arms, indicating a history of intravenous drug use. The fact of these track marks lends further credence to the 911 caller's claims that they saw someone shooting up in the Moundsville Walmart parking lot. Ms. Garloch's characterization of the track marks as 'old' does nothing to diminish the import of the marks themselves: according to the body camera video, the marks themselves were not closely analyzed by officers, and they were labeled 'old' by Ms. Garloch. That is, the label of "old" track marks was not necessarily the conclusion of police officers. Indeed, on the body camera video, Cpl. Shilling appears unconvinced by Ms. Garloch's assertions that they are old track marks.

The timing of this interaction is also suspicious. Though it is certainly not illegal to be at a Walmart at 1:45 a.m., putting on makeup, it is not a likely scenario, either. There is no evidence that Ms. Garloch and Defendant were at the Walmart to solve an emergency, i.e. diapers, formula, or something that needed to be purchased but that could not wait until later in the morning.[5] Such evidence would have helped to dispel the very reasonable notion that Ms. Garloch was not being completely truthful with officers.

[5] Indeed, it appears that no such emergency existed. After Defendant had been detained, he was found to have batteries and several pieces of jewelry in his pockets. He denied attempting to shoplift.

Against this backdrop of facts, Cpl. Mucheck and Cpl. Shilling each conducted their own visual inspection of Defendant's vehicle. During his inspection, Cpl. Shilling saw what he called a stem pipe in the center console of the car. Cpl. Shilling testified that, based upon his training and experience as a drug recognition expert with the State of West Virginia, he believed the pipe to be a device typically used to smoke methamphetamine and/or crack cocaine. During the September 11, 2020 hearing, Cpl. Shilling described his training in narcotics, which training included devices such as the pipe at issue. Cpl. Shilling's immediate impression of the nature of the pipe is also captured on the body camera video - Cpl. Shilling points out the pipe to Cpl. Mucheck and tells him that the pipe is a 'meth pipe or a crack pipe.' Based upon the above-detailed factual backdrop, and given Cpl. Shilling's training and experience, the undersigned would conclude that it was reasonable for Cpl. Shilling to believe that the pipe in the console of Defendant's vehicle was used to smoke illegal substances, and therefore, the criminal nature of the pipe was immediately apparent.

Defendant argues that with the recent advent of CBD oil and hemp, the pipe at issue could have just as easily been used to smoke either one of those two legal substances. Defendant's argument is well-taken. However, simply because pipes of this nature can and apparently have been used more recently to smoke legal substances does not neutralize Cpl. Shilling's conclusion that the pipe was contraband or constituted evidence of a crime. *See Brown, supra*. Again, his conclusion was based upon his experience and training, and upon the facts in his purview at the time of the seizure, none of which included any indication that the pipe in question had been used to smoke CBD oil or hemp. This argument is therefore not persuasive.

Because there was probable cause to believe the pipe constituted contraband or evidence of a crime, probable cause existed to search the balance of Defendant's vehicle on the night in question.

B. Probable Cause to Search

"The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *United States v. Davis*, 576 Fed.Appx. 292, 294 (4th Cir. 2014) (quoting *California v. Acevedo*, 500 U.S. 565, 580, 111 S.Ct. 1982 (1991). As was explained above, probable cause is a flexible, common-sense standard. "[I]t does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required." *Texas v. Brown*, 450 U.S. 730, 742, 103 S.Ct. 1535, 1544 (1983) (internal citations and quotations omitted).

Defendant argues that probable cause to search Defendant's vehicle did not exist on the night in question because the mere presence of a glass pipe, without more, no longer vests police with probable cause to search in light of the rise of use of legal substances such as CBD oil and hemp, which are smoked using a device such as the one found in Defendant's vehicle. To support his position, Defendant relies upon a line of cases addressing the smell of burning or burnt marijuana and the implications of the same for purposes of probable cause. However, a review of the cited case law reveals that these cases are not instructive in the case at bar. By all indications, the cases upon which Defendant relies imply that it is easy to confuse the smell of burnt marijuana with legal hemp, and without knowing what a person is smoking, it is difficult to place the weight of probable cause on this one fact. While this may be true, such a sentiment is of no moment here because the smell of marijuana and/or hemp is not implicated by the evidence in this case.

Moreover, the absence of the smell of burning marijuana or hemp works against Defendant's case in this instance. If the smell had been present, that would have more closely confined the pipe at issue to being used for hemp or marijuana. In such an instance, any argument that probable cause to search for methamphetamine and/or crack existed would have been less convincing because it would not have been as likely that the pipe was used to smoke methamphetamine and/or crack. However, because no marijuana or hemp smell was present, this expands the possibilities for the drugs for which the pipe could have been used. In other words, it becomes just as likely that the pipe was or could have been used to smoke methamphetamine or crack as it is that the pipe was or could have been used to smoke hemp or marijuana. Because of this and because there is evidence that a pipe such as the one at issue is commonly used to smoke methamphetamine and/or crack cocaine, the presence of the pipe is reasonably indicative of the presence of illegal substances in the vehicle. Further, and again, officers were not required to establish with any particularity the chances or the likelihood that the pipe was used to smoke methamphetamine and/or crack, as opposed to being used to smoke marijuana, CBD oil and/or hemp, before relying upon the same as a basis for probable cause. *See Brown, supra*.

Defendant also contends that other jurisdictions have held that the presence of a pipe, without more, does not supply probable cause to arrest. Defendant cites *T.T. v. State*, 253 So.3d 15 (Fla. App. 2018) and *Walker v. State, supra* in support of this argument. A review of those cases reveals, however, that they are not useful for our purposes.

In *T.T. v. State*, the court recognized that "Florida courts have declined to find probable cause when an object, commonly used for drugs, is seen or touched." *T.T.*, 253 So.3d at 16 (citing *Walker v. State*, 514 So.2d 1149 (Fla.2d DCA 1987) (plain view of

pipe did not constitute probable cause to arrest for possession of paraphernalia)). The court did so while considering whether a motion to suppress was rightly decided by the trial court.

In *T.T. v. State*, appellant was charged by petition for delinquency with possession of cannabis. *T.T.*, 253 So.3d 15 (Fla. 4th DCA 2018). Cannabis was found on appellant's person when an officer patted appellant down for weapons. The pat-down occurred after appellant was asked to step out of a car in which he was a rear-seat passenger at the time of a traffic stop. *Id.* at 17. Appellant filed a motion to suppress, which was denied by the trial court. He pled no contest to the charges and reserved his right to appeal the suppression ruling. *Id.*

The appellate court found that the trial court erred when it denied appellant's motion to suppress. In so holding, the court noted that there was no testimony that the officer smelled marijuana prior to the pat-down. Further, the officer admitted that at the time of the pat-down search, he knew the item later identified as marijuana was not a weapon. The court ultimately determined that the officer's testimony regarding his training and experience was not sufficient for the trial court to find that his conclusion that appellant had contraband on his person was something more than a "feeling" or a "hunch." *Id.* at 19-20.

In *Walker*, two St. Petersburg police detectives were working in the south St. Petersburg area on October 17, 2016 near several cottages where it was claimed numerous drug arrests had been recently made. They walked between cottages trying to catch someone in the process of dealing drugs. This area in particular was referred to as a "high crime" area by police – this despite the fact that no recent criminal activity had been reported there. *Walker*, 514 So.2d at 1150.

One of the aforementioned officers approached Mr. Walker who was sitting on the front porch of his residence. According to officers, Mr. Walker made a quick move as if to conceal something behind his right hip. Officers ordered him to produce what he had in his hand. He did

not immediately comply. The officer pulled his gun and again ordered him to do so. When Mr. Walker did not reveal the object, the officer frisked him and, feeling a hard object in Mr. Walker's back pocket, pulled out a smoking pipe. Officers arrested Mr. Walker for possession of drug paraphernalia. *Id.*

Mr. Walker moved to suppress the evidence of the pipe. When testifying during the suppression hearing, the officer admitted that he knew the object in Mr. Walker's back pocket was a pipe and not a gun before he seized it. Notwithstanding this testimony, the trial court denied Mr. Walker's motion. On appeal, the Florida Appellate Court reversed because the initial stop and the subsequent search violated the Stop and Frisk Law contained in the Florida statutes. *Id.* In explaining the decision, the court held that the officer did not have "founded suspicion" to temporarily detain Mr. Walker on the night of the interaction in question. Rather, he had only what the court called "mere suspicion," which was not based on anything other than a hunch. *Id.* at 50-51. The court further explained that, even if reasonable suspicion to detain existed, the officer exceeded the permissible scope of an investigatory pat-down when he reached into Mr. Walker's pocket to retrieve an item he admittedly knew was not a weapon. *Id.* at 51. Finally, the court held that, although the stem of the pipe seized was in plain view, the pipe alone nevertheless could not constitute probable cause to arrest for possession of paraphernalia because pipes are used to smoke materials other than drugs. Consequently, they are not contraband *per se*. Importantly, officers did not notice anything else that would lead them to believe that the pipe in question had been used for illegal purposes. *Id.* at 1151. That is not the case here.

In the instant matter, before officers even arrived on scene, they received a call stating that a female in a blue Volkswagen was shooting up in the passenger seat of the car, which was located in the Moundsville Walmart parking lot. When officers arrived at the Walmart a short time later,

officers easily identified the blue Volkswagen because of the dearth of vehicles in the parking lot, and they saw a lone female exit the passenger side of the blue Volkswagen. They approached her and questioned her about the allegations in the 911 call, which she denied. This denial is acknowledged; however, as was mentioned previously, the denial does not carry much weight because persons who inject illegal drugs are not likely to admit to such activity, especially to a police officer. In addition to finding the vehicle which matched the description of the anonymous caller, and in addition to encountering a female in and around the passenger side of the vehicle, this call and this interaction occurred at approximately 1:45 a.m. – an unusual hour to be in a Walmart parking lot applying one's make up. Ms. Garloch also displayed track marks on her arms. Though she contended that the track marks were 'old,' the track marks nevertheless constituted evidence of illegal drug use, especially when combined with her admission that she 'used to' inject narcotics. They were also consistent with the allegations made by the person in the anonymous 911 call. When officers found the pipe against this backdrop of facts, a reasonable belief clearly existed that illegal substances would be found in the balance of the vehicle. This is wholly different than *T.T.*, where the only arguable evidence of illegal activity was the appellant's bloodshot eyes and uncomfortable demeanor. This is also wholly different than *Walker* where the only arguable evidence of illegal activity was a pipe (which was not detected until after an invalid stop and frisk) and nothing else.

Moreover, the *Walker* holding is not on all fours with this case. The *Walker* court noted that probable cause to arrest would not exist if officers relied upon a pipe and nothing more to arrest Mr. Walker. However, the issue before this Court is not whether there was probable cause

to arrest Defendant[6]; but rather, whether probable cause to search Defendant's vehicle existed. These are two distinctly different inquiries. Probable cause to arrest a suspect requires probable cause to believe that the suspect committed a crime. Probable cause to search requires probable cause to believe that the specific object of the search will be found in a particular place. *United States v. Griffith*, 867 F.3d 1265, 1271, 432 U.S.App.D.C. 234, 240 (D.C. 2017) (citing *Steagald v. United States*, 451 U.S. 204, 212-13, 101 S.Ct. 1642 (1981). The validity of Defendant's arrest did not rely upon the pipe alone, as the court theorized in *Walker*. Rather, the question here is whether officers were justified in searching the balance of Defendant's vehicle after finding the pipe, and in light of the totality of the circumstances that existed at the time of the search. The *Walker* case is therefore not persuasive.

V.
CONCLUSION

Defendant has failed to establish a basis upon which to suppress the evidence that is the subject of his Motions. Further, the Government has met its burden by a preponderance of the evidence. Accordingly, and for all of the foregoing reasons, the undersigned **RECOMMENDS** that Defendant's **Motion to Suppress [21] and Supplemental Motion to Suppress [32] be DENIED**.

Any party who appears *pro se* and any counsel of record, as applicable, may, within **fourteen (14) days** after being served with a copy of this Report and Recommendation file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection. A copy of such objections should be submitted to

[6] One could credibly argue that because the arrest came after the search, the issue of whether probable cause to arrest is in fact before the Court. However, this argument is derivative of the main issue, which is whether officers had probable cause to search Defendant's vehicle in the first instance.

the District Court Judge of Record. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

The Clerk is **DIRECTED** to forward a copy of this Report and Recommendation to parties who appear pro se and all counsel of record, as applicable, as provided in the Administrative Procedures for Electronic Case Filing in the United States District Court for the Northern District of West Virginia, to the United States Marshals Service and to the United States Probation Office.

Dated: 9-28-2020

JAMES P. MAZZONE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling Division

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	Case No. 5:19cr-24 (JPB-JPM)
	:	
v.	:	
	:	
RICKY D. RUNNER,	:	
	:	
Defendant.	:	

DEFENDANT'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION TO THE DISTRICT JUDGE RECOMMENDING THAT DEFENDANT'S MOTION TO SUPPRESS AND SUPPLEMENTAL MOTION TO SUPPRESS BE DENIED

NOW COMES the Defendant, Ricky D. Runner, by and through his undersigned counsel, Robert G. McCoid, Esq., of McCoid Law Offices, P.L.L.C., and, pursuant to Rule 12.1, L.R. P.L. P., hereby timely files his objections to the Magistrate Judge's Report and Recommendations, filed on September 28, 2020 [Doc. 33], that Defendant's Motion to Suppress Evidence and Statements [Doc. 21] and Supplemental Motion to Suppress Evidence and Statements [Doc. 32] be denied.

I. RELEVANT PROCEDURAL HISTORY

On October 11, 2018, Defendant, Ricky D. Runner, was the subject of an unconstitutional investigatory search by Moundsville Police Department Officers Mucheck and Shilling. The search resulted in the seizure of a firearm and suspected drugs. Mr. Runner was consequently arrested and charged with Unlawful Possession of a Firearm.

On August 20, 2020, counsel for the Defendant filed a Motion to Suppress Evidence and Statements. [Doc. 21]. An evidentiary hearing on the motion was held on September 11, 2020, before United States Magistrate Judge James P. Mazzone at which each party presented testimony. At the request of the Magistrate Judge, counsel filed a Supplemental Motion to Suppress Evidence and Statements on September 18, 2020. [Doc 32]. On September 28, 2020, the Magistrate Judge issued his Report and Recommendation ("the Report") to the Court. [Doc. 33].

The Defendant, Mr. Runner, through counsel files three objections to the Report. Mr. Runner respectfully asserts that these findings and conclusions in the Report are not correct and that the Court should suppress physical evidence obtained in violation of Mr. Runner's constitutional rights secured to him under the Fourth Amendment.

II. OBJECTION: MR. RUNNER RESPECTFULLY OBJECTS TO THE REPORT'S FINDING THAT THE OFFICERS HAD PROBABLE CAUSE TO SEARCH MR. RUNNER'S VEHICLE.

The crux of the issue at Bar is simply this: does the presence of a glass stem pipe, which may be used to smoke illegal narcotics, but is also pervasively used to smoke legal cannabinoid ("CBD") oil, in the console of a vehicle furnish, *without more*, vest law enforcement officers with probable cause to search that vehicle. The Report relying on "facts" *dehors* the record or reaching sinister conclusions from otherwise innocent, mundane facts, concludes that it does. Mr. Runner respectfully disagrees.

A. There are exactly zero facts in the record substantiating that Stacey Garloch deceived officers, exhibited "suspicious" behavior, or did or said anything that would contribute to a finding of probable cause.

The Report accurately and rather thoroughly details the facts that were developed from the testimony of the witnesses who testified at the September 11, 2020, suppression

hearing. However, it also fails to include salient facts and otherwise includes gratuitous ones. A brief recounting of the relevant facts are recounted in turn.

The Report notes that Officer Mucheck was dispatched to the Wal-Mart parking lot in Moundsville, West Virginia, in response to an anonymous call that indicated a female was "shooting up" in a blue Volkswagon. Mucheck responded within minutes, identified a blue Volkswagon, and observed a female exiting the vehicle. He approached her and notified her that he had received information that triggered his presence.

The female, identified as Stacy Garloch, laughed when confronted with the allegation and denied having injected narcotics. She was not evasive, engaged the officer and responded to his questions. Tr. at p. 13, l. 10-24. The body camera video reflected that she actually had a friendly disposition. Mucheck observed no recent track marks on her arms. Tr. at p. 15, l. 12.[1]

She consented to a search of her purse, which yielded no contraband. Tr. at p. 16, l. 14-24. By way of explanation as to what she was doing in the car, she advised the officers that she had been applying make-up. Tr. at p. 15, l. 17-19. Mucheck agreed that Ms. Garloch was made up. Tr. at p. 15, l. 24-25; p. 16, l. 1-3. Upon conducting a visual inspection of the interior of the car through its windows, Mucheck identified several

[1] The Report takes issue with whether the track marks that were on Ms. Garloch's arms may have been fresh or were, as she stated, old, contending that "the label of 'old' track marks was not necessarily the conclusion of the police officers." *See* Report at p. 15. *That contention is entirely inaccurate*: it was the conclusion of Mucheck, who did not hedge or equivocate in his under-oath testimony that he observed no track marks. Tr. at p. 18, l. 11-12. The Report at p. 15 contends that "Cpl. Shilling appears unconvinced by Ms. Garloch's assertions that they are old tracks." While the subject body camera video certainly reflects that Shilling very diligently studied Ms. Garloch's arms (and was perhaps disappointed not to see fresh evidence of an injection), he, himself, characterized what she saw as "*scars*," *i.e.* old track marks – exactly what Ms. Garloch said that they were. *See* Videos (identified as 05D12117201810110148030011110.avi on the video menu) and introduced as Exhibit #2 at the subject suppression hearing.

make-up bags in the pocket of the passenger side door, a fact that he acknowledged corroborated Ms. Garloch's statements that she was, indeed, applying make-up in the car. Tr. at p. 16, l. 8-13.

Of enormous significance to the assessment of whether the officers enjoyed probable cause to search the vehicle was what the officers did *not* observe. As reflected in both the testimony of the officers, the body camera video, and in the Report, *Ms. Garloch did not exhibit any symptoms of impairment, including slurred speech, disorientation, or difficulty ambulating*. Tr. at p. 13, l. 25; p. 14-25. In light of the facts recounted above, Officer Mucheck acknowledged that *not only was the anonymous caller's information not corroborated, it was actually contradicted by what he had observed.* Tr. at p. 17, l. 7-11; p. 18, l. 5-8. The Report makes no mention whatsoever of of Mucheck's testimony in that regard.

The Report also finds the "timing of this interaction [to be] suspicious." Report at p. 15. The Report finds that Ms. Garloch putting on makeup at 1:45 a.m. to not be "a likely scenario, either." *Id.* Elsewhere, the Report states "1:45 a.m. [is] an unusual hour to be in a Walmart parking lot applying one's makeup." *Id.* at p. 21. The source of the information relied upon to reach these conclusion that it is unlikely that Ms. Garloch would be putting on make-up at 1:45 a.m. in the Wal-Mart parking lot is unknown. It is certainly not contained in the record as either a fact or an expression of an opinion. Moreover, the Report fails to square the conclusion it reaches that Ms. Garloch's claim to have been putting on makeup at 1:45 a.m. is "suspicious" or "not . . . likely" with the fact that Mucheck actually testified that, based on the information in his possession, he believed Ms. Garloch was telling the truth concerning putting on her makeup. Tr. p. 18, l. 25; p.19, l. 1-8.

Additionally, the Report finds it significant that no evidence exists to substantiate that either Ms. Garloch or Mr. Runner were present at Wal-Mart at 1:45 a.m. to "solve an emergency" such as purchasing "diapers, formula, or something that needed to be purchased but that could not wait until later in the morning" or offered the officers an explanation as the nature of their business at Wal-Mart. Report at p. 15. Charitably, the Report notes that it is not illegal to be at Wal-Mart at 1:45 a.m., but then, in baffling fashion, it proceeds to link the fact that neither Ms. Garloch nor Mr. Runner volunteered what "emergency" necessitated their patronage of Wal-Mart during the early morning hours, thereby "dispel[ling] the very reasonable notion that Ms. Garloch was not being completely truthful with officers."[2] The Report neglects to reference the basis for its contention that an individual's failing to account for what "emergency" triggers a shopping excursion to Wal-Mart at 1:45 a.m. is suspicious or contributes to a finding of probable cause to search.

As to Ms. Garloch's denial of having injected drugs, the Report acknowledges the same, yet it then proceeds to effectively discount it, noting that, "for obvious reasons," her "denial does not carry much weight, because persons who inject illegal drugs are not likely to admit such activity, especially to a police officer." *See* Report at, respectively, p. 15 and p. 21. In other words, she is damned if she does and damned if she doesn't: if she admits to having injected drugs, she was quite evidently using them, but if she denies that she was using drugs, she must have been using them, because no one who uses drugs is likely

[2] It warrants repetition that the Officer Mucheck acknowledged that he was in possession of zero evidence – zero – to contradict Ms. Garloch's statement that she was merely putting on makeup. Tr. p. 18, l. 25; p.19, l. 1-8. The source of the Report's conclusion that it was a "reasonable notion" that she was not being completely truthful with officers remains a mystery to the undersigned, particularly in light of Mucheck's candid concession.

to admit to using them. The implications of this analysis are positively Orwellian in their scope. What the Report does not address in those portions of its discussion, however, is that her denial is accompanied by zero evidence of any impairment that would be associated with someone who was under the influence of drugs.

Summarily, the Report either selectively chooses facts from the record or derives them from a source unknown to Mr. Runner to buttress the overall finding of probable cause to search the vehicle. The bare facts of the matter are that: (a) the anonymous caller's information was inarguably contradicted, not corroborated; (b) the officers were in possession of no information that furnished them with a belief that Ms. Garloch was engaged in any illegal conduct; and (c) the information in the officers' possession was that Ms. Garloch had merely been applying her makeup – nothing more. To impute suspicious or improper motives to her merely because she was in Wal-Mart's parking lot at 1:45 a.m., was applying her makeup before entering the store, and failed to offer an explanation as to the "emergency" that needed to be addressed through a purchase at Wal-Mart during the wee hours of the morning amount to nothing more than "spin[ning] . . . largely mundane acts into a web of deception." *U.S. v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011).[3]

[3] Based upon the body camera video admitted into evidence, it is plain that Wal-Mart was open for business as usual at 1:45 a.m., and no evidence was introduced by the Government in support of the search to indicate that patronage of Wal-Mart at that time was limited to only those citizens experiencing "emergenc[ies]." Presumably, Wal-Mart is also open for business at that time of the morning for those employed doing shift work, insomniacs, and anthropophobiacs, among others. Had the subject encounter occurred in the parking lot of a closed business, perhaps a more sinister conclusion would be justified. But shopping at a twenty-four (24) hour establishment at a time outside of conventional business hours hardly justifies the rather expansive and factually unsupported conclusions reached in the Report that Ms. Garloch was up to no good in the parking lot.

B. Nothing done or said by Mr. Runner contributed to a finding of probable cause.

The Government does not argue, nor does the Report suggest, that anything done or said by Mr. Runner contributes to a finding of probable cause to search the vehicle. The Report gratuitously notes, however, that, post-arrest, Mr. Runner was found to have batteries and jewelry in his pockets, the implication being that he shoplifted or intended to shoplift those items from Wal-Mart, although he denied the same. *See* Report at p. 15, fn. 5. This observation, while perhaps valuable in making Mr. Runner look like a bad person, is, of course, wholly irrelevant to the issue concerning the constitutionality of the search of the vehicle, Mr. Runner's subsequent arrest, and the ensuing search of his person.

C. The presence of a glass pipe in the center console did not vest the police with probable cause to search the vehicle.

The Report notes that "'probable cause is a flexible, common-sense standard.'" *Id.*, *quoting Texas v. Brown*, 460 U.S. 730, 741 (1983). It goes on to acknowledge the requirement that, in order for the "plain view" doctrine to apply to justify a warrantless search, the incriminating character of what is viewed must be "'immediately apparent,' although such term does not 'imply that an unduly high degree of certainty as to the incriminatory character of the evidence is necessary for application of the . . . doctrine.'" *See* Report at p. 13, *quoting Brown*, 460 U.S. at 741.

Now to the heart of the issue before the Court: does the presence of the glass pipe, without more, furnish a law enforcement officer with probable cause to search the vehicle? The Report concludes that, coupled with Officer Shilling's testimony, probable cause did exist. However, the Report carefully qualifies this conclusion with references to the time of the encounter, Ms. Garloch's application of makeup, her presumed

deception (which was never established – zero evidence was ever adduced that she was in fact injecting herself with narcotics), and her failure to notify officers as to what "emergency" necessitated a shopping trip to Wal-Mart at 1:45 a.m. *See* Report at pp. 15-16. As thoroughly established above, all of variables are "largely mundane acts." *Foster*, 634 F.3d at 248.

Officer Shilling testified that the pipe he observed is commonly used to smoke narcotics. Tr. at p. 49, l. 6-13. He professed not to know that individuals also smoke legal CBD oil out of the same pipes. Tr. at p. 54, l. 10-11. The Report fails to note, however, Officer Mucheck's concession that, with the advent of CBD hemp and oil sales, using a glass pipe does not necessarily connote narcotics use. Tr. at p. 26, l. 21-25; p. 27, l. 1-21. Coupled with the evidence of defense witness William Schmitt, the proprietor of Holistic Cloud, a CBD store located across the river from Moundsville in Bellaire, Ohio, who testified that he has sold *a thousand glass pipes* since January, 2020, alone, and that they are used to smoke both hemp and CBD oil, the probability of concluding that the glass pipe was used for smoking narcotics becomes even more remote. Tr. at p. 62, 1. 7-25; p.63, l. 1-13.[4]

Despite having thoroughly researched the issue, the undersigned concludes that the Fourth Circuit appears never to have addressed foursquare the question of whether the presence of a smoking pipe, without more, vests a law enforcement officer with probable cause to search. The Court has upheld a search by a park ranger based upon his mere observation of a pipe on a suspect, although another local police officer had just

[4] Recall, too, that no witness could testify that the pipe in question had ever actually been used. Tr. at p. 53, l. 10-14.

supplied the park ranger with information that he had observed the defendant smoking and had detected the odor of burnt marijuana. *United States v. Halvorsen*, 849 F.2d 607 (4th Cir. 1988) (unpublished disposition). All other Fourth Circuit cases that uphold probable cause to search based upon plain view of so-called paraphernalia appear to rely on additional variables over and beyond the mere presence of it. *See, e.g., U.S. v. Bullard*, 645 F.3d 237 (4th Cir. 2011) (search upheld under plain view when officers smelled narcotics and saw both cocaine residue and paraphernalia); *United States v. Jones*, 667 F.3d 477 (4th Cir. 2012) (propriety of protective sweep and ensuing search warrant upheld in which officers plainly viewed precursors to manufacture of methamphetamine, smelled the strong odor of chemicals associated with methamphetamine production, and saw a marijuana pipe with marijuana in it).

The Report apparently overlooks the significance of the "burnt marijuana" cases and declines to even address them. Report at pp. 17-18.[5] However, as noted in the Supplemental Motion filed by Mr. Runner, these are the closest analogues to the question *sub judice* that he has been able to identify (a sentiment apparently shared by the Government in its Supplemental Response to Motion to Suppress at pp. 1-2 [Doc. 21]). The undersigned has identified not a single case in either any state or federal jurisdiction speaking to issue of the applicability of the plain view doctrine involving smoking pipes in light of the advent of legalized hemp and CBD oils. Hemp containing less than 0.3% of

[5] Inscrutably, the Report concludes that the absence of the odor or burnt marijuana or hemp works *against* Mr. Runner, because, presumably, had it been present, there would be a closer question as to whether Mr. Runner and/or Ms. Garloch had been smoking one or the other. Report at p. 18. This observation is exactly not accurate. Burnt hemp smells like burnt marijuana, and marijuana remains illegal in West Virginia. Paraphernalia is not illegal in West Virginia, although it may be used for either legal or illegal purposes. *See,* W. Va. Code § 60A-4-403a [1980].

tetrahydrocannabinol and its derivatives were legalized by virtue of the West Virginia Industrial Hemp Development Act of 2002 [W. Va. Code § 19-12E-1]. Beyond passing reference to the idea that Mr. Runner's "argument is well-taken," *see* Report at p. 16, the Report otherwise simply neglects to assess the import of the recent prolificacy of smoking pipes for hemp and CBD oil in weighing whether the officers enjoyed probable cause to search Mr. Runner's vehicle.

Judge Goodwin in the Southern District recently mused on an interrelated issue, observing that

> [t]he Fourth Circuit has not addressed the potential effect legal hemp has on its Fourth Amendment precedent. Similarly, there is very little case law on the subject from other jurisdictions. * * * There is certainly a nationwide movement to legalize or decriminalize marijuana. Perhaps in the future, revisiting this precedent will be warranted. But possession of marijuana is still a criminal offense under West Virginia state law and federal law. *See* W. Va. Code §§ 60A-4-401 and 60A-2-204; 21 U.S.C. § 841(a). Therefore, Corporal Lowe's belief that there was likely illegal contraband present in Defendant's jeep was reasonable based on the odor of marijuana emanating from the vehicle. I find that law enforcement had probable cause to search Defendant's car and therefore I need not reach the issue of consent.

United States v. Boggess, Case No. 2:19-cr-00296 at pp. 10-11 (S.D. W.Va., March 13, 2020) (unpublished disposition).

In the absence of any other evidence whatsoever that Mr. Runner or his companion were engaged in any illegal or suspicious conduct whatsoever that would justify searching the vehicle (no impairment, no evasiveness, no corroboration of any data from the anonymous caller beyond "innocent facts" (*e.g.*, there was a female in a blue

volkswagon)), the officers lacked probable cause to search the vehicle based upon merely seeing a glass pipe in the console of the vehicle.[6]

III. CONCLUSION

Based on the preceding, as well as the arguments and authorities set forth in the Defendant's Motion to Suppress, which is hereby incorporated by reference in its entirety, your Defendant, Ricky D. Runner, respectfully requests that this Court suppress all evidence seized in the subject search conducted on October 11, 2018, and for such further relief that the Court deems just and proper.

Respectfully submitted,

RICKY D. RUNNER,
Defendant.

By: /s/ *Robert G. McCoid*
Of Counsel

[6] With regard to the cases cited by Mr. Runner in his supplemental motion regarding other jurisdictions evaluating searches based on paraphernalia alone, the Report chides the undersigned for confusing the standards governing probable cause to search and probable cause to arrest. *See* Report at pp. 21-22. While there are certainly two different forms of analysis required for these separate inquiries, the point stands that the *quantum* of evidence required for either is identical. *See U.S. v. Humphries*, 372 F.3d 653, 659 (4th Cir. 2004) ("[I]n both cases, the quantum of facts required for the officer to search or to seize is "probable cause," and the quantum of evidence needed to constitute probable cause for a search or a seizure is the same. 2 Wayne R. LaFave, Search & Seizure § 3.1(b) (3d ed.1996); *compare [Maryland v.] Pringle*, 124 S.Ct. [795,] ... 799-800 [2003] (arrest context), with *[Illinois v.] Gates*, 462 U.S. [213,] ... 230-32, 103 S.Ct. 2317 [1983] (search context).").

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling Division

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	Case No. 5:19cr-24 (JPB-JPM)
v.	:	
RICKY D. RUNNER,	:	
Defendant.	:	

CERTIFICATE OF SERVICE

Service of the foregoing **Defendant's Objections to Magistrate Judge's Report and Recommendation to the District Judge Recommending that Defendant's Motion to Suppress and Supplemental Motion to Suppress Be Denied** was had upon the following by delivering to him a true and correct copy thereof via CM/ECF notification this 13th day of October, 2020.

Robert H. McWilliams, Esq.
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Wheeling, West Virginia 26003

RICKY D. RUNNER,
Defendant.

By: /s/*Robert G. McCoid*
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