NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL DEWAYNE DENNIS, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 27, 2022
Lyle W. Cayce
Clerk

No. 19-50855

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MICHAEL DEWAYNE DENNIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:18-CR-1199-1

Before HIGGINBOTHAM, HAYNES, and WILSON, *Circuit Judges*.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

A jury found Michael Dennis guilty of conspiracy to possess with intent to distribute more than 100 kilograms of marijuana. Dennis now appeals his conviction and sentence.

I.

The Department of Homeland Security began investigating Michael Dennis after a number of accomplices described delivering marijuana to him. On April 30, 2018, DHS agents installed pole cameras directed at the front

APPENDIX A

and back of Dennis's properties in Houston, Texas. Until July 9, 2018, the cameras captured video of incidents similar to the deliveries described by cooperating defendants Ray Trevino and Ausencio Garcia-Herrera. On June 24 and July 9, the video showed boxes being unloaded from pickup trucks into the garage, Dennis going from the garage to his house and returning with a bag, trucks departing, and Dennis moving the boxes from the garage to his house. The video also showed Jonathan Ray Alaniz delivering boxes to the garage twice; Houston police stopped Alaniz after he left the property, seizing approximately $5,000 and thirty pounds of marijuana.

On June 20, 2018, Dennis was indicted for conspiracy to possess with intent to distribute more than 100 kilograms of marijuana in violation of 21 U.S.C. §§ 841(a), (b)(1)(B), and 846. The indictment included notice of a demand of forfeiture. On July 11, 2018, law enforcement executed an arrest warrant for Dennis and a search warrant for his property. During a forced entry into his home, an agent shot Dennis on seeing him with a firearm. After his arrest, agents found an AR-15 rifle and an AK-47-type pistol with a drum magazine, 111.85 kilos of marijuana, nineteen firearms, $197,313 cash, money counters, scales, and ledgers showing prices, weights, and names for hydroponic marijuana sales for $800 to $1,000 per pound on his property.

Dennis's first retained counsel entered an appearance on August 3, 2018. Pretrial motions were due by September 16, 2018. Prior to trial, seven different lawyers represented Dennis; other than motions to substitute counsel or for continuances, counsel filed no pretrial motions. The district court granted nine continuances and set three plea hearings, then denied a motion to suppress as untimely.

Dennis was convicted in a two-day jury trial. After accepting the verdict, the district court held a hearing on forfeiture and sentenced Dennis to 216 months in prison and five years' supervised release. The district court

also ordered Dennis to forfeit his weapons, boat, Houston properties, and $7,200,000 as proceeds of the offense. Dennis timely appeals.

II.

Dennis challenges the denial of three pre-trial motions: leave to file untimely motions to suppress, its merits, and a motion for a continuance. We address each in turn.

A.

Trial counsel filed their notice of appearance on August 9, 2019. At an August 13 docket call the district court told counsel that the trial would proceed on September 11. On August 29, 2019, Dennis moved to suppress the video surveillance and evidence from the search of his property. On September 5, 2019, Dennis moved for leave to file the motions to suppress, nearly a year after the due date of September 16, 2018 for pretrial motions. At the pretrial conference, the district court addressed the lateness of the motions, heard counsel's argument, denied the motions, and declined to suppress any evidence. Dennis contends that the district court abused its discretion by denying him leave to file an untimely motion to suppress.

We review the district court's denial of a motion to suppress as untimely for abuse of discretion.[1] A motion to suppress that is filed after the deadline for pretrial motions while untimely, may be considered if the party shows good cause.[2] Although we have "not ruled on the standard of review of a district court's finding of lack of good cause under Rule 12(c)(3),"[3] in

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[1] *United States v. Oliver*, 630 F.3d 397, 410 (5th Cir. 2011).

[2] FED. R. CRIM. P. 12 (c)(3); *United States v. Williams*, 774 F. App'x 871, 876 (5th Cir. 2019) (per curiam).

[3] *Williams*, 774 F. App'x at 876.

Williams this Court stated that a showing of good cause requires a showing of cause and prejudice.[4]

Dennis has shown neither cause nor prejudice. For the year prior to his trial, Dennis had at least seven different lawyers. Here, counsels' appearance a month before trial cannot justify the late filings.[5] Prior counsel could have moved to suppress as they were aware of the surveillance.[6] Similarly, the ongoing plea negotiations did not prevent and do not justify prior counsels' failure to file motions to suppress.[7] Dennis has not shown that he was prejudiced by the denial of leave to file his untimely motions. The district court was familiar with the facts and legal issues, heard counsels' argument, and gave oral rulings on them before trial.[8] The district court did not abuse its discretion in denying Dennis leave to file his untimely motion to suppress.

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[4] *Id*. at 876-77; *see Davis v. United States*, 411 U.S. 233, 243–44 (1973); *United States v. Fry*, 792 F.3d 884, 888 (8th Cir. 2015) ("Under Rule 12(c)(3), as amended December 1, 2014, a court may consider an issue not timely raised under Rule 12(b)(3) only upon a showing of 'good cause,' which requires a showing of cause and prejudice."); 1A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 194 (5th ed. 2019).

[5] *See United States v. Gulley*, 780 F. App'x 275, 283 (6th Cir. 2019) (change in counsel alone not sufficient to constitute good cause for late filing); *United States v. Turner*, 602 F.3d 778, 787 (6th Cir. 2010).

[6] *Williams*, 774 F. App'x at 877; *see United States v. Knezek*, 964 F.2d 394, 398–99 (5th Cir. 1992); 1A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 194 (5th ed. 2019).

[7] *See United States v. Walden*, 625 F.3d 961, 965 (6th Cir. 2010) (belief that motion to suppress would not be necessary due to planned plea did not excuse late filing).

[8] *Williams*, 774 F. App'x at 874, 877.

B.

Dennis contends that the district court erred in denying his motion to suppress. When a pretrial motion is denied as untimely, we review the denial of the motion for plain error.[9] To show plain error, Dennis must show a forfeited error that is clear or obvious, which affects his substantial rights.[10] With that showing, we have the *discretion* to correct the error, but only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.[11]

1.

Dennis argues that the pole cameras were an unreasonable intrusion into his privacy under the Fourth Amendment. "[O]fficial intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause."[12] However, a defendant cannot assert a privacy interest in information which he "voluntarily conveyed to anyone who wanted to look."[13] Dennis relies on *United States v. Cuevas-Sanchez* to argue that the fencing around his property established his privacy interest, but given that one can see through his fence and that the cameras captured what was open to public view from the street, this is not a clear or obvious application of our precedent.[14] Dennis argues the prolonged and continuous

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[9] *United States v. Vasquez*, 899 F.3d 363, 373 (5th Cir. 2018), *as revised* (Aug. 24, 2018).

[10] *Puckett v. United States*, 556 U.S. 129, 135 (2009).

[11] *Id.*

[12] *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018).

[13] *Id.* at 2215 (citation omitted).

[14] *See United States v. Cuevas-Sanchez*, 821 F.2d 248, 250–51 (5th Cir. 1987); *Evans v. Lindley*, No. 21-20118, 2021 WL 5751451, at *5 (5th Cir. Dec. 2, 2021) (per curiam); *United States v. Beene*, 818 F.3d 157, 162 (5th Cir. 2016) (noting there was no expectation

nature of the surveillance violated his Fourth Amendment rights. Although the Supreme Court addressed a form of continuous surveillance in *Carpenter*, unlike cell-site location information, there is nothing inherent in the use of security cameras to cast doubt on their validity.[15] It is rather whether the surveillance invades protected privacy interests. Surveillance of areas open to view of the public without any invasion of the property itself is not alone a violation.[16] All that was surveilled here was from the view from the street, continuously visible to individuals.[17] We do not say that the length of time surveilled is irrelevant, but we find no privacy interest was here invaded—information subject to the daily view of strollers and the community. The legal issues here are not so clear that any error would be plain or obvious.

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of privacy and that defendant had not posted "no trespassing" signs); *United States v. Moffitt*, 233 F. App'x 409, 411 (5th Cir. 2007) (per curiam) (defendant did not have legitimate expectation of privacy with respect to his driveway and yard). Other circuits have held that similar surveillance does not violate the Fourth Amendment. *See also United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022) (en banc) (eight months of video surveillance with a pole camera trained on a side door, attached garage, drive-way, and portions of the lawn and public street in front of an un-fenced house was not suppressed, court divided on whether this was because it did not violate the Fourth Amendment or because agents had acted in good faith reliance on existing authority); *United States v. Tuggle*, 4 F.4th 505, 513 (7th Cir. 2021) (18 months of video surveillance with three cameras viewing the front of un-fenced Tuggle's home, an adjoining parking area, and another portion of the outside of his house did not invade a reasonable expectation of privacy); *United States v. Houston*, 813 F.3d 282, 287–88 (6th Cir. 2016) (defendant "had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads"); *United States v. Vankesteren*, 553 F.3d 286, 290 (4th Cir. 2009) (surveillance cameras on farmer's land did not violate Fourth Amendment).

[15] *Carpenter*, 138 S. Ct. at 2220.

[16] *See California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("[T]he mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.").

[17] *Ciraolo*, 476 U.S. at 213.

Dennis fails to show that the district court clearly erred in not suppressing the video evidence.[18]

2.

Dennis also sought to suppress the fruit of the search of his property as relying on stale information, urging that the affidavit did not contain the dates of the cooperating defendants' deliveries of marijuana.

A search warrant may be invalidated upon a showing that the supporting affidavit includes assertions that were deliberate falsehoods or made with reckless disregard for the truth and the remaining portion of the affidavit is insufficient to support a finding of probable cause.[19] It must be shown that the affiant made specific statements that were deliberately false or made in reckless disregard of the truth.[20] It is the defendant's burden to "make[] a strong preliminary showing that the affiant excluded critical information from the affidavit with the intent to mislead the magistrate."[21] Dennis has offered no proof that the affiant deliberately or recklessly falsified statements about the information from cooperating defendants to mislead the court. Although the dates were omitted, the defendants collectively described nineteen deliveries of hundreds of pounds of marijuana taking place over months. And the more recent video evidence showed that Dennis was engaging in the same conduct described, which freshened the

[18] *United States v. Prieto*, 801 F.3d 547, 555 (5th Cir. 2015); *United States v. Miller*, 665 F.3d 114, 136 (5th Cir. 2011).

[19] *Franks v. Delaware*, 438 U.S. 154, 171 (1978); *United States v. Brown*, 298 F.3d 392, 395–96 (5th Cir. 2002).

[20] *Franks*, 438 U.S. at 171–72.

[21] *United States v. Tomblin*, 46 F.3d 1369, 1377 (5th Cir. 1995) (citation omitted).

information.[22] Dennis cannot show that the district court plainly erred when it declined to suppress evidence from the search of his property.

C.

Dennis argues that the district court abused its discretion in denying his final motion for a continuance. We review the denial of a continuance for abuse of discretion.[23] We look to the totality of the circumstances, including:

> (a) the amount of time available; (b) the defendant's role in shortening the time needed; (c) the likelihood of prejudice from denial; (d) the availability of discovery from the prosecution; (e) the complexity of the case; (f) the adequacy of the defense actually provided at trial; and (g) the experience of the attorney with the accused.[24]

From August 2018 to September 2019, the district court granted nine continuances, providing Dennis adequate time to prepare for trial.[25] The shortened amount of time trial counsel had to prepare was of Dennis's making.[26] The district court set the September trial date on June 26, 2019. Dennis retained new counsel in August and counsel undertook the representation knowing the trial date. The evidence was straight-forward and discovery was timely.[27] Dennis concedes that "[t]rial [c]ounsel performed well at trial," and cites no deficiencies in their representation. None of the grounds on appeal address errors attributable to counsel's want of

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[22] *United States v. Webster*, 734 F.2d 1048, 1056 (5th Cir. 1984).

[23] *United States v. Walters*, 351 F.3d 159, 170 (5th Cir. 2003).

[24] *Id.*

[25] *United States v. Diaz*, 941 F.3d 729, 740 (5th Cir. 2019) (two continuances); *United States v. Kelly*, 973 F.2d 1145, 1148 (5th Cir. 1992) (two continuances).

[26] *Walters*, 351 F.3d at 170.

[27] *Diaz*, 941 F.3d at 740.

preparation and Dennis has not identified any prejudice from the denial of the continuance.

III.

A.

Dennis also moved for limited discovery of the drug quantity information in the presentence reports (PSRs) of cooperating defendants Alex Perez-Orozco, Garcia-Herrera, Trevino, Ibarra-Gonzalez, and Hermilio Garcia-Nunez. The district court denied the motion.

We review the district court's decision to disclose PSR information to a third party for abuse of discretion.[28] "There is a general presumption that courts will not grant third parties access to the presentence reports of other individuals."[29] This presumption is supported by "powerful policy considerations," including the defendant's privacy interest; maintaining confidential information about informants, investigations, and grand jury proceedings; and not chilling the "transmission of information by the defendants."[30] "[O]nly where a 'compelling, particularized need for disclosure is shown should the district court disclose the report.'"[31]

Dennis argues that the need to avoid an unwarranted disparity between his and the other defendants' sentences justifies disclosure. The rub is that a defendant's drug quantity extends only to criminal activity "he was directly involved [in] or that was reasonably foreseeable to him."[32] Dennis

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[28] *United States v. Huckaby*, 43 F.3d 135, 138 (5th Cir. 1995).

[29] *Id.* (internal quotation omitted).

[30] *Id.*

[31] *Id.* (quoting *United States v. Corbitt*, 879 F.2d 224, 239 (7th Cir.1989)).

[32] *United States v. McClaren*, 13 F.4th 386, 411 (5th Cir. 2021), *cert. denied sub nom. Fortia v. United States*, 142 S. Ct. 1244 (2022).

worked with all of the other defendants to distribute marijuana, while they were responsible only for what they distributed. And unlike the others, Dennis did not cooperate with the investigation. The cooperating defendants were not similarly situated to Dennis.[33] The district court did not abuse its discretion in denying Dennis's request for sentencing information.

B.

Dennis next challenges the length of his sentence, arguing that the district court miscalculated the drug quantity finding, misapplied the enhancement for possession of a firearm, and erroneously refused to consider the changing laws regarding marijuana. These arguments are without merit.

"Using a bifurcated review process, we first examine whether the district court committed any significant procedural error."[34] "A district court's interpretation or application of the Sentencing Guidelines is reviewed *de novo*, and its factual findings . . . are reviewed for clear error. There is no clear error if the district court's finding is plausible in light of the record as a whole."[35] "If the district court's decision is procedurally sound, we then consider the substantive reasonableness of the sentence."[36] In reviewing the substantive reasonableness of the sentence, we apply "an abuse-of-discretion standard of review, and within-Guidelines sentences enjoy a presumption of reasonableness."[37]

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[33] *United States v. Gaspar-Felipe*, 4 F.4th 330, 344 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 903 (2022).

[34] *United States v. Nguyen*, 854 F.3d 276, 280 (5th Cir. 2017).

[35] *United States v. Juarez Duarte*, 513 F.3d 204, 208 (5th Cir. 2008) (per curiam) (citation omitted).

[36] *Nguyen*, 854 F.3d at 280.

[37] *United States v. Scott*, 654 F.3d 552, 555 (5th Cir. 2011).

1.

Dennis first raises a procedural challenge to the calculation of the drug quantity finding of 11,194.37 kilograms. "The defendant bears the burden of showing that the information in the PSR relied on by the district court is materially untrue."[38] This finding was supported by 9,000 kilograms based on Trevino's testimony, 1,896.07 kilograms based on Ibarra-Gonzalez's statement and Garcia-Herrera's testimony, 118.85 kilograms seized from Dennis, and $197,313 seized from Dennis, converted to 186.45 kilograms.

Dennis argues that the calculation is not supported by the record because Trevino, Garcia-Herrera, and Ibarra-Gutierrez are not reliable and have motives to falsify testimony. Information provided by codefendants and confidential sources may support a drug quantity finding;[39] such statements are sufficiently reliable where other information corroborates details about the drug scheme.[40] Here, in addition to the testimony, there was video surveillance, a recorded call with Trevino, and the marijuana, money, scales, and money counters found on Dennis's property, all corroborating the district court's finding. Moreover, Dennis argued to the jury that Trevino and Garcia-Herrara were unreliable because they cooperated with the government. "[T]o find [the testimony] categorically unreliable for sentencing purposes, where the government's burden of proof is by a preponderance of the evidence, would automatically call into question the jury's verdict, which was based on the higher beyond a reasonable doubt

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[38] *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995).

[39] *United States v. Zuniga*, 720 F.3d 587, 591–92 (5th Cir. 2013); *United States v. Cantu-Ramirez*, 669 F.3d 619, 629 (5th Cir. 2012).

[40] *United States v. Rogers*, 1 F.3d 341, 344 (5th Cir. 1993).

standard."[41] Dennis's argument that Trevino, Garcia-Herrera, and Ibarra-Gutierrez provided unreliable testimony fails.

Dennis also challenges the conversion of the $197,313 cash to 186.45 kilograms of marijuana. "Converting the money seized from a drug defendant into its equivalent amount of drugs is not clear error."[42] The record supports the $480 per pound value used to convert the $197,313[43] because Dennis told Trevino he was buying marijuana for $380 to $400 a pound and hydroponic marijuana for $800 per pound.

2.

Dennis challenges the two-level enhancement for the use of violence. Section 2D1.1(b)(2) directs an increase of two levels to the base offense level "if the defendant used violence, made a credible threat to use violence, or directed the use of violence."[44] Application of the provision is a factual finding reviewable for clear error.[45] An agent entering Dennis's home saw the barrel of an assault rifle protrude around a corner, withdraw, and emerge again. Near the entry, the agents found an AR-15 rifle and an AK-47-type pistol with a drum of magazine boxes. The district court's finding that Dennis used or threatened the use of force was not clearly erroneous.

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[41] *Cantu-Ramirez*, 669 F.3d at 629.

[42] *United States v. Haines*, 803 F.3d 713, 743 (5th Cir. 2015); U.S.S.G. § 2D1.1 cmt. n. 5).

[43] Even without the converted marijuana quantity, the total quantity of marijuana exceeds the 10,000 kilogram marijuana threshold for base offense level 34, rendering harmless any error. U.S.S.G. § 2D1.1 Drug Quantity Table.

[44] U.S.S.G. § 2D1.1(b)(2).

[45] *United States v. Lira-Salinas*, 852 F. App'x 860, 861 (5th Cir. 2021) (per curiam).

3.

Dennis also challenges the substantive reasonableness of his sentence because the district court did not consider the changing legal status of marijuana. Even in states with more lenient marijuana laws, other federal courts have declined to consider the status of marijuana as a sentencing factor.[46] Even so, the district court sentenced Dennis to 216 months—144 months below the guidelines range.[47] Dennis has already received what he now requests: a downward variance of his sentence to account for the difference between marijuana and other drugs. The sentence imposed by the district court was without error.

IV.

Finally, Dennis challenges the forfeiture of his property.

A.

Dennis argues that he ought to have a new trial on forfeiture because he did not personally waive his right to a jury. Dennis did not object to the judge hearing the forfeiture until months after the hearing. As Dennis's objection was not properly preserved, we review for plain error. Dennis "bears the burden of proving (1) error, (2) that is plain, and (3) that affects his substantial rights."[48]

When the indictment states the government is seeking forfeiture "the court must determine before the jury begins deliberating whether either party

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[46] *United States v. Zachariah*, No. SA-16-CR-694-XR, 2018 WL 3017362, at *1 (W.D. Tex. June 15, 2018) (collecting cases).

[47] The district court said it imposed a non-guidelines sentence because it "was marijuana and not meth, and not some other heavy type of drug."

[48] *United States v. Valdez*, 726 F.3d 684, 699 (5th Cir. 2013) (quoting *Johnson v. United States*, 520 U.S. 461, 466–67 (1997)).

requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict."[49] Forfeiture, "as an aspect of sentencing, does not fall within the Sixth Amendment right to a jury determination of guilt or innocence."[50] We have not recognized a constitutional right to a jury for criminal forfeiture.[51] The district court determined before trial that the forfeiture hearing would proceed without a jury. After trial, the district court confirmed, and counsel twice replied, that Dennis did not wish for a jury. "[B]ecause counsel is the defendant's agent, the defendant 'must accept the consequences of the lawyer's decision[s].'"[52] Accepting counsel's waiver of a jury is not plain error.

B.

Dennis argues that there is insufficient evidence to support the $7.2 million forfeiture ordered by the district court and that it thus violates the Excessive Fines Clause.[53] We review the district court's legal conclusions as to the propriety of a forfeiture order *de novo*, the district court's findings of facts under the clearly erroneous standard, and "the question of whether those facts constitute legally proper forfeiture *de novo*."[54]

The Comprehensive Forfeiture Act ("CFA") "was intended to reach every last dollar that flowed through the criminal's hands in connection with

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[49] FED. R. CRIM. P. 32.2(b)(5)(A).

[50] *Libretti v. United States*, 516 U.S. 29, 30 (1995).

[51] *United States v. Simpson*, 741 F.3d 539, 560 (5th Cir. 2014).

[52] *United States v. Cabello*, 33 F.4th 281, 295 (5th Cir. 2022) (quoting *Taylor v. Illinois*, 484 U.S. 400, 418 (1988)).

[53] Dennis also challenges the district court's calculations on the basis that Trevino was not a credible witness, but, as above, the district court found Trevino to be credible.

[54] *United States v. Olguin*, 643 F.3d 384, 395 (5th Cir. 2011).

the illicit activity."[55] This Court has "upheld reasonable estimates for calculating criminal forfeiture,"[56] bound by the stricture that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[57] When making the proportionality determination, we consider

> (a) the essence of the defendant's crime and its relationship to other criminal activity; (b) whether the defendant was within the class of people for whom the statute of conviction was principally designed; (c) the maximum sentence, including the fine that could have been imposed; and (d) the nature of the harm resulting from the defendant's conduct.[58]

Dennis's activity was on going; he falls within the class of people for whom the statute of conviction was principally designed, dealing with sources for drugs in Mexico; the forfeiture amount, approximately one-and-a-half times the maximum guidelines and statutory range of $5 million, was not "grossly disproportional;"[59] and the scale of his distribution inflicted the harm addressed by the statute of conviction. Dennis is only being held accountable for sums he received from his own involvement in this criminal conspiracy.[60] Finally, contrary to Dennis's assertions, the district court accounted for the forfeiture of Dennis's real property in setting the forfeiture amount; the

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[55] 21 U.S.C. § 853(a)(2); *Olguin*, 643 F.3d at 400.

[56] *United States v. Mazkouri*, 945 F.3d 293, 307 (5th Cir. 2019) (collecting cases).

[57] *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

[58] *United States v. Suarez*, 966 F.3d 376, 385 (5th Cir. 2020) (citation omitted).

[59] *Suarez*, 966 F.3d at 387; *see United States v. Haro*, 753 F. App'x 250, 259 (5th Cir. 2018).

[60] *Olguin*, 643 F.3d at 400.

forfeiture of these assets was not duplicative. The $7.2 million forfeiture order was without error.

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We AFFIRM Dennis's conviction and sentence, including its order of forfeiture.

United States Court of Appeals for the Fifth Circuit

No. 19-50855

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MICHAEL DEWAYNE DENNIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:18-CR-1199-1

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, HAYNES, and WILSON, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA

v.

Case Number: DR:18-CR-01199(1)-AM
USM Number: 42723-479

(1) MICHAEL DEWAYNE DENNIS
aka: Michael Spiller

Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, (1) MICHAEL DEWAYNE DENNIS aka: Michael Spiller, was represented by John Finbar Carroll and Antuan L. Johnson.

The defendant was found guilty on Count One of the Indictment by a jury verdict on September 12, 2019 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846	Conspiracy to Possess with Intent to Distribute More than 100 Kilograms of Marijuana	Between on or about July 1, 2014 through on or about June 20, 2018	One

As pronounced on March 17, 2021, the defendant is sentenced as provided in pages 2 through 8 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall 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 shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 23nd day of March, 2021.

ALIA MOSES
UNITED STATES DISTRICT JUDGE

APPENDIX C

Arresting Agency: HSI

DEFENDANT: (1) MICHAEL DEWAYNE DENNIS aka: Michael Spiller
CASE NUMBER: DR:18-CR-01199(1)-AM

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **Two Hundred Sixteen (216) Months** with credit for time served since July 11, 2018, pursuant to 18 U.S.C. 3584(a).

The Court makes the following recommendation to the Bureau of Prisons:

That the defendant serve this sentence at F. C. I. Bastrop, if possible.

The defendant shall remain in custody pending service of sentence.

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 Marshal

DEFENDANT: (1) MICHAEL DEWAYNE DENNIS aka: Michael Spiller
CASE NUMBER: DR:18-CR-01199(1)-AM

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Five (5)** years.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court.

_X_ The defendant shall reside in a residential reentry center for a period of up to six (6) months. The defendant shall follow the rules and regulations of the center. Further, once employed the defendant shall pay 25% of his/her weekly gross as long as it does not exceed the contract rate.

_X_ The defendant shall abstain from the use of alcohol and any and all intoxicants.

_X_ The defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The program shall include testing and examination to determine if the defendant has reverted to the use of drugs and alcohol. The probation officer shall supervise the participation in the program (provider, location, modality, duration, intensity, etc.). The defendant shall pay the costs of such treatment if financially able.

_X_ The defendant shall not use or possess any controlled substances without a valid prescription. If a valid prescription exists, the defendant must disclose the prescription information to the probation officer and follow the instructions on the prescription.

_X_ The defendant shall submit to substance abuse testing to determine if the defendant has used a prohibited substance. The defendant shall not attempt to obstruct or tamper with the testing methods. The defendant shall pay the costs of testing if financially able.

_X_ The defendant shall not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption.

DEFENDANT: (1) MICHAEL DEWAYNE DENNIS aka: Michael Spiller
CASE NUMBER: DR:18-CR-01199(1)-AM

MANDATORY CONDITIONS

1. The defendant shall not commit another federal, state or local crime during the term of supervision.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
4. The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
5. If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et. seq.*) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
6. If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
7. If this judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.
8. The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. The defendant shall notify the court of any material change in defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

DEFENDANT: (1) MICHAEL DEWAYNE DENNIS aka: Michael Spiller
CASE NUMBER: DR:18-CR-01199(1)-AM

STANDARD CONDITIONS OF SUPERVISED RELEASE

1. The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the Court or probation officer instructs the defendant to report to a different probation office or within a different time frame. The defendant shall not leave the judiial district without permission of the court or probation officer.
2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation Officer.
3. The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court.
4. The defendant shall answer truthfully the questions asked by the probation officer.
5. The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.
7. The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless excused from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the Court.
9. If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
10. The defendant shall 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).
11. The defendant shall 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.
12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the Court may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
13. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.
14. If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.
15. If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is the condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
16. If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.
17. If the defendant is exluded, deported, or removed upon release on probation or supervised release. the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office, or as ordered by the Court.

DEFENDANT: (1) MICHAEL DEWAYNE DENNIS aka: Michael Spiller
CASE NUMBER: DR:18-CR-01199(1)-AM

CRIMINAL MONETARY PENALTIES / SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 111 E. Broadway Ste. 100, Del Rio, Texas 78840.

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

	Assessment	Fine	Restitution	AVAA Assessment *	JVTA Assessment **
TOTAL:	$100.00	$2,500.00	$0.00	$0.00	$0.00

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of $100.00. The debt is incurred immediately.

Fine

The defendant shall pay a fine of $2,500.00. The Court finds the defendant has the present and future ability to pay a reduced fine.

Schedule of Payments

Payment shall be made at the rate of no less than $45.00 per month, due by the third day of each month beginning no earlier than 60 days after release from imprisonment. The Court imposed payment schedule shall not prevent statutorily authorized collection efforts by the U.S. Attorney. The defendant shall cooperate fully with the U.S. Attorney and the U.S. Probation Office to make payment in full as soon as possible.

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 above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

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

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.

* 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

DEFENDANT: (1) MICHAEL DEWAYNE DENNIS aka: Michael Spiller
CASE NUMBER: DR:18-CR-01199(1)-AM

DENIAL OF FEDERAL BENEFITS

(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. 862a

IT IS ORDERED that the defendnat shall be ineligible for all federal benefits for a period of Ten (10) years ending March 17, 2031.

DEFENDANT: (1) MICHAEL DEWAYNE DENNIS aka: Michael Spiller
CASE NUMBER: DR:18-CR-01199(1)-AM

FORFEITURE

Findings of Forfeiture as to defendant's interest only.

For purposes of this matter, the defendant's rights, title and interest to the weapons as stipulated at the beginning of the forfeiture hearing and end of the Jury Trial are hearby forfeited.

Smith & Wesson, M&P Pistol, .40 cal, s/n HNJ0443;
Taurus, Judge Handgun, .45 cal/.410 gauge, s/n KN167025;
Smith & Wesson, M&P Pistol .40 cal, s/n HSM7111;
Springfield, XD40 Pistol, .40 cal, s/n XD594648;
Winchester, 74 Rifle, .22 cal, s/n 247916A;
Marlin, 60 Rifle, .22 cal, s/n 13338878;
Remington, Magnum Shotgun, 12 gauge, s/n V354557M;
Remington, 597 Rifle, .22 cal, s/n Obliterated;
Remington, Express Rifle, .22 cal, s/n C06608M;
Remington, 770 Rifle, 30.06 cal, s/n M71709823;
BM&S, Mohawk Shotgun, 12 gauge, s/n Obliterated;
Marlin, 336 Rifle, 30/30 cal, s/n 25054471;
Stevens, 59A Shotgun, .410 gauge, s/n Obliterated;
Romarm Cugir, GP/WASR-10/63 Rifle, 7.62x39 mm, s/n 197EM2073;
Zastava, PAP M92 PV Pistol, 7.62x39 mm, s/n M92PV067456;
Mossberg, MMR Tactical Rifle, .223 cal, s/n MMR04842A;
Winchester, Super X Pump Shotgun, 12 gauge, s/n 12AZX40073;
Remington, 597 Rifle, .22 cal s/n C2684470;
I.O. Inc., Sporter Rifle, 7.62x39 mm, s/n S032817; and
Any related ammunition and firearms accessories

The Court finds that the boat, engines, and trailer which were purchased with proceeds from the conspiracy are hereby forfeited

1985 Rybovich Rybo Runner, HIN: RBV30054L485;
Suzuki DF300 Outboard Motor, s/n 30001Z-880176;
Suzuki DF300 Outboard Motor, s/n 30001F-880333;
2013 Seahawk NXTRIHD 31-33 Boat Trailer, VIN: 1N9BB3339DB171169.

The Court will order that the defendant's rights, title, and interest also be forfeited for facilitation and also for the use of proceeds in improving 6110 Grapevine Street, Houston, Harris County, Texas 77085 and 6118 Grapevine Street, Houston, Harris County, Texas 77085.

A sum of money equal to Seven Million Two Hundred Thousand Dollars and No Cents ($7,200,000.00), which represents the amount of proceeds obtained, directly or indirectly, as a result of the violation set out in Count One. The Court does find and expect remission for any amounts that are ultimately recovered by the Government on the forfeiture of items.

The Clerk is responsible for sending a copy of this page and the first page of this judgment to:
U.S. Department of Justice , Office of Justice Programs, Washington, DC 20531

FILED
SEP 5 2019
CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL DENNIS,

Defendant.

Criminal Action No:
2:18-CR-01199

ORDER ON MOTION FOR LEAVE TO FILE MOTIONS TO SUPPRESS BECAUSE COUNSEL WAS NOT COUNSEL OF RECORD DURING THE FILING DEADLINE

On this 5th day of September, 2019, came to be considered the Defendant's Motion for leave to file motions to suppress because counsel was not counsel of record during the filing deadlines, the Court having considered the merits of same, finds it:

(GRANTED) (DENIED).

HON. ALIA MOSES
UNITED STATES DISTRICT JUDGE

APPENDIX D

Any objections to that, Mr. Major?

MR. MAJOR: No, Your Honor.

THE COURT: Okay. And Mr. Carrion?

AUSA HAIL: And, Your Honor, Mr. -- that should actually be Rodolfo Martinez. He's on our witness list. I apologize. That was a -- that was an error. And that's the individual who actually put the camera up, maintained the camera, and he talked about its maintenance while it was on the street.

THE COURT: Give me his name again.

AUSA HAIL: Rodolfo Martinez, Junior.

THE COURT: Okay. Any objections to that, Mr. Major?

MR. MAJOR: I would just reurge our -- our motion to suppress grounds regarding his -- his testimony. I -- I know your -- Your Honor has made the Court's position clear on that, but our -- that would be our -- our objection to his -- his testimony, is that that --

THE COURT: Okay, but it's on a public -- it's on public property and it's on a pole. What's the objection? It's something open to the public.

MR. MAJOR: Right, Your Honor. It has to do with the -- the technology that was used. Ms. -- Ms. --

THE COURT: Okay. The problem is that y'all's motion to suppress was also late. That -- that -- and again, it's not your fault because you came in in August. But this -- having

this case set for trial and given -- and -- and I will be honest, a big part of it is this Court's docket, not having the time to set them for hearings, that there -- there wasn't time to set hearings on these matters.

Go ahead.

MS. INNOCENTI-PLACETTE: We understand, Your Honor. I'm just --

THE COURT: Ms. Green?

MS. INNOCENTI-PLACETTE: -- just so that I can answer Your Honor's question --

THE COURT: Uh-huh.

MS. INNOCENTI-PLACETTE: -- since the U.S. Supreme Court in *Carpenter* there's been a -- a number of cases that have come out that have determined because of the nature of the video footage of the camera --

THE COURT: Isn't *Carpenter* the -- the phone pinging system?

AUSA HAIL: I think it was the -- the --

MS. INNOCENTI-PLACETTE: The --

AUSA HAIL: -- the GPS.

THE COURT: The -- the GPS coordinates, but it's based on what -- within the cell phone, the pinging of the cell phone to the towers and the GPS coordinates. What does that have to do with the pole towers since the pole camera system does not have that?

MS. INNOCENTI-PLACETTE: Correct, Your Honor. The courts that have -- courts have interpreted *Carpenter* to mean that in some cases technology invades privacy by the dense -- density of the information. For example, and we cite in our motion one of the cases out of Massachusetts, and a number of cases that have come from that --

THE COURT: That's not a Fifth Circuit case, though.

MS. INNOCENTI-PLACETTE: That's correct, Your Honor.

THE COURT: Okay.

MS. INNOCENTI-PLACETTE: Because the -- the camera can pan, zoom, employ facial recognition technologies and other information and be able to time track the daily movements of a person.

THE COURT: Uh-huh.

MS. INNOCENTI-PLACETTE: And if they're -- especially if it's on a home, it -- the courts have determined that does invade our subjective and objective --

THE COURT: Well, but it's not a court within the Fifth Circuit. It's been a court in the First Circuit.

MS. INNOCENTI-PLACETTE: That's correct, Your Honor. There's not been cases in the Fifth Circuit have -- that have adjudicated that. In -- in a large portion because *Carpenter* is so new that some of these themes and -- and premises that have been applied by those other courts --

THE COURT: Uh-huh.

MS. INNOCENTI-PLACETTE: -- just have not percolated in the other circuits. And we -- we don't have a Fifth Circuit case on point.

AUSA HAIL: We actually have a Fifth Circuit case that's on point, Your Honor. They cite it. We cite it. However, it's not on point and favorable to the defense. It actually says that pole cameras are -- should not be used when there's a fence that's high enough to show an expectation of privacy. Defense says that that case should apply here because the defendant had a fence around his property, but the government has attached multiple photos of that property. That fence is completely see-through. So to compare the two and to say it's on point or applicable or even favorable to the defense is completely misleading to the Court.

THE COURT: Let me -- let's back up for just a second. As far as I know, there isn't any use of any facial recognition technology in this case.

AUSA HAIL: No, Your Honor, there isn't.

THE COURT: Okay. So it's not invasive to that point. There isn't any information that any doc -- any of these -- any of the footage captures anything that's going on within the home?

AUSA HAIL: No, it does not, Your Honor.

THE COURT: Okay. So we're not invading the privacy of the home. So what we're talking about is any items that

would be visible to the public just walking down the street.

AUSA HAIL: Correct.

THE COURT: So why is that overly invasive?

MS. INNOCENTI-PLACETTE: Your Honor, there's -- in essence, there are -- the camera's pointed at the -- the front, kind of curtilage of the house.

THE COURT: I get it, but if it's open to the public and it's visible to the public, how is that so invasive just because it's technology?

MS. INNOCENTI-PLACETTE: Because of the standpoint of the camera, Your Honor, it -- it is high up and it's actually able to get a better vantage point than it is on the street.

THE COURT: Okay, but is it capturing anything that could not be captured from just walking on the street by any person?

MS. INNOCENTI-PLACETTE: Your Honor, we don't -- you know, because Your Honor had not granted leave, we can -- we do not have -- I mean, we don't --

THE COURT: Do we have a picture that maybe we can take a look at?

AUSA HAIL: They're attached to the government's response. I think it's in a --

THE COURT: Yeah, but they're -- but they're in black and white?

AUSA HAIL: -- a consolidated response.

THE COURT: Is that the one that's in black and white?

AUSA HAIL: I have the colored photos. Would you like the colored, Your Honor?

THE COURT: Yeah. And has counsel seen them?

AUSA HAIL: Yes, they were attached --

MS. INNOCENTI-PLACETTE: Yes.

AUSA HAIL: -- to our motion and part of discovery.

THE COURT: Okay. The -- first one, though, is just a map.

AUSA HAIL: It's an aerial photo to show the roads, Your Honor, because we reference the roads.

THE COURT: Okay.

AUSA HAIL: And the pole cameras were placed on both of the streets, not on any private property.

THE COURT: Okay. So they weren't -- they were not on the -- on the property -- any part of the property of the home?

AUSA HAIL: That's correct, Your Honor.

THE COURT: Okay. So what am I seeing in these pictures that could not otherwise be seen just walking on the street by any person?

MS. INNOCENTI-PLACETTE: Your Honor, because the cameras are at a vantage point where they can zoom in --

THE COURT: Okay, counsel, on these pictures, what can I see that I could not otherwise see just walking on the street?

MS. INNOCENTI-PLACETTE: In those particular pictures,

Your Honor --

THE COURT: Uh-huh.

MS. INNOCENTI-PLACETTE: -- those pictures are -- there's nothing.

THE COURT: Okay. So what evidence would have been gotten that could not otherwise have been -- been gotten that was open to the public because of the use of the pole cameras?

MS. INNOCENTI-PLACETTE: Your Honor, I --

THE COURT: Okay, but I'm just saying, if -- if this is open to the public, okay, and all we're talking about is it's from up here versus from down here just kind of a situation, what evidence -- you're seeking to suppress the pictures, I'm -- I'm assuming.

AUSA HAIL: No, the whole video, Your Honor.

THE COURT: All right. But I'm saying the -- and the video which also shows the pictures. I mean they -- they're shown on the pictures what can be seen on the videos, right?

MS. INNOCENTI-PLACETTE: Correct, Your Honor.

THE COURT: Okay. What -- what is on those videos that any person walking down the street couldn't videotape from a phone? Any person.

MS. INNOCENTI-PLACETTE: Your Honor, in -- in some cases there would be license plates on the cars that --

THE COURT: But isn't that open to the public?

MS. INNOCENTI-PLACETTE: Depending on the vantage --

depending on the vantage point, no, Your Honor, because of trees. And we've not --

THE COURT: Yeah, but that has nothing to do with whether this is invasive technology or not, counsel.

MS. INNOCENTI-PLACETTE: And, Your Honor, we would argue because it has the capability of being able to --

THE COURT: But the capability alone doesn't make it overly invasive. If there's a Fifth Circuit case that says if there isn't any showing of an expectation of privacy by the person -- what -- traditionally, the Fourth Amendment law was anything that we put out to the public can be captured by the government without any problem, because we put it out to the public. These technology cases have kind of said, Well, you know, I don't know.

We don't know what -- whether that's kind of the situation. But that's always been traditional Fourth Amendment law. What was available to the public.

Now, I'm looking at Exhibit B, which is a -- a picture of the home and the vehicle. I'm not seeing anything in this picture that was captured by technology that couldn't have been captured by the naked eye by just walking in front of the house.

MS. INNOCENTI-PLACETTE: And, Your Honor, for those particular photos, I would agree.

THE COURT: Okay. So the -- the question then

becomes: What's on the video? Because we also know that if the vehicles are on the street -- let's say the vehicles are traveling on the street and law enforcement captures the license plates, that's not a Fourth Amendment seizure. Right?

So what is captured here that would somehow because it's -- it's a pole camera versus just a Kodak camera that makes it that much more invasive? Just the angle?

MS. INNOCENTI-PLACETTE: The angle and the -- the camera is essentially surveilling over a constant period of time. If someone would be -- if someone would be walking down the street with a camera, essentially they might capture some of this very same information. That is correct, Your Honor.

THE COURT: Okay, but what if they're sitting on the corner with a video camera, counsel?

MS. INNOCENTI-PLACETTE: Your Honor, that would be the same -- the same circumstance. However, when you're looking at three months of constant footage --

THE COURT: Uh-huh.

MS. INNOCENTI-PLACETTE: -- that would be the equivalent of a person sitting on that same bench in full view and -- and with -- with the -- the person's awareness of that -- of that footage --

THE COURT: But that wouldn't require the --

MS. INNOCENTI-PLACETTE: -- over a constant period of time.

THE COURT: That would be -- require the consent of the person whose matters that were put in public. It doesn't require their consent.

MS. INNOCENTI-PLACETTE: I'm sorry, Your Honor, I didn't understand the question.

THE COURT: Say a private person is sitting on a corner for three months. It may be that the person whose items were being videotaped would know or notice that, but the consent is not required because it's something that's open to the public.

MS. INNOCENTI-PLACETTE: That's correct, Your Honor.

THE COURT: So why does the time fraction -- or time period matter in this case, because they're on a pole and no one is sitting there?

MS. INNOCENTI-PLACETTE: Your Honor, we would argue that there would be a subjective expectation of privacy --

THE COURT: No, counsel, there is no subjective expectation of privacy. The expectation of privacy under *Rakas* is objective. It's not subjective. Let's get that clear.

MS. INNOCENTI-PLACETTE: Okay. Your -- yes, Your Honor. We would argue that there would be an -- an objective expectation of privacy if -- in the sense that if you were not able -- because the cameras are not able to be seen by the -- by the --

THE COURT: But you don't need consent, counsel.

You're -- you're basically saying, Because my client didn't know he was being videotaped, it's ain't fair, is what you're basically saying.

So I don't know that my house is being photographed by Google by a satellite, but I don't get to say you can't put it on Google Earth. I don't have -- I don't have that much of an expectation of privacy. I don't get to say -- I'm driving down the road and somebody videotapes my car, I don't get to say tain't fair.

As a matter of fact, when -- when police officers use video cameras and you've got a road -- a traffic -- driving on the -- on the road and you're videotaping the actions of the driver ahead of you, they don't need the driver's consent.

MS. INNOCENTI-PLACETTE: And -- and, Your Honor, we would argue that because of the -- the advance -- and because of the dense nature of the -- the digital information that can be obtained in that way -- and with Google Earth, Google Earth can only get to so much of a distance.

THE COURT: Google Earth can get really close, because you can now get a street view of homes and cars and license plates and the faces of people on Google Earth, counsel.

MS. INNOCENTI-PLACETTE: That -- that is true, Your Honor, but it's not a --

THE COURT: So it's pretty dense.

MS. INNOCENTI-PLACETTE: But it is not a continuous

feed and not something that could be --

THE COURT: So you're arguing that because it's a continuous feed it can't be used?

MS. INNOCENTI-PLACETTE: Your Honor, because --

THE COURT: I'm not being persuaded, counsel. The fact that it's a continuous feed and -- feed and your client didn't know about it does not convince me. His consent is not needed. That goes to a subjective knowledge and subjective intent.

MS. INNOCENTI-PLACETTE: Uh-huh.

THE COURT: This is not a subjective intent inquiry, this is an objective intent inquiry.

Now, the funny part, Ms. Inno -- Innocenti --

MS. INNOCENTI-PLACETTE: Innocenti, yes, Your Honor.

THE COURT: I want to say it correctly.

MS. INNOCENTI-PLACETTE: Uh-huh.

THE COURT: The -- the funny part is I have actually had cases where I have ordered restitution because the defendants have found the pole cameras and they've gone and they've painted over the lens. So I have actually ordered restitution for pole cameras because they do see them.

MS. INNOCENTI-PLACETTE: Uh-huh.

THE COURT: So it's -- it's funny that you're arguing that to someone who's actually ordered restitution for that issue.

MS. INNOCENTI-PLACETTE: I understand, Your Honor.
THE COURT: So, I'm not -- at this point, I'm not seeing a problem with the use of these matters, or the person --
MS. INNOCENTI-PLACETTE: Yeah.
THE COURT: -- or the person who's going to testify how they were installed and --
MS. INNOCENTI-PLACETTE: Thank you.
THE COURT: -- what -- how they were operated.
Okay. And --
MS. INNOCENTI-PLACETTE: Your Honor, thank you for your consideration of --
THE COURT: Yes.
MS. INNOCENTI-PLACETTE: -- of our motion.
THE COURT: Now, there was -- I have a notice of 404(b), but I'm not seeing that there's 404(b).
AUSA HAIL: No, Your Honor.
THE COURT: Okay. I just wanted to make double sure. Okay.
All right. On the experts, the government's experts, any other issues we need to take up?
AUSA HAIL: Those were all of them, Your Honor.
THE COURT: Okay. And then on the defendant's intent to use an expert, any objections by the government?
AUSA HAIL: Yes, Your Honor. We received that notice last night. We have not received any reciprocal discovery from

THE COURT: Okay, we're going to do sentencing today. There isn't any point of having a release pending sentencing if I'm going to sentence him today. The question is whether I'm going to -- if -- if after that, it would be an appropriate situation. But let's get the sentencing done today. This case has been pending a long time.

MR. CARROLL: And in reference to the sentencing, Your Honor, also not ruled on is the motion for discovery of information in presentence investigation reports of co-actors. Document Number 192 --

THE COURT: Okay, wait.

MR. CARROLL: -- that we filed.

THE COURT: I don't -- which one are you talking about? Doc -- document number what?

MR. CARROLL: 192, Your Honor.

THE COURT: Hold on just a second.

By the way, motions for discovery at this point are late.

MR. CARROLL: Well, Your Honor, it was filed some time ago and it was --

THE COURT: Yeah, but it's late. It was filed after the -- the conviction.

MR. CARROLL: Yes, but it's in reference to the sentencing, Your Honor, because we were -- in order to be prepared for the sentencing --

THE COURT: Co-conspirators actually testified at the trial, Mr. Carroll.

MR. CARROLL: We're aware of that, and what we wanted to review was, specifically and discretely, the assignment of quantity of drugs as well as relevant conduct for those people in their presentence investigation reports.

THE COURT: You're not going to get their presentence investigation reports, Mr. -- Mr. Carroll. I'm not releasing theirs.

MR. CARROLL: And we were only asking for the discrete information from the report rather than the entire report.

THE COURT: That would require whether or not their attorneys would object to that release. I'm -- I'm not doing that without giving them an opportunity for a hearing.

Do you want that letter back, Mr. Carroll, or do you want me to keep it in my file?

MR. CARROLL: Your Honor, would the Court keep it?

THE COURT: That's fine.

MR. CARROLL: And we object to proceeding without the requested information from the --

THE COURT: I'm not giving you anything out of presentence reports, Mr. Carroll. I don't care how much you object. You don't have the permission of their counsel and that defendant for me to release a sealed document to you, or any part of that sealed document. It is sealed like I seal

everybody's document.

Now, at the trial co-conspirators testified and they testified to quantities as well. Were you all able to look at the transcript to see if it was any of these people on here?

MR. CARROLL: Yes, Your Honor.

THE COURT: So you've got the information as to quantities based on their testimony at trial that were subject to cross-examination.

MR. CARROLL: Well, we have the information they testified to.

THE COURT: I get it, subject to cross-examination. I -- I understand.

DEFENDANT DENNIS: Can -- can I speak?

THE COURT: But what probation found in terms of relevant conduct or what the government was asking for in those cases is not relevant for this. That's for the Court's information. That's not to be used as evidence by another defendant. That's not proper, and it's not Rule 16, and it's not exculpatory, and it's not anything else.

So that's -- my point is, these folks testified; they were subject to cross-examination on amounts and relevant conduct.

MR. CARROLL: We wanted to see whether, Your Honor, there is a disparity in the way they are being treated for sentencing versus Mr. Dennis.

THE COURT: No, Mr. Carroll. Disparity is in the amount of the sentence, whether like defendants were tried -- were considered the same under the circumstances. It's not whether relevant conduct was the same or not. Because you don't know what else might have affected a sentence that is different from Mr. Dennis'. So you can't look at just relevant conduct for disparity purposes. And you don't know what part of the conspiracy they were part of or not part of, and then that would require opening up the entire presentence report. And that's not a finding by the government, that's not anything else than a document written by probation for the Court to use for sentencing purposes. It's not to be used as a fishing expedition in any other sentencing, and that's what y'all are trying to do.

MR. CARROLL: Our point is that the --

THE COURT: You're not getting it, Mr. Carroll.

MR. CARROLL: -- quantity is a building block in the sentencing determination.

THE COURT: No, it's not for the Court, Mr. Carroll. What I need for the sentencing determination in this case is before me in this presentence report. There is no case law and no statute that allows or basically says the Court is to dig into every other presentence report of related defendants to make that determination.

Now, if you take a look at the presentence report --

let me get -- you've got their actual sentences in the presentence report. It's Paragraph 11 through 15.

MR. CARROLL: Yes, Your Honor.

THE COURT: You -- you've got their sentences there. That's the disparity point, Mr. Carroll. Not anything else. Because it's not just the relevant conduct that determines their sentences. I -- I'm not -- I'm not -- I'm just using this as a hypothetical. They may not have gotten any adjustments for possession of a handgun. That would have affected their sentence. And so relevant conduct wouldn't really be all that there is to that particular calculation and issue.

So that would open the door to any other factors that you would then want to determine why the sentences are -- are not the same with this defendant and all the other co-conspirators. So, no, we're not going down that rabbit trail, Mr. Carroll. I'm not -- I'm not releasing all that information or any of it from these other presentence reports that are sealed.

MR. CARROLL: No, we --

THE COURT: And they were sealed with the understanding of that defendant and his attorney, and I'm not unsealing them willy-nilly.

MR. CARROLL: Your Honor, we did not want to get on that slippery slope that you described. I mean, I understand --

THE COURT: But that's where we're going to,

Mr. Carroll.

MR. CARROLL: I think we can do this without doing that.

THE COURT: No, Mr. Carroll. I don't need that information. I'm the -- I'm the sentencing person in this particular case. I don't need to look at those co-defendants' presentence -- and I don't want to call them "co-defendants" -- I guess, co-conspirators' presentence reports. They testified. I heard the testimony. It was in trial. It was subject to cross-examination. Why do I need to dig into a presentence report when I have testimony under oath and on the record?

MR. CARROLL: Well, for example, Your Honor, if --

THE COURT: You don't even know what I'm going to sentence Mr. Dennis to and whether it's even a disparity. You don't even know that.

MR. CARROLL: If -- if there are 6,000 kilograms -- just as an example --

THE COURT: Sure.

MR. CARROLL: -- assigned to Mr. Dennis based on information received from Mr. Trevino stating that he participated in the delivery of 6,000 kilograms, and his presentence report assigns him 780 kilograms --

THE COURT: Okay. But let's take another hypothetical, Mr. Carroll, because this is just purely hypothetical. If we know about the other 5,000 and however many

kilograms as to Mr. Dennis -- if it was given under a Rule 11, it couldn't be used as relevant conduct. And I'm not disclosing all of those factors and those rabbit trails we go down on, because that relevant conduct is not dispositive of this issue in the court today. Because I -- you know I don't see anything under Rule 11. That's not part of what I hear or see for sentencing purposes. So I don't know if that information as to Mr. Dennis -- it's not -- it's relevant conduct as to Mr. Dennis, but it can't be used under the co-conspirator, so it didn't tell me anything, Mr. Carroll. It just doesn't tell me anything. And you can't rely on that information to say Mr. Dennis' relevant conduct should be reduced to the co-conspirators'. Because then I'd have to explain to you, Well, Mr. Carroll, I can't because there was a Rule 11. I -- I -- that's not something that the Court can begin doing. And that's what we'd end up doing in every single case if this door is opened. So I'm -- I'm not going down those rabbit trails.

And keep in mind, as -- as you know generally, Mr. Carroll -- I know you know this, I'm going to just put it on the record. There are people that are involved in the conspiracy that are not involved in the entire conspiracy. Okay? So where Mr. Dennis would be held liable for his entire involvement in the conspiracy, that may not be everybody -- the same for all the other co-conspirators. Maybe I couldn't hold them accountable for some of it because they exited the

conspiracy at one point or they entered it at another point. So it doesn't tell me anything without all of that other information that I would then have to disclose to you or disclose on the record to explain the disparity. We're not going there.

Now, y'all have no idea what I'm going to do for sentencing. I have no idea what I'm going to do for sentencing. We don't know where we are in some of this stuff.

Now, do you have -- for those purposes, Mr. Carroll, do you have the sentences that have been imposed on some of the co-conspirators? And keep in mind, I have one co-conspirator --

Mr. Kennedy, did you try the case?

AUSA KENNEDY: With -- with Mr. Bonner?

THE COURT: Remind me on Mr. Perez-Orosco -- remind me of some of the witnesses' names at the trial, because it's been a while so I don't remember all of the witnesses' names.

AUSA KENNEDY: Yes, Your Honor. There was Rey Trevino, and then the other individual was Garcia-Herrera.

THE COURT: Okay. Now, keep in mind, Mr. -- and Mr. Carroll, would you show Mr. Dennis these two paragraphs that I'm referring to. Mr. Dennis was worried about the five years.

Mr. Trevino and Mr. Herrera, 12 and 13, they've got -- they got five years, and they testified at the trial. They testified. You're thinking five years for going to trial -- and -- and you're not being punished for going to

Okay, Mr. Carroll, I'm -- I'm not granting that motion for discovery of the co-defendants' presentence reports. That takes care of at least one of the outstanding matters at this point.

What -- what other outstanding matters before we go through the objections?

MR. CARROLL: We -- we addressed them. There were the two, Your Honor.

THE COURT: Okay. Just the two.

MR. CARROLL: And we addressed them.

THE COURT: Okay. And I -- I still -- Mr. Carroll, do you want a copy of this letter for your files?

MR. CARROLL: I would appreciate that, Your Honor.

THE COURT: Okay.

MR. CARROLL: Thank you.

THE COURT: Okay. So, Mr. Carroll, let's start going through the objections. And I think most of the objections were information that your client wanted to add to the presentence report. Is -- is that a -- a majority, I should say. Not all of them.

MR. CARROLL: Some -- some of the objections are the early objections, primarily, Your Honor.

THE COURT: Right. Okay, so let me ask you this. The first objection that I'm seeing in -- in my documentation had to do with the inclusion of what -- his point of view on the

United States Constitution, Fourth Amendment

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

APPENDIX G

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

1B1.3 - RELEVANT CONDUCT (FACTORS THAT DETERMINE THE GUIDELINE RANGE)

(a) CHAPTERS TWO (OFFENSE CONDUCT) AND THREE (ADJUSTMENTS). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) CHAPTERS FOUR (CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD) AND FIVE (DETERMINING THE SENTENCE). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	CAUSE NO. DR18-CR-1199-AM
	§	
MICHAEL DEWAYNE DENNIS	§	

CORRECTED
DEFENDANT MICHAEL DEWAYNE DENNIS'S
MOTION TO SUPPRESS EVIDENCE OF WARRANTLESS VIDEO SURVEILLANCE AND ANY FRUITS THEREFROM

TO THE HONORABLE ALIA MOSES, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS, DEL RIO DIVISION:

Now comes the Defendant, Mr. Michael Dewayne Dennis, in the above-captioned matter and hereby respectfully moves, pursuant to the Fourth Amendment of the United States Constitution and Fed. R. Crim. P 12, to suppress evidence of and fruits from a warrantless video surveillance which was used to seize the Defendant, to seize items, and to secure a statement from the Defendant. *See*, generally, *United States v. Leonel Michael Vargas*, No. CR-13-6025-EFS (E.D. Wash. Dec. 15, 2014) (Order Granting Defendant's Motion to Suppress, Docket No. 106 and at 2015 U.S. Dist. LEXIS 451 (Jan. 5, 2015) (covert video surveillance violated Fourth Amendment) and *U.S. v. Moore-Bush*, Case No. 3:18-cr-30001-WGY, *1 (W.D. Mass. June 3, 2019) and at 2019 U.S. Dist. LEXIS 92631 (June 3, 2019).

A. Relevant Facts

The Government installed two pole cameras, one camera on or about April 20, 2018, and the other on or about June 14, 2018, to surveil the properties and curtilage located at 6110 Grapevine and 6118 Grapevine in Houston, Texas (collectively, the "Grapevine Properties"). The

6118 Grapevine Property was Mr. Dennis's private home, and the 6110 Grapevine Property was a tire shop that Mr. Dennis inherited from his grandfather. The tire shop was no longer open to the public and, instead, was utilized by Mr. Dennis as a private workshop for repairing and reselling vehicles and other mechanical equipment.

One pole camera was directed over an iron fence and trees at the two garage doors of the 6010 Grapevine workshop. *See* Figure 1. The second camera was directed over a wood privacy fence at the back of the 6018 Grapevine home. *See* Figure 2. The first pole camera continuously recorded activities associated with Mr. Dennis's private life for more than three (3) months, and the second for over a month. When being monitored, the pole camera had the ability to pan and to zoom in on residents, visitors, vehicles, service providers – anyone and everyone who was connected in any way to Mr. Dennis's home. No judicial authorization was obtained for the use of the camera, and the Government obtained information from the pole camera that was used for and included in a search warrant for the Grapevine Properties.

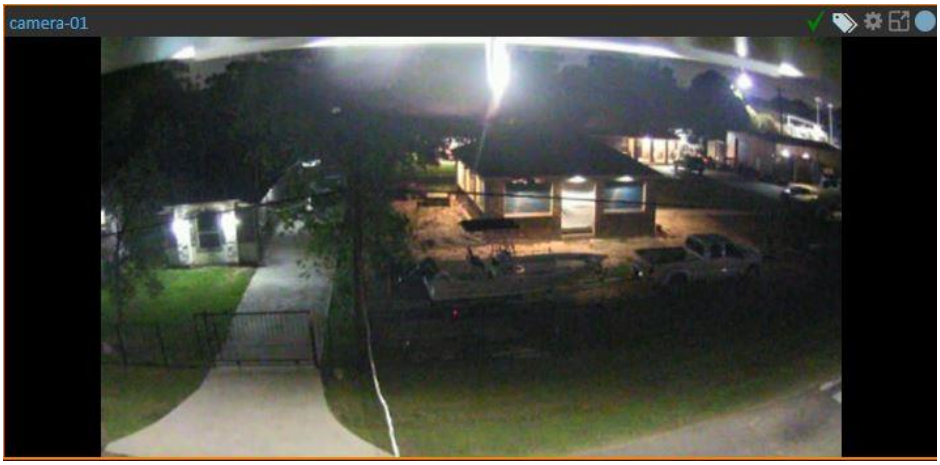

Figure 1: Camera 01 was aimed at the front of Mr. Dennis's home (left) and Mr. Dennis's workshop (right).

Figure 2: Camera 02 was aimed at Mr. Dennis's backyard.

B. The Unlawful Video Surveillance and its Fruits Should Be Suppressed

The warrantless use of pole camera surveillance violated Mr. Wills's Fourth Amendment right to be protected from unreasonable government intrusion into his life. *See Carpenter v. United States*, 138 S.Ct. 2206, 22219 (2018). Indeed, the Fifth Circuit has long held that "indiscriminate video surveillance raises the spectre of the Orwellian state." *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987). The pole camera footage and images must be suppressed, along with all evidence derived directly or indirectly therefrom. *See Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963).

Mr. Dennis had a constitutionally protected reasonable expectation of privacy in the Grapevine Properties, where he lived and where he worked in his private workshop. *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (citing *California v. Ciraolo*, 476 U.S. 207, 212-13, 106 S.Ct. 1809, 1812, 90 L. Ed. 2d 210 (1986)); *United States v. Yanez*, 2012 U.S. Dist. LEXIS 38981, *7 (S.D. Tex. 2012); *U.S. v. Moore-Bush*, 2019 U.S. Dist. LEXIS 92631 (W.D. Mass. June 3, 2019).

The Fifth Circuit Court of Appeals, in *United States v. Cuevas-Sanchez*, 821 F.2d 248, 250 (5th Cir. 1987), held that that camera surveillance of a defendant's curtilage violated the

defendant's Fourth Amendment rights. In doing so, the court rejected the government's contentions that the defendant had no subjective expectation of privacy "in activities conducted in his backyard visible to a casual observer." *United States v. Cuevas-Sanchez*, 821 F.2d 248, 250 (5th Cir. 1987). The Fifth Circuit explained the curtilage of the defendant's home was "an area protected by traditional fourth amendment analysis," and that the defendant had manifested a subjective expectation of privacy in erecting a fence around the property. *United States v. Cuevas-Sanchez*, 821 F.2d 248, 250 (5th Cir. 1987); *see also United States v. Yanez*, 2012 U.S. Dist. LEXIS 38981, *8 (S.D. Tex. 2012)(holding electronic video surveillance of the defendant's backyard, including his driveway, garage, and the back of his house required a warrant); *see also U.S. v. Moore-Bush*, 2019 U.S. Dist. LEXIS 92631 (W.D. Mass. June 3, 2019)(quiet, residential neighborhood in a house obstructed by a large tree).

Moreover, Mr. Wills has a reasonable expectation of privacy "in the whole of his movements" over the course of three months "from continuous video recording with magnification and logging features in the front of [his] house." *U.S. v. Moore-Bush*, 2019 U.S. Dist. LEXIS 92631 (W.D. Mass. June 3, 2019). As in *U.S. v. Moore-Bush*, the Court may infer from Mr. Dennis's choice of neighborhood and home within it that he did not subjectively expect to be surreptitiously surveilled with meticulous precision each time he or a visitor came or went from his home. *U.S. v. Moore-Bush*, 2019 U.S. Dist. LEXIS 92631 (W.D. Mass. June 3, 2019).

The prolonged, covert use of a hidden pole camera to spy on and record the activities associated with a private home invades privacy in a manner much different from simple physical surveillance. In general, United States citizens do not expect law enforcement to be allowed to undertake this kind of invasive and surreptitious surveillance without resort to a judicially approved warrant: "society expects that law enforcement's continuous and covert video

observation and recording of an individual's front yard must be judicially approved…." *United States v. Vargas*, 2014 U.S. Dist. LEXIS 184672, at *17 (Wash E.D. 2014).

A person has a "reasonable expectation of privacy in the whole of [her] physical movements." *Carpenter v. United States*, 138 S. Ct. 2006, 2219 (2018). Carpenter addressed law enforcement's warrantless accessing of CSLI information where that information is in the hands of a third party and concluded that the acquisition of the defendant's CSLI data was a search that generally requires a warrant supported by probable cause. In that case, the government used an 18 U.S.C. §2703(d) subpoena to access the defendant's CSLI records, but the showing necessary for the subpoena "fell well short of the probable cause required for a warrant." *Carpenter*, 138 S. Ct. at 2219. According to the *Carpenter* Court, the CSLI search invaded Carpenter's personal privacy interests that are protected by the Fourth Amendment.

Here, the pole camera surveillance focused on Mr. Dennis's home and workshop recorded the whole of his physical movements in and out of his home for a period of three months. Prolonged surveillance, for Fourth Amendment purposes, is not only quantitatively but also qualitatively different. Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. *United States v. Maynard*, 615 F.3d 544, at 561-562 (D.C. Cir. 2010), aff'd sub nom *United States v. Jones*, 132 S.Ct. 945 (2012). The pole camera surveillance and recording catalogued the privacies of Mr. Dennis's personal life, his visitors, deliveries, associations, etc, as well as the time and date of all of his physical movements in and out of her home - a "too permeating police surveillance." *United States v. Di Re*, 332 U.S. 581, 595 (1948).

The *Carpenter* court recognized that modern technology has created new challenges for Fourth Amendment analysis:

> Although no single rubric definitively resolves which expectations of privacy are entitled to protection,1 the analysis is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll v. United States*, 267 U. S. 132, 149, 45 S. Ct. 280, 69 L. Ed. 543, T.D. 3686 (1925). On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States*, 116 U. S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746 (1886). Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re*, 332 U. S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210 (1948). (emphasis added).

138 S.Ct. at 2213-2214.

It is difficult to imagine what could be a more permeating Orwellian police surveillance than what is provided by a pole camera constantly recording the activities associated with a person's home. As the court observed in *Carpenter*, constant surveillance can reveal "familial, political, religious, and sexual associations." *Carpenter*, 138 S. Ct. at 2217 (quotation omitted).

As with CSLI data, the acquisition of a comprehensive and detailed recording of Ms. Moore's private life is a search deserving of Fourth Amendment protection and that protection is afforded by a warrant. This court should decline to grant the government unrestricted access to intimacies of Mr. Dennis's private life absent a warrant authorizing the intrusion:

> As Justice Brandeis explained in his famous dissent, the Court is obligated—as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government"—to ensure that the "progress of science" does not erode Fourth Amendment protections. *Olmstead v. United States*, 277 U. S. 438, 473-474, 48 S. Ct. 564, 72 L. Ed. 944 (1928). Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent. *Di Re*, 332 U. S., at 595, 68 S. Ct. 222, 92 L. Ed. 210.

Carpenter, 138 S.Ct. at 2223.

Before the police can set up a pole camera to record the activities intimately associated with a home, they should be required to get a warrant. *Riley v. California*, 573 U.S. 373, 403 (2014).

WHEREFORE, for the reasons set forth herein, Defendant Michael Dewayne Dennis requests that this Court allow this motion and Order that all evidence obtained through the warrantless use of the pole camera in violation of his Fourth Amendment rights be suppressed and that all evidence derived from that unconstitutional search and seizure also be suppressed. Mr. Dennis further requests a hearing at which the Government must establish that the use of the pole camera surveillance and recording over a three-month period falls within one of the narrow exceptions of the warrant requirement.

Respectfully Submitted,

GOLDSTEIN & ORR

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ATTORNEYS FOR MICHAEL DENNIS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent to Ms. Amy Hail, Assistant United States Attorney, as a registered participant of the CM/ECF this 27th day of August, 2019.

By: */s/Abasi D. Major*

Abasi D. Major

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	CAUSE NO. DR18-CR-1199-AM
	§	
MICHAEL DEWAYNE DENNIS	§	

ORDER ON CORRECTED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OF WARRANTLESS VIDEO SURVEILLANCE AND ANY FRUITS THEREFROM

On this _____ day of _____, 2019, came to be considered the Corrected Defendant's Motion to Suppress Evidence of Warrantless Video Surveillance and Any Fruits Therefrom, the Court having considered the merits of same, finds it:

(GRANTED) (DENIED).

_____
HON. ALIA MOSES
UNITED STATES DISTRICT JUDGE