NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALFONZO JOHNLOUIS,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

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

APPENDIX - COURT OPINIONS AND ORDERS

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 21-30085

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ALFONZO JOHNLOUIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:18-CR-185-2

ON PETITION FOR REHEARING EN BANC

Before BARKSDALE, STEWART, and DENNIS, *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 Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 11, 2022
Lyle W. Cayce
Clerk

No. 21-30085

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ALFONZO JOHNLOUIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:18-CR-185-2

Before BARKSDALE, STEWART, and DENNIS, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

This case presents a novel question involving two provisions within the United States Constitution: the United States Postal Service and the Fourth Amendment.[1] Alfonzo Johnlouis moved to suppress narcotics evidence that the Government seized after a letter carrier's thumb slipped

[1] In 1789, the states ratified the Constitution with a clause giving Congress the power "To establish Post Offices and post Roads" and "To make all Laws which shall be necessary and proper" for administering, inter alia, the agency. U.S. CONST. art. I, § 8. Two years later, they ratified the Fourth Amendment as part of the Bill of Rights. *Id.* amend. IV.

through a hole in a package, initiating an allegedly illegal search. According to Johnlouis, the Fourth Amendment per se applies to letter carriers because they are government actors subject to its warrant requirement. According to the Government, this letter carrier was not a government actor to whom the Fourth Amendment applies, and her inspection of the package did not fall within its purview. The district court agreed with the Government and denied Johnlouis's motion. For the following reasons, we AFFIRM.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 3, 2017, United States Postal Service ("USPS") letter carrier Jasia Girard was delivering mail in Lafayette, Louisiana. As she was picking up a package for delivery to 109 Hogan Drive, her thumb slipped through a preexisting hole. After feeling a "plastic bag" containing "little balls" she thought to be marijuana, Girard removed her thumb and decided she would not deliver the package because she did not feel comfortable leaving it "with all those kids around there." She then looked through the hole and observed what appeared to be "aluminum pans with a little Ziploc bag." At this point, Girard lifted a previously torn flap of the package to better assess what was inside and saw hard white rocks. Upon researching "hard white rock substance" on the internet with her phone, she determined that these rocks were probably methamphetamine.

According to Girard, she was "freaked out" and felt morally obligated not to deliver the package on account of the children in the area as well as her experience with a relative's methamphetamine addiction. Instead of leaving it with her supervisor or contacting the Postal Inspection Service—USPS's law enforcement arm—Girard brought this package and two others addressed to 109 Hogan Drive to the property manager, Billie Love.[2] She

[2] 109 Hogan Drive is one of a series of houses with a common property manager.

informed Love that she believed the packages contained methamphetamine and suggested that Love may want to call the police. Girard then left but was later contacted by Special Agent Douglas Herman of the Federal Bureau of Investigation to whom she relayed what had happened. As a letter carrier, she received no law enforcement training, and aside from the instant incident, she had never interacted with law enforcement during her employment with USPS.

Lafayette police officer Brandon Lemelle responded to Love's call and met with her at the property manager's office. Love relayed to Lemelle what Girard had told her about the discovery of the suspected methamphetamine. Lemelle also spoke with Herman, who arrived five to ten minutes after him and informed Lemelle that 109 Hogan Drive was a suspected methamphetamine stash house. A K-9 officer sniffed the three packages and "hit," leading Lemelle to believe that they contained narcotics and that he had probable cause for a search warrant that a state judge approved. Execution of the search warrant uncovered a combined eighteen pounds of methamphetamine. In an interview with officers, the owner of the residence stated that Alfonzo Johnlouis had informed her the packages would arrive at her address.

Johnlouis was indicted for (1) conspiracy to distribute and possess with intent to distribute methamphetamine, and (2) attempted possession of a controlled substance with intent to distribute. He subsequently filed a motion to suppress, arguing that the narcotics evidence had been seized in violation of the Fourth Amendment following an illegal search of a parcel by a USPS letter carrier. A magistrate judge conducted an evidentiary hearing at which the relevant testimony was adduced.

Adopting the magistrate judge's report and recommendation, the district court denied Johnlouis's motion. It determined that despite her position as a USPS letter carrier, Girard did not carry out law enforcement

action within the meaning of the Fourth Amendment; as such, it did not apply to her inspection of the package and the contents were not subject to suppression. In the alternative, the district court held that even if Girard did carry out law enforcement action within the meaning of the Fourth Amendment, such action did not rise to the level of misconduct warranting application of the exclusionary rule. Next, it determined that Lemelle's subsequent search of the package pursuant to a warrant was done in good faith and that the contents would have inevitably been discovered. Finally, the district court reasoned that Herman's statement to Lemelle that 109 Hogan Drive was a suspected stash house provided independent probable cause for the search of the package after the K-9 officer hit on it.

Johnlouis ultimately pled guilty to the conspiracy count, and the attempt count was dismissed pursuant to the terms of his plea agreement. The district court sentenced him within the guidelines range to 120 months of imprisonment, followed by five years of supervised release. Johnlouis reserved his right to appeal the denial of his motion to suppress.

II. STANDARD OF REVIEW

On appeal from a denial of a motion to suppress evidence, this court reviews "the district court's findings of fact for clear error and its conclusions of law de novo." *United States v. Lopez-Moreno*, 420 F.3d 420, 429 (5th Cir. 2005). We may affirm the ruling "on any basis established by the record," *United States v. Ibarra-Sanchez*, 199 F.3d 753, 758 (5th Cir. 1999), and should do so "if there is any reasonable view of the evidence to support it." *United States v. Michelletti*, 13 F.3d 838, 841 (5th Cir. 1994) (en banc) (citations omitted).

III. DISCUSSION

The threshold question in this case is whether the Fourth Amendment applies to Girard, a USPS letter carrier. This court must decide whether she

was a government actor to whom the Fourth Amendment applies at the time she peered into the hole and lifted the flap of the package at 109 Hogan Drive.[3] Although it is evident that Girard was an employee of the federal government, the parties dispute whether this fact alone has Fourth Amendment implications.

A. Applicable Law

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. CONST. amend. IV. "[O]fficial intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). "Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable." *United States v. Jacobsen*, 466 U.S. 109, 114 (1984).

Federal courts have "consistently construed [the Fourth Amendment] as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the [g]overnment or with the participation or knowledge of any governmental official.'" *Id.* at 113 (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)). "[T]he arrival of police on the scene to confirm the presence of contraband

[3] The Government does not specifically dispute that Girard's actions constituted a search. According to the Government, whether Girard in fact searched the package "need not be resolved, for . . . that conduct was not subject to the protections of the Fourth Amendment." Because the Government does not dispute that Girard in fact searched the package—that is, "examine[d] [it] by inspection," *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (internal quotation marks and citation omitted)—we assume that a search occurred.

and to determine what to do with it does not convert [a] private search into a government search subject to the Fourth Amendment." *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992) (quoting *Illinois v. Andreas*, 463 U.S. 765, 769 n.2 (1983)).

B. Analysis

Notably, this court's precedents assessing the constitutionality of searches by USPS employees have involved searches by members of the Postal Inspection Service, not letter carriers. *See, e.g.*, *United States v. Osunegbu*, 822 F.2d 472, 474–75, 477–80 (5th Cir. 1987); *United States v. King*, 517 F.2d 350, 351–55 (5th Cir. 1975); *see generally* 39 C.F.R. § 233.1(a) (describing postal inspectors' investigative and arrest powers). However, neither party cites any authority discussing whether a person falls within the ambit of the Fourth Amendment merely by dint of their being a USPS employee. And like the district court, we are "not aware of any case finding that suppression is justified based upon the acts of a letter carrier without any intervening act by a postal inspector or other law enforcement officer[.]"

Moreover, the cases cited by the parties in support of their arguments do not offer a definitive answer. *United States v. Van Leeuwen* and *Ex parte Jackson*, for instance, place within the scope of the Fourth Amendment searches conducted by "postal authorities" and "officials connected with the postal service," respectively. 397 U.S. 249, 251 (1970); 96 U.S. 727, 733 (1877). Yet neither explores the scope of those terms nor casts any light on whether a letter carrier qualifies as an "authority" or "official." Indeed, *Van Leeuwen*—despite containing the above language that the district court, in any event, found to be dicta—is not a case about USPS employees at all; a USPS employee first alerted police to a suspicious package, but the issue in that case was whether a customs agent violated the Fourth Amendment by detaining the package while awaiting a warrant to search it. 397 U.S. at 250–53.

However, although there does not appear to be any authority that expressly endorses Johnlouis's per se approach, there are several cases that suggest being a government employee does not make one a government actor for Fourth Amendment purposes. Each requires something more—namely, a connection to law enforcement.

Consider *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). In this case, public hospital staff conducted urine tests of obstetrics patients who were subsequently arrested after testing positive for cocaine and who brought successful Fourth Amendment claims. The Supreme Court concluded that the "members of [the state hospital] staff [were] government actors, subject to the strictures of the Fourth Amendment." *Id.* at 76. However, in doing so, the Court repeatedly emphasized that these staff members were carrying out the tests "for law enforcement purposes," that it was "law enforcement officials who helped develop and enforce the policy," and that there was "extensive involvement of law enforcement officials at every stage." *Id.* at 69, 73, 84. Crucially, Girard's role as a letter carrier did not involve law enforcement duties, she received no law enforcement training, and she never interacted with law enforcement during her employment with USPS outside of this incident.

Meanwhile, the cases Johnlouis cites from sister circuits undermine his argument because they too underscore the primacy of law enforcement ties in the Fourth Amendment context. *See United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016); *Oliver v. United States*, 239 F.2d 818 (8th Cir. 1957). In *Ackerman,* the Tenth Circuit held that the National Center for Missing and Exploited Children was a government actor for the purposes of the Fourth Amendment because Congress imbued it with "many unique law enforcement powers." 831 F.3d at 1298; *see generally id*. at 1295–1300. And in *Oliver*, the Eighth Circuit held that postal employees required a warrant to inspect first-class mail, but the letter carrier who intercepted the suspicious

package "had been serving also as an undercover agent for the Bureau of Narcotics."[4] 239 F.2d at 820; *see generally id*. at 820–23.

Of course, we have "never limited the [Fourth] Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police." *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). "[W]e have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities," including building inspectors,[5] firefighters,[6] teachers,[7] healthcare workers,[8] and, yes, even USPS employees.[9] *Id*. After all, "[t]he basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 528 (1967). "Because the individual's interest in privacy and personal security suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards, it would be anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when [he] is suspected of criminal behavior." *New Jersey*, 469 U.S. at 335 (internal quotation marks and citations omitted).

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[4] It should be noted that *Oliver* is silent as to who actually performed the search. *See Oliver*, 239 F.2d at 820 (stating only that "the package was opened and inspected" after the letter carrier alerted the USPS superintendent).

[5] *See New Jersey*, 469 U.S. at 335 (citing *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 528 (1967)).

[6] *See id*. (citing *Michigan v. Tyler*, 436 U.S. 499, 506 (1978)).

[7] *See id*. at 341.

[8] *See Ferguson*, 532 U.S. at 76.

[9] *See, e.g.*, *Osunegbu*, 822 F.2d at 480; *see also United States v. Jones*, 833 F. App'x 528, 537–38 (5th Cir. 2020) (per curiam) (holding that seizure of packages by a contractor hired by the Postal Inspection Service did not violate the Fourth Amendment because the seizure was based on reasonable suspicion).

But the building inspectors, firefighters, teachers, healthcare workers, and USPS employees that courts have identified as government actors to whom the Fourth Amendment applies were all carrying out law enforcement functions. The same cannot be said of Girard. Surely her inspection of the package addressed to 109 Hogan Drive does not resemble the "arbitrary invasions by government officials" that the Fourth Amendment was ratified to protect against. It was not even motivated by a desire to investigate a legal violation. The record reflects that Girard's thumb slipped through a hole in a package, and that she inspected this package after feeling its contents because of her concern for children and her experience with a relative. She was not inspecting the package to enforce law. We therefore hold that the Fourth Amendment does not per se apply to Girard. As such, we offer a narrow holding tailored to the peculiar facts of this case and the particular activities of individual government actors. Here, despite working for an agency that employs inspectors who undertake law enforcement activities, Girard is not one of them. Notwithstanding that she works for the government, she is not a government actor to whom the Fourth Amendment applies.

Ordinarily, this resolution would not dispose of Johnlouis's Fourth Amendment claim because he could argue that Girard was a private person acting in the capacity of a government agent by searching the package with the knowledge of, or in order to assist, law enforcement. *See United States v. Pierce*, 893 F.2d 669, 673 (5th Cir. 1990), *cert. denied*, 506 U.S. 1007 (1992). Where a search is conducted by someone other than "an agent of the government," this court has held that it still violates the Fourth Amendment if (1) "the government knew of and acquiesced in the intrusive conduct" and (2) "the party performing the search intended to assist law enforcement efforts or to further his own ends." *Id.* But Johnlouis explicitly disclaims any such alternative argument, calling the district court's characterization of the inspection as a private citizen search "legal error." He maintains that "the

letter carrier is a government employee/actor" who "cannot search a Priority Mail, First Class Mail (sealed mail), without a search warrant" even though "none of her job duties entail law enforcement duties." Johnlouis has thus abandoned any argument that the Fourth Amendment applies to Girard outside of his contention that her employment by USPS per se renders her subject to the Fourth Amendment. *See United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006).

Accordingly, because the Fourth Amendment does not per se apply to Girard, the district court correctly concluded that she did not perform an unconstitutional warrantless search of a package that could justify the suppression of evidence. We therefore do not reach Johnlouis's arguments with respect to the exclusionary rule, the good faith exception, and the inevitable discovery and fruit of the poisonous tree doctrines.[10]

IV. CONCLUSION

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

[10] Although the special concurrence raises an alternative basis for affirmance, the independent source doctrine was never mentioned in the magistrate judge's report and recommendation, the district court judgment adopting it, and the briefs and oral argument on appeal. "We see no principled basis for addressing [an issue not presented by either side] here." *Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021).

JAMES L. DENNIS, *Circuit Judge*, concurring in the judgment:

"We may affirm the district court's ruling on a motion to suppress based on any rationale supported by the record." *United States v. Ganzer*, 922 F.3d 579, 583 (5th Cir. 2019) (cleaned up). Unlike the majority, I would assume without deciding that the Fourth Amendment applies to a USPS letter carrier like Ms. Girard who searched a package (and did research on what she observed) that she was delivering in the scope and course of her official duties, but would affirm the district court on the alternate ground that the independent source doctrine renders the exclusionary rule inapplicable even if Girard's warrantless search violated the Fourth Amendment. Thus, I concur in the judgment only.

As the majority notes, our court has previously held that a search by a member of the Postal Inspection Service, the law enforcement arm of the USPS, must comply with the Fourth Amendment's strictures. *United States v. Osunegbu*, 822 F.2d 472, 474, 477–80 (5th Cir. 1987). But I've been unable to find a published precedent involving a USPS letter carrier (not a postal inspector). In distinguishing a letter carrier from a postal inspector for purposes of the Fourth Amendment, I am concerned that the majority's "connection to law enforcement" test may prove unworkable for district courts and could lead to confusion rather than clarity in our case law.[1] We should leave resolution of this question—whether there is a difference between a postal inspector and a letter carrier for Fourth Amendment

[1] For example, application of the majority's test, in my view, actually leads to the conclusion that the Fourth Amendment applies to Girard. By Girard's own admission, her search of the package was motivated by a suspicion that it contained illegal drugs, and not only did she look inside the package, but she then investigated what she saw by doing an internet search on her phone to confirm her suspicions.

purposes—for another case, because this case can be resolved on firmer grounds.

Whether the Fourth Amendment applies and is violated in a given case does not end the inquiry; if the search is unconstitutional, there is still the matter of whether the fruits of the search should be suppressed pursuant to the exclusionary rule. *See Herring v. United States*, 555 U.S. 135, 138 (2009) ("[S]uppression is not an automatic consequence of a Fourth Amendment violation."). In this case, I would hold that exclusion is not warranted, even if Girard's search violated the Fourth Amendment, because an independent source furnished legal grounds to admit the evidence.

In preparing to deliver a package addressed to 109 Hogan Drive, the letter carrier's thumb accidentally slipped into a pre-existing hole in the package, and she felt what she thought was marijuana.[2] She then manipulated the flap to look into the box and saw what she thought looked like hard white rocks.[3] She did an internet search on her phone for "hard white rock substance" and concluded that the package contained methamphetamines. She then delivered the package to a private party, the property manager of the Madeline Place housing complex, which includes 109 Hogan Drive, and told the manager about her suspicion that the package contained methamphetamines, even though suspicious packages are supposed to be returned to the postal inspector per USPS policy. *See* USPS, § 169.2, *Reporting Postal Offenses,* Postal Operations Manual (POM Issue 9, July 2002); USPS, § 223.5, *Suspected Narcotics*, Administrative Support Manual (ASM 13, July 1999). The property manager then called the police.

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[2] The district court did not find, and Johnlouis does not contend on appeal, that this slip of Girard's thumb constituted a "search."

[3] The Government does not seriously dispute that Girard's actions in lifting the flap of the package to get a look at its concealed contents constituted a "search."

The police in turn obtained a valid search warrant based on independently-developed probable cause, most significantly from a positive "hit" by a drug-detection dog.

The district court, assuming *arguendo* that the Fourth Amendment was violated, ruled in the alternative that the evidence should not be suppressed because the inevitable discovery exception to the exclusionary rule applied. The district court reasoned that the result would have been the same if Girard had turned over the package to the postal inspector, as postal regulations instructed, because the postal inspector would have likely obtained a search warrant based on a drug-detection dog sniff or contacted the police. I agree with the district court's alternative ruling that an exception to the exclusionary rule applies, though I believe the closely-related independent source exception rather than the inevitable discovery exception is a better fit for the facts of the case.

Our court has suggested that the two doctrines are closely related and may even overlap in some cases. *United States v. Grosenheider*, 200 F.3d 321, 328 n.8 (5th Cir. 2000) (characterizing "the two doctrines" as "two sides of the same coin" because "inevitable discovery is no more than 'an extrapolation' of the independent source doctrine" (quoting *Murray v. United States*, 487 U.S. 533, 539 (1988)). The independent source doctrine was first referenced by Justice Holmes, writing for the Court in *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920). In *Silverthorne*, Justice Holmes explained that "knowledge gained by the Government's own wrong cannot be used by it" to later obtain the same knowledge by legal means, but that "this does not mean that the facts thus obtained become sacred and inaccessible." *Id.* at 392. Instead, the exclusionary rule would not apply if the same knowledge is "gained from an independent source." *Id.* at

392. The doctrine was developed further in *Segura v. United States*, 468 U.S. 796 (1984), and *Murray v. United States*, 487 U.S. 533 (1988).

Justice Brennan, dissenting in *Nix v. Williams* and joined by Justice Marshall, explained that "[w]hen properly applied, the 'independent source' exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means. It therefore does no violence to the constitutional protections that the exclusionary rule is meant to enforce." 467 U.S. 431, 459 (Brennan, J., dissenting). "The 'inevitable discovery' exception is likewise compatible with the Constitution, though it differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed." *Id.* [4]

Citing the inevitable discovery doctrine, the district court found that "the result would have been the same"—meaning the drugs would have been discovered—if Girard "had complied with USPS procedures by returning the packages to the post office" without illegally searching the package by manipulating its cardboard flap to peer into the pre-existing hole. The court reasoned that, had Girard turned over the package to the postal inspector "based on her initial, accidental discovery"—meaning the inadvertent insertion of her thumb into the pre-existing hole in the package when Girard felt what she thought were balls of marijuana wrapped in plastic between two sheet pans—then the inspector would have likely obtained a search warrant

[4] As the Third Circuit explained, "[t]he independent source and inevitable discovery doctrines . . . differ in that the former focuses on what actually happened and the latter considers what would have happened in the absence of the initial search." *United States v. Herrold*, 962 F.2d 1131, 1140 (3d Cir. 1992).

in the same manner as Officer Lemelle and the drugs would have been discovered.

The district court's inevitable discovery analysis relied on, or extrapolated from, Girard's testimony—repeated both on direct examination and on cross—that she decided to deliver the package to the property manager, Billie Love, because of her concern that it contained drugs *after* her thumb went into the package *but before* she manipulated the flap to gain a view of the contents:

> On direct examination
>
> Q. At that moment when you pulled out your thumb, what if anything did you intend to do?
>
> A. Not deliver that package, to bring it --
>
> Q. Why not?
>
> . . .
>
> A. Oh. I was going to bring it to the office manager.
>
> On cross-examination
>
> Q. Okay. Well, I just want to know one thing. When you are there looking at this box and you decided in your mind that it's not good stuff. It's something that appears to you, based upon your research, to be drugs. Why didn't you call your supervisor?
>
> A. I don't know. I freaked out. I was not delivering the box. Once I put my thumb in it and felt what appeared to be drugs, I wasn't delivering it to the door.

At the end of the suppression hearing, the district court stated that it found Girard to be credible. In applying the inevitable discovery doctrine to these facts, however, I think that the district court took a more complicated route than necessary, imagining a hypothetical road-not-taken (inevitable discovery) instead of analyzing what actually happened to determine whether

Officer Lemelle's application for a search warrant that led to the methamphetamines was in fact a result of Girard's search (independent source).

"Under the 'independent source' exception to the exclusionary rule, the government must make two showings in order for a lawful search pursuant to a warrant to be deemed 'genuinely independent' of a prior illegal search: (1) that the police would still have sought a warrant in the absence of the illegal search; and (2) that the warrant would still have been issued (i.e., that there would still have been probable cause to support the warrant) if the supporting affidavit had not contained information stemming from the illegal search." *United States v. Runyan*, 290 F.3d 223, 234 (5th Cir. 2002) (citation omitted) (quoting *Murray*, 487 U.S. at 542).

Though unpublished, our decision in *United States v. Newton* provides a helpful illustration of the doctrine. In *Newton*, a police officer responding to a call about drug sales at an apartment complex smelled marijuana emanating from a specific apartment and then peered through a gap in the apartment's closed window blinds, at which point he saw Newton handling bags of marijuana. 463 F. App'x 462, 465–66 (5th Cir. 2012). When officers knocked on the door, Newton fled in a car, but was later found and arrested while running on foot. *Id.* at 466. Officers obtained a search warrant and searched the apartment. Newton moved to suppress the drugs because the search warrant affidavit included the fact that an officer observed Newton handling marijuana. *Id.* at 465.

Our court, assuming that the officer violated the Fourth Amendment by peeking through the window, held that suppression of the evidence was not required because of the independent source doctrine. Even when the tainted information was removed from the affidavit, the remaining facts—particularly, the odor of marijuana—provided probable cause for a search

warrant of the apartment for drugs. *Id.* at466. The same is true in this case. Even when the tainted information—here, Girard's observation of the methamphetamines—is removed from the affidavit, the remaining facts in the affidavit provided probable cause for a search warrant for the packages.

As to the first part of the test, whether Officer Lemelle would have sought a warrant in the absence of Girard's search, the record supports the conclusion that the answer is yes. Had Girard delivered the package to Love and told her that she thought the package contained *marijuana*, there is no reason to think that Love would not have called Officer Lemelle or that he would not have investigated the suspicious package and sought a search warrant. Put another way, Girard's unlawful visual inspection of the interior of the package only provided the additional information that Girard thought the package contained one illegal drug—methamphetamines—instead of another illegal drug—marijuana. It is just as likely Officer Lemelle would have responded with the K-9 no matter what kind of illegal drugs he thought were suspected to be in the package. Lemelle testified that he drove to the location with a K-9 because it was "normal" to dispatch a K-9 when responding to a call about a suspicious package. He also testified that, pursuant to department rules, he is required "to at least get a K-9 alert" when seeking a search warrant for a postal package.

As to the second part of the test, whether there would have been probable cause for the warrant absent the information gleaned from Girard's visual interior search, based on our precedent the answer is also yes. Without relying on Girard's visual interior search, but relying only on her alerting the police to a suspicious package based only on her accidental thumb feel, under our precedent there was still sufficient support for probable cause to issue a search warrant because a certified police K-9 conducted a drug-detection sniff and alerted to the presence of drugs in the packages. *See United States v. Ned*, 637 F.3d 562, 567 (5th Cir. 2011) ("We have repeatedly affirmed that

an alert by a drug-detecting dog provides probable cause to search.") (citing *Resendiz v. Miller*, 203 F.3d 902, 903 (5th Cir. 2002) (holding that a "drug-sniffing canine alert is sufficient, standing alone, to support probable cause for a search")).

* * *

Because the record supports affirming the district court's denial of the motion to suppress on an independent source rationale, I concur in the judgment on that ground.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

UNITED STATES OF AMERICA	**CASE NO. 6:18-CR-00185**
VERSUS	**JUDGE ZAINEY**
DERRICK FELTON (01) **ALFONZO JOHNLOUIS (02)** **KIANA LEWIS (03)**	**MAGISTRATE JUDGE HANNA**

JUDGMENT

For the reasons stated in the Report and Recommendation [Rec. 166] of the Magistrate Judge previously filed herein and after an independent review of the record, a *de novo* determination of the issues, and consideration of the objections filed herein, and having determined that the findings are correct under applicable law for the reasons set forth in the Report and Recommendation;

IT IS ORDERED that the Motions to Suppress filed by Defendants, Derrick Felton and Alfonzo Johnlouis (Rec. 137 and 138) are hereby **DENIED**.

THUS DONE AND SIGNED in New Orleans, Louisiana on this 14th day of May, 2020.

JAY C. ZAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

UNITED STATES OF AMERICA	**CASE NO. 6:18-CR-00185**
VERSUS	**JUDGE ZAINEY**
DERRICK FELTON (01) **ALFONZO JOHNLOUIS (02)**	**MAGISTRATE JUDGE HANNA**

REPORT AND RECOMMENDATION

Before the Court are Motions to Suppress filed by Defendants, Derrick Felton and Alfonzo Johnlouis. (Rec. Doc. 137 and 138). The Government opposed the Motions (Rec. Doc. 143), and Defendants replied (Rec. Doc. 148; 149). The Motions were referred to the undersigned magistrate judge for review, report, and recommendation in accordance with the provisions of 28 U.S.C. §636 and the standing orders of this Court. The Court conducted an evidentiary hearing on March 5, 2020. (Rec. Doc. 156). The parties filed post-hearing briefs. (Rec. Doc. 161-163). Considering the evidence, the law, and the arguments of the parties, and for the reasons fully explained below, the Court recommends that both Motions be denied.

Factual and Procedural Background

Defendants[1] were collectively indicted on one count of Conspiracy to Distribute and Possess with Intent to Distribute Methamphetamine, while Johnlouis

[1] Kiana Lewis is also a defendant, but she did not file a motion to suppress.

was additionally indicted with Attempted Possession with Intent to Distribute a Controlled Substance, and Felton was additionally indicted with Attempted Distribution of a Controlled Substance. (Rec. Doc. 1). Felton and Johnlouis were arraigned on September 5, 2018 (Rec. Doc. 54) and August 8, 2018 (Rec. Doc. 40), respectively. The Court certified the case as complex, thereby extending the time period for trial under the Speedy Trial Act. (Rec. Doc. 61). Felton and Johnlouis filed similar motions to suppress on November 26, 2019 seeking to suppress all evidence discovered following the search of three Priority Mail boxes containing methamphetamine.

Jasia Girard, a United States Postal Service (USPS) letter carrier testified that on November 3, 2017 she was delivering boxes to 109 Hogan Drive, Lafayette, Louisiana when her thumb went through an existing hole of unknown origin in one of the boxes. (Rec. Doc. 156, p. 25-27). When her thumb was in the box, she felt two aluminum pans and a plastic bag containing little balls, which she initially thought to be marijuana. (Rec. Doc. 156, p. 27; 53-54). After pulling her thumb from the box, she peered into the hole and observed what appeared to be two aluminum pans and a clear plastic bag. (Rec. Doc. 156, p. 29-30). In order to get a better view, she lifted a previously torn flap along the right side of the hole and observed what appeared to be hard white rocks in plastic bags. (*Id*.; p. 51-52; 67; 76-77). She then

Googled "hard white rock drugs" and concluded the package contained methamphetamine. (Rec. Doc. 156, p. 31; 76).

Ms. Girard did not feel comfortable leaving the packages at the door of 109 Hogan because there were children in the area so she decided to bring the packages to the office manager of the property (described as several small homes) at 216 Hudson Drive and asked the manager if she would accept delivery of the packages. (Rec. Doc. 156, p. 28). She told the manager, Billie Love, that she believed the box contained methamphetamine, based on her Google search. (Rec. Doc. 156, p. 31). Ms. Love agreed to accept the packages and later contacted the Lafayette Police Department. (Rec. Doc. 156, p. 31). Ms. Girard testified that she was "freaked out" during the whole ordeal and felt morally obligated not to leave the package on a doorstep in the area where children were around. (Rec. Doc. 156, p. 52; 72; 78; 108).

On cross-examination, Defendants' counsel presented several U.S. Postal regulations, including the Postal Operations Manual and Administrative Support Manual, as well as 18 U.S.C. §1703. (Rec. Doc. 160-1). Ms. Girard agreed that a postal employee is not permitted to open any mail. (Rec. Doc. 156, p. 34). Although she admitted that postal regulations and 18 U.S.C. §1703 prohibited postal employees from searching or inspecting any sealed mail (Rec. Doc. 160-1, p. 1-5), she admitted that she inspected the contents of the package when she lifted the flap alongside the hole because she was curious. (Rec. Doc. 156, p. 48-49; 65; Rec. Doc.

160-1, p. 15). Although she admitted that postal procedures required postal employees to report suspicious packages to the Postal Inspection Service (Rec. Doc. 160-1, p. 10-11), she testified that she did not recall or was unaware of these rules, and she admitted leaving it with the property manager rather than contacting her supervisor. (Rec. Doc. 156, p. 35-49; 71-72). However, she also testified that an office manager is an authorized recipient of packages addressed to units within a complex and that the same policies and procedures authorize delivery of a suspicious package. (Rec. Doc. 156, p. 38; 48-49; 123-24).

Officer Brandon Lemelle with the Lafayette Police Department Narcotics Team testified that Ms. Love contacted him on November 3, 2017 regarding suspicious boxes at the property manager's address. (Rec. Doc. 156, p. 130). A K9 officer and, later, FBI Agent Herman met him there. Once there, Officer Lemelle observed the three boxes and the hole in the side of one of the boxes, though he did not peer into the hole. (Rec. Doc. 156, p. 131). Ms. Love advised that a postal worker came to the office with three packages and explained to Ms. Love that her finger had slipped into a hole in one of the boxes, that she had observed what appeared to be methamphetamine, and that she had a prior experience with "crystal meth". (Rec. Doc. 156, p. 133). The postal worker told Ms. Love that she did not want to deliver the boxes to 109 Hogan and asked if she could leave the boxes with Ms. Love. (Rec. Doc. 156, p. 133). Officer Lemelle never spoke with Ms. Girard and that all the facts

regarding the postal worker's actions came from Ms. Love. (Rec. Doc. 156, p. 132). Ms. Love further advised Officer Lemelle that Vonquilla Woods had contacted her by text message on November 2 asking if mail had been delivered for her. (Rec. Doc. 156, p. 133-34; Rec. Doc. 159-1). Ms. Love also provided a written statement to Officer Lemelle regarding these facts. (Rec. Doc. 159-2).

In addition to speaking with Ms. Love and obtaining her written statement, Officer Lemelle spoke with FBI Agent Doug Herman, who advised that he was familiar with Vonquilla Woods and that 109 Hogan Drive was believed to be a stash house for methamphetamine. (Rec. Doc. 156, p. 135). Further, a K9 on scene "hit" on all three boxes, indicating the boxes contained drugs. (Rec. Doc. 156, p. 135-36).

Based on the foregoing information Officer Lemelle prepared an Affidavit for Search Warrant to open the boxes. (Rec. Doc. 159-2, p. 2-4). Since he believed he had enough information to establish probable cause based on the evidence he obtained from Ms. Love, Agent Herman, and the positive K9 alert, he did not interview Ms. Girard. (Rec. Doc. 156, p. 136). A state district court judge signed the warrant and the boxes were searched and large amounts of methamphetamine were discovered . (Rec. Doc. 156, p. 137).

Photographs introduced into evidence reveal a white Priority Mail box with a thumb-sized hole on the side and some tearing along the right side of the hole. (Rec. Doc. 138-2; 159-1, p. 10). Another photograph shows a metal pan (or pans) inside

of the opened box. (Rec. Doc. 138-3). The Government provided the actual box in question for the Court's inspection. Subsequent to the evidentiary hearing, the Court conducted an inspection of the box and the hole at the Federal Bureau of Investigations office.

Defendants seek exclusion of all evidence obtained as a result of Ms. Girard's conduct and the law enforcement officers' subsequent opening of the three boxes pursuant to warrant as unconstitutional searches. The Government contends that Defendants lack standing to challenge the searches of the boxes, which were not addressed to or from them, and, that, regardless of standing, the searches were proper.

Law and Analysis

"The exclusionary rule was created by the Supreme Court to 'supplement the bare text' of the Fourth Amendment, which 'protects the right to be free from 'unreasonable searches and seizures,' but ... is silent about how this right is to be enforced.'" *United States v. Ganzer*, 922 F.3d 579, 584 (5th Cir.), *cert. denied,* 140 S. Ct. 276 (2019), citing *Davis v. United States*, 564 U.S. 229, 231 (2011). The exclusionary rule operates to exclude the prosecution from introducing evidence obtained unconstitutionally. *Id.* Its purpose is to deter officer misconduct, not to redress injury to the victim of a constitutional violation or to address judicial errors or misconduct. *Id*., citing *Davis v. United States*, 564 U.S. 229, 236-37 (2011), and

United States v. Leon, 468 U.S. 897, 916 (1984). Exclusion of evidence is an "extreme sanction." *Id*. Its principle purpose is the deterrence of *police* misconduct, and it should only be applied when the benefits of deterrence outweigh the costs of exclusions—the potential that dangerous criminals go free. *Herring v. United States*, 555 U.S. 135, 141-45 (2009) (emphasis added). ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.") The Supreme Court has "repeatedly held" that "the rule's sole purpose… is to deter future Fourth Amendment violations." *Davis*, 564 U.S. 236-37.

Generally, "the defendant has the burden of proving, by a preponderance of the evidence, that the material in question was seized in violation of his constitutional rights." *United States v. Roch*, 5 F.3d 894, 897 (5th Cir. 1993). However, if the defendant produces evidence that he was the subject of a warrantless search, the burden shifts to the Government to justify the warrantless search. *Id.*

Defendants propose that two searches are at issue: 1) Ms. Girard's warrantless search of the box; and 2) Officer Lemelle's subsequent search pursuant to the warrant. However, the Government first challenges Defendants' standing.

I. Defendants' Standing

Even if a search is unreasonable, for the exclusionary rule to apply in favor of a particular defendant, he must prove that his own Fourth Amendment rights were

violated. *United States v. Parks*, 119 F. App'x 593, 597 (5th Cir. 2004), citing *Rakas v. Illinois*, 439 U.S. 128, 133 (1978). Both the sender and the addressee of a package have a reasonable expectation of privacy in the contents of the package. *United States v. Villarreal*, 963 F.2d 770, 774-75 (5th Cir.1992). Where the defendant is neither the sender nor the addressee, and his only interest in the package is to avoid its evidentiary force against him, he lacks standing. *Id*. Nonetheless, the Fifth Circuit has held that "individuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names." *Id*. at 774.

The boxes in this case were addressed to "Christopher Lewis" at 109 Hogan Drive, from "James Earl." (Rec. Doc. 156, p. 9-10). The Government argued that these apparently fictitious names do not confer standing, relying upon *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993) (citing *United States v. Lewis*, 738 F.2d 916, 919–20 n. 2 (8th Cir.1984), with approval, for the proposition that the use of an alias in a criminal scheme such as the one in this case may not confer standing). *Daniel* conflicts with *Villareal*; however, the Court need not resolve the issue.[2] Both Felton and Johnlouis conceded solely for the purposes of the Court's consideration

[2] The Court notes that adherence to *Villareal* appears to be the predominate approach taken by the courts. See e.g. *United States v. Bogen*, No. CR 16-40, 2017 WL 497756, at *3 (E.D. La. Feb. 7, 2017); *United States v. Pettiway*, 429 F. Appx 132, 136, fn. 5 (3d Cir. 2011); *United States v. Castellanos*, 716 F.3d 828, 834 (4th Cir. 2013); *United States v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009); as well as the well-reasoned discussion of the conflict between *Daniel* and *Villareal* in *United States v. Pitts*, 322 F.3d 449, 457 (7th Cir. 2003).

of the Motions to Suppress that they were the sender and the intended recipient, respectively. (Rec. Doc. 156, p. 19). Thus, the Court assumes standing in the following analysis.

II. The USPS Employee's Warrantless "Search" of the Box.

In brief, Defendants argue that Ms. Girard's thumb going into the hole, her feeling inside the box, and her lifting of the flap to get a better view of the contents, constituted a warrantless search by a government agent. The Government argues that Ms. Girard was acting in her personal capacity, rather than as a Government agent, and that the exclusionary rule does not apply to deter conduct of postal workers.

At the hearing, Defendants did not seriously contest that Ms. Girard's initial intrusion of placing her thumb into the hole in the box was accidental and therefore did not constitute a search. (Rec. Doc. 156, p. 204). Rather, Defendants contend that Ms. Girard's subsequent action of lifting the flap along the side of the hole and peering inside constituted a search. To search is "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection." *Kyllo v. United States*, 533 U.S. 27, 33, fn. 8 (2001). Ms. Girard testified that she "inspected" the box when she lifted the flap to get a better view of what was inside. (Rec. Doc. 156, p. 48-49; 65). She admitted to an investigator that she "got nosy." (Rec. Doc. 165-1, p. 15).

In *Villareal*, the Fifth Circuit clearly set forth that certain packages enjoy Fourth Amendment protection from governmental search:

> [C]ommon carriers or other private parties do not violate the Fourth Amendment if they search the packages of others, whether or not they have authority to do so, since the amendment protects only against unreasonable *governmental* action. *See Jacobsen*, 104 S.Ct. at 1656; *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 2404, 65 L.Ed.2d 410 (1980); *United States v. Koenig*, 856 F.2d 843, 847 (7th Cir.1988) (emphasis added). In such cases, "[t]he arrival of police on the scene to confirm the presence of contraband and to determine what to do with it does not convert the private search into a government search subject to the Fourth Amendment." *Illinois v. Andreas*, 463 U.S. 765, 103 S.Ct. 3319, 3323 n. 2, 77 L.Ed.2d 1003 (1983). But if government agents themselves are to open containers that are sent by mail or private carrier, the requirements of the Fourth Amendment must be satisfied. Therefore, even if government agents have probable cause to believe that there is contraband in a container sent by mail or common carrier, they generally cannot search it unless they first obtain a warrant, or unless some exception to the warrant requirement applies.
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> *Villarreal*, 963 F.2d at 774.

The Court agrees that Ms. Girard, as an USPS employee, could conceivably be considered a Government agent in some circumstances; however, the Court disagrees that her conduct as a letter carrier in this factual situation brings her actions within the scope of the exclusionary rule, the primary purpose of which is to deter law enforcement misconduct. The Court finds that, based on the facts of this case, Ms. Girard was not acting as a law enforcement officer and that she did not commit the type of misconduct contemplated by the exclusionary rule.

A. <u>The USPS employee was not acting as law enforcement.</u>

The United States Postal Inspection Service is the law enforcement arm of the Postal Service. See 39 C.F.R. § 233.1 *et seq*. Ms. Girard was indisputably not a member of the Postal Inspection Service. Further, letter carriers' traditional duties do not include law enforcement actions. (Rec. Doc. 156, p. 21). Ms. Girard testified that she did not have any law enforcement training and that she had not had any interactions with law enforcement other than this incident. (Rec. Doc. 156, p. 22). Cases with similar facts generally involve postal inspectors who are members of the Postal Inspection Service. See e.g. *Bogen, supra; United States v. King*, 517 F.2d 350, 351 (5th Cir. 1975); *United States v. Osunegbu*, 822 F.2d 472, 474 (5th Cir. 1987); *United States v. Huntsberry*, No. 17-CR-00331, 2018 WL 3129736, at *2 (W.D. La. June 8, 2018), *report and recommendation adopted*, No. 17-CR-00331, 2018 WL 3119863 (W.D. La. June 25, 2018). The Court is not aware of any case finding that suppression is justified based upon the acts of a letter carrier without any intervening act by a postal inspector or other law enforcement officer, or based upon the conduct by a letter carrier which could be construed as "law enforcement activity" that was not law enforcement authorized. Therefore, the Court requested, and the parties provided, post-hearing briefs on this issue. (Rec. Doc. 161-163).

Defendants first cited *United States v. Van Leeuwen*, 397 U.S. 249 (1970) for the proposition that "a postal worker who conducts an inspection or search of First Class Priority Mail parcels is required to first obtain a warrant prior to making any

search of that item." (Rec. Doc. 138-1, p. 8). In *Van Leeuwen*, a postal worker told a police officer, who happened to be present, that he was suspicious of the package. *Id*. at 250. The officer likewise noticed suspicious elements prompting an investigation and ultimately he obtained a search warrant to open the package. *Id*. Defendants rely upon the Supreme Court's statement that, "It has long been held that first-class mail such as letters and sealed packages subject to letter postage…is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment." Rec. Doc. 138-1, p.8, citing *Id*., at 251.

This Court questions whether a letter carrier, as opposed to a member of the Postal Inspection Service, could be blanketly considered a "postal authority" as contemplated by the Supreme Court's *dicta*. For example, Ms. Girard, in her capacity as a letter carrier, did not have the training, credentials, or any other statutory or regulatory authority to request a warrant from a judicial officer on her own. That task is specifically delegated to members of the Postal Inspection Service or investigative officers designated by the Board of Governors, i.e. investigators with the Office of the Inspector General. See 29 C.F.R. Pt. 233.1, 18 U.S.C. §3061 and 29 C.F.R. Pt. 230.4. The jurisprudence is replete with cases involving searches and warrants sought to be obtained by members of the Postal Inspection Service. Not so with letter carriers.

Defendants also rely on *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2010), wherein the Tenth Circuit determined that the National Center for Missing and Exploited Children was subject to Fourth Amendment requirements. In drawing the line between public and private entities, the court emphasized "police function" as a key trait in classifying an entity as governmental. *Id*., at 1295. The court reasoned that NCMEC's "special law enforcement duties and powers" rendered it a governmental entity for purposes of the Fourth Amendment. *Id*. at 1296. Under the Tenth Circuit's analysis, a letter carrier for the USPS, as opposed to a member of the Postal Inspection Service, would not qualify as such.

The "Postal Inspection Service", as opposed to the USPS in general, is defined elsewhere in federal law specifically as a "Federal law enforcement agency". See e.g., 8 U.S.C. §1701. The Chief Postal Inspector is appointed by the Postmaster General. 39 U.S.C. §204. The Cross Reference to §204 specifically states "Postal career service [such as Ms. Girard] as not including individuals appointed under this section, see 39 U.S.C. §1001". The Office of the Inspector General is given specific oversight responsibilities of "all activities of the Postal Inspection Service." 39 C.F.R. Pt. 230.1(e), *cf.* 39 U.S.C. §1001(e). The compensation for Postal Inspectors is different than that of other postal service employees. 39 U.S.C. §1003. Finally, and most importantly, 39 C.F.R. Pt. 233.1 provides the specific law enforcement authority of the Postal Inspection Service which is not delegated to postal service

employees such as Ms. Girard. See also 18 U.S.C. §3061 and 29 C.F.R. Pt. 230.4 for law enforcement authority delegated to investigative officers. Thus, even if the USPS is a "governmental agency," it would the duties of the Postal Inspector, the Postal Inspection Service and the Office of the Inspector General that bring it within the special law enforcement duties and powers contemplated in *Ackerman* not the day-to-day delivery services of a letter carrier. *Ackerman* is unavailing to Defendants.

Defendants also rely on *U.S. v. Emery*, an opinion from the District Court of South Dakota which at the time of this ruling is on appeal to the Eighth Circuit. There, a postal employee observed a toy car and a bag which appeared to contain drugs fall out of a damaged package. *United States v. Emery*, 392 F. Supp. 3d 1023, 1025-26 (D.S.D. 2019). The employee replaced the items in the box and contacted law enforcement. *Id*. Upon an officer's arrival, the employee removed the items from the box for the officer's observation. *Id*. The court denied the defendant's motion to suppress, finding the employee did not conduct a search. *Id*. at 1029. Rather, the initial intrusion—when the bag fell onto the floor—was lawful. *Id*. Having found that no search occurred, the court did not consider whether the exclusionary rule would otherwise apply to the postal employee's actions. Thus, *Emery* is inapplicable to the facts of this case.

Emery is nonetheless notable in that the court analogized the case to the Supreme Court's opinion in *United States v. Jacobsen*, 466 U.S. 109 (1984), a factually similar case involving a FedEx (i.e. private) carrier's discovery of drugs in a damaged package. *Id*. at 1029. ("And, like in *Jacobsen*, [the postal employee's] lawful initial intrusion extinguished Emery's reasonable expectation of privacy, at least to the extent that [the postal employee] now knew that the box contained a suspicious looking baggie full of a white, crystal-like substance.") In other words, the court equated the postal employee's actions to that of a private carrier under the "private search doctrine." *Id*. at 1030. The instant facts suggest the same result here.

Based specifically on the facts of this case, the Court finds that the exclusionary rule should not be applied to Ms. Girard's actions. She did not have any law enforcement training, she was not a member of the Postal Inspection Service and did not serve as law enforcement in any capacity whatsoever at the time she was in possession of the packages. Nor was she acting under the direction of any branch of law enforcement or in any law enforcement capacity delegated to her by the USPS Board of Governors or the Office of the Inspector General. Rather, her accidental discovery of the contents of the packages and suspicion of drugs prompted her curiosity to look inside the pre-existing hole by moving a pre-existing flap back a slight bit to look inside. At that point she decided to determine whether the property manager, who was a private citizen, would accept the package. Ms. Girard believed

she was authorized to deliver the package to the property manager, or she could have left it on the doorstep of the Hogan Drive address. She chose the former option in order to protect the children in the area. Once the property manager agreed to accept the package, Ms. Girard advised the property manager of her suspicions that the package contained narcotics. The Court finds there is no law enforcement action, based on these facts, that would trigger the application of the exclusionary rule.

B. The USPS employee's actions were not misconduct.

Even if the Court were to find that a law enforcement action occurred, the Court finds that Ms. Girard was not guilty of the type of misconduct which the exclusionary rule was designed to deter. In *Davis*, the Supreme Court explained:

> Real deterrent value is a "necessary condition for exclusion," but it is not "a sufficient" one. The analysis must also account for the "substantial social costs" generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.
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> The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh

> the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way[.]"

Davis, 564 U.S. at 237-238 (citations omitted).

In arguing that Ms. Girard's actions warranted application of the exclusionary rule, Defendants highlighted 18 U.S.C. §1703(a), which states:

> Whoever, being a Postal Service officer or employee, unlawfully secretes, destroys, detains, delays, or opens any letter, postal card, package, bag, or mail entrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier or other employee of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or the Postal Service, shall be fined under this title or imprisoned not more than five years, or both.

Interpreting jurisprudence indicates that §1703 requires criminal intent or proof of an unlawful purpose. *United States v. Costello*, 255 F.2d 876, 881 (2d Cir. 1958); *Fliashnick v. United States*, 223 F. 736, 738 (2d Cir. 1915) ("The evidence may be circumstantial, it may depend upon presumptions, but there must be some proof from which the jury can draw the conclusion that the defendant acted unlawfully and with guilty intent.") See also generally *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2009 (2015) ("Although there are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.'")

Defendants also submitted evidence of USPS procedures which prohibit postal employees from searching, inspecting, and delaying mail. First, the Court finds that Ms. Girard did not delay the packages, because she testified that she promptly delivered the package to the complex manager, who was an authorized recipient in this situation. (Rec. Doc. 156, p. 38; 48-49; 123-24). Second, although Ms. Girard testified that she "inspected" the box when she lifted the flap to confirm her suspicions that the box contained drugs, it borders on absurd to suggest she "opened" the box within the meaning of §1703(a) by her actions. If the Court accepted Defendants' logic, the box was "opened" before she ever looked inside of it by virtue of the pre-existing hole of undisclosed origin.

The Court finds that none of Ms. Girard's actions suggest she had the requisite intent required for a violation of §1703(a). Further, the Court finds that a single, isolated violation of a postal policy does not amount to the deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights contemplated by the exclusionary rule. Rather, to the extent Ms. Girard did violate a postal policy, which this Court expressly does not determine, the penalty lies with her employer, not by forcing society to "swallow this bitter pill" of exclusion as a "last resort."

The inevitable discovery doctrine also bears noting. This rule renders the exclusionary rule inapplicable to otherwise suppressible evidence if that evidence would inevitably have been discovered by lawful means. *United States v. Jackson*,

596 F.3d 236, 241 (5th Cir. 2010), citing 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.4(a) (3d ed.1996). In this case, the result would have been the same even if Ms. Girard had complied with USPS procedures by returning the packages to the post office and notifying her supervisor of her suspicions based on her initial, accidental discovery, subsequently corroborated by looking through a pre-existing hole with a partial tear moved out of the way to see inside. Once notified of Ms. Girard's suspicions, the Postal Inspector would likely have obtained a search warrant based on the same information which ultimately led to Officer's Lemelle's warrant, such as the K9 sniff.

The Court will not extend the reaches of the exclusionary rule to the actions of a non-law enforcement letter carrier who was not acting under the direction of law enforcement, such as a Postal Inspector, or in any law enforcement capacity. Neither will the Court punish the Government for Ms. Girard's innocent conduct motivated by moral obligations. Thus, the Court recommends that Defendants' Motions to Suppress be denied insofar as they seek to exclude evidence resulting from Ms. Girard's conduct.

The Court cautions that this ruling should not be construed, as Defendants suggest, in such a way as to upend the well-settled notion that the Constitution affords individuals a reasonable expectation of privacy in sealed packages. *Ex parte Jackson*, 96 U.S. 727, 732 (1877). The Court's ruling does not give free rein to postal

employees to search and inspect sealed mail. Rather, the particular facts of this case justify the Court's finding that the exclusionary rule should not be applied here.

III. The Officer's Search Pursuant to Warrant

Defendants next argue that Officer Lemelle's search of the boxes pursuant to a warrant was unconstitutional because the warrant was based on false statements. In *Franks v. Delaware*, the Supreme Court held that a defendant may challenge the veracity of the affidavit supporting a warrant only as follows:

> There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.
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> *Franks v. Delaware*, 438 U.S. 154, 171 (1978)

Defendants contend that Officer Lemelle's affidavit was invalid, because it did not disclose Ms. Girard's "prior illegal and warrantless search" (Rec. Doc. 138-1, p. 9), and it failed to describe Ms. Girard's search in detail. (Rec. Doc. 137, p. 5). The Government counters that even if Ms. Girard had performed an unconstitutional search, Officer Lemelle's affidavit is protected by the good faith exception. "The good-faith exception provides that where probable cause for a search warrant is founded on incorrect information, but the officer's reliance upon the information's

truth was objectively reasonable, the evidence obtained from the search will not be excluded." *United States v. Cavazos*, 288 F.3d 706, 709 (5th Cir. 2002).

Having found that Ms. Girard's conduct does not justify application of the exclusionary rule, the Court finds that Officer Lemelle's affidavit, based, in part, upon Ms. Girard's discovery, as learned second-hand through the complex manager, was valid. Defendants did not present any evidence of deliberate falsehood or reckless disregard for the truth by Officer Lemelle. In fact, Officer Lemelle did not interact with or obtain any information directly from Ms. Girard. (Rec. Doc. 156, p. 132). Rather, Officer Lemelle learned from the complex manager, Ms. Love, that a postal delivery employee's (Ms. Girard's) finger had slipped into a hole in the box and that she had observed what she believed to be methamphetamine. The affidavit attested that the employee had then left the boxes with the complex manager, who notified law enforcement and explained the circumstances to Officer Lemelle. (See Rec. Doc. 156, p. 132-34; Rec. Doc. 159-2, p. 2-4). Thus, even if Ms. Love's hearsay statements to Officer Lemelle were inaccurate, the detailed facts set forth in the affidavit show that Officer Lemelle relied in good faith on those statements. See *United States v. Satterwhite*, 980 F.2d 317, 321 (5th Cir. 1992) ("An affidavit may rely on hearsay—information not within the personal knowledge of the affiant, such as an informant's report—as long as the affidavit presents a 'substantial basis for

crediting the hearsay.'") Defendants presented no evidence that Ms. Love's statements should have been discredited.

In addition to Officer Lemelle's good faith reliance on Ms. Love's statements, in conjunction with Agent Herman's statement regarding the belief that 109 Hogan was a stash house for methamphetamine, Officer Lemelle demonstrated additional and independent probable cause after the K9 alerted to the presence of drugs in the boxes. See *Franks, supra, fn. 8* ("[I]f what is left [after the inaccuracies] is sufficient to sustain probable cause, the inaccuracies are irrelevant."). The Fifth Circuit in *Daniel, supra*, considered a similar scenario in which information from an airline worker regarding a suspicious package prompted law enforcement to engage K9 assistance. *Daniel*, 982 F.2d at 148 (5th Cir. 1993). The court held that no Fourth Amendment violations occurred when the package was only briefly detained, and the sender of the package had no reasonable expectation of privacy on the exterior of the package. *Id*. at 150, citing *United States v. Lovell*, 849 F.2d 910, 913 (5th Cir.1988). See also *Huntsberry*, 2018 WL 3129736, at *6, citing *United States v. Dovali-Avila*, 895 F.2d 206, 207-08 (5th Cir. 1990); and *United States v. Gonzalez–Basulto*, 898 F.2d 1011, 1013 (5th Cir. 1990). ("Based solely on the K-9s alerting to the presence of narcotics in the packages, probable cause was established to search the packages.") Defendants have not presented any evidence that Officer Lemelle's

affidavit was deliberately false or not otherwise based on probable cause. Therefore, the Court finds that the warrant was valid.

Conclusion

For the reasons discussed herein, it is recommended that Defendants' Motions to Suppress (Rec. Doc. 137 and 138) be DENIED.

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed. R. Crim. P. 59(b), parties aggrieved by this recommendation have fourteen days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen days after being served with of a copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in the report and recommendation within fourteen days following the date of its service, or within the time frame authorized by Fed. R. Crim. P. 59(b) shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the district court, except upon grounds of plain error. See *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. §636(b)(1).

THUS DONE in Chambers, Lafayette, Louisiana on this 7th day of April, 2020.

PATRICK J. HANNA
UNITED STATES MAGISTRATE JUDGE