

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AARON LEE PORTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI**

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1 reasonable suspicion to believe that backpack contains a gun
2 or evidence of a crime. This is really not very different
3 from that.

4 The officers don't have anything indicating that this
5 particular backpack contains evidence of a crime, let alone
6 the crime they're arresting Mr. Porter for. So we do not
7 believe there's reasonable suspicion here to seize the
8 backpack, and because of that everything that follows was
9 unlawful.

10 THE COURT: Okay. Thank you. The Court appreciates
11 the presentations of counsel that were quite thorough, both
12 written and oral argument. As pertinent to the issue at hand,
13 which is whether or not to suppress the evidence found in the
14 backpack, the Court makes the following findings of fact: On
15 August 6th, 2020, Detective Lopez of the Denver Police
16 Department was assigned to assist Detective Brian Lang of the
17 Denver Police Department who was the chief investigator on
18 investigation of a shooting that had occurred on July 22,
19 2020.

20 On that particular day, August 6th, 2020, Lopez
21 received a briefing prior to conducting surveillance at the
22 home of the defendant Aaron Porter. The briefing, which was
23 provided in the form of a bulletin, informed Detective Lopez
24 that Mr. Porter was a Crips street gang member, that he was
25 likely to be found at a specific address, that he was wanted

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1 for attempted murder, indeed, they had an arrest warrant for
2 him on that charge, and that he was believed to be armed and
3 dangerous, and specifically to be armed with a handgun.

4 Detective Lopez, with that background information,
5 undertook surveillance at what I believe was either Mr.
6 Porter's home or at least the place where he was residing at
7 the time. He observed Mr. Porter leave the home and enter a
8 vehicle while Mr. Porter was carrying a backpack, a black
9 backpack, or at least a dark-colored backpack. They followed
10 the vehicle to Mr. Porter's place of employment, which was a
11 company called Propak ROC, a business where the employees, or
12 at least Mr. Porter who was an employee, was repairing broken
13 pallets, wood pallets.

14 Detective Lopez observed Mr. Porter exit the vehicle
15 that he had driven over there in and still with his backpack
16 with him enter the warehouse. Detective Lopez then went into
17 the reception area, initially asked to see a manager, and was
18 seen by Mr. Scott Williamson, who was the plant manager.

19 Detective Lopez advised Mr. Williamson that he had an arrest
20 warrant for the arrest of Mr. Porter and asked for his
21 assistance in getting Mr. Porter to come from the work areas
22 of the warehouse to the office where they could make an
23 arrest. He also asked for Mr. Williamson's assistance in
24 allowing uniformed police officers from the Denver Police
25 Department into the building and into what turned out to be a

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1 conference room where they could wait for Mr. Hill (sic) to be
 2 brought so they could arrest him, apparently the police
 3 officers' means of trying to arrest Mr. Porter without doing
 4 so in the presence of other employees and in a situation where
 5 somebody potentially could get hurt.

6 So on the guise of needing to talk to Mr. Porter
 7 about some issues concerning his compensation, Mr. Williamson
 8 was able to retrieve Mr. Porter and have him brought or bring
 9 him up to the office where he was arrested by Detective Lopez
 10 and/or the other uniformed police officers who were there in
 11 the conference room. The detective asked, according to his
 12 report, Mr. Porter if he wanted me to retrieve his personal
 13 belongings from the business, and he, meaning Porter, told him
 14 he didn't have any. The defense would read some ambiguity
 15 into that sentence. I'm not so sure there's ambiguity in the
 16 sentence, quote, I asked Porter if he wanted me to retrieve
 17 his personal belongings from the business, and he told me he
 18 didn't have any, closed quote.

19 But in any event, according to the testimony of Lopez
 20 here in court under oath this morning, he asked the defendant
 21 did he have any personal belongings that he wanted retrieved,
 22 and the answer was he did not -- by Porter -- he didn't have
 23 any personal belongings. According to Lopez, he then asked
 24 what about the backpack, because Lopez knew from observation
 25 that he had entered the workplace with a backpack. He asked

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1 what about the backpack? And according to Porter he said --
 2 according to Lopez, Porter said I don't have a backpack.

3 Now, the defendant has raised credibility issues
 4 about the question and answer concerning the backpack because
 5 there was no mention of it in the report. He was asked about
 6 that during his testimony here today, and Detective Lopez said
 7 he didn't realize at the time that that detail was going to
 8 turn out to be so important, and he didn't put it in his
 9 report, but he said, I specifically remember that we had the
 10 conversation about the backpack. This case happened only a
 11 year ago, and I remember that that is what was said.

12 So as I told Mr. Kraut, I take his point. These
 13 reports are intended to be accurate. These reports are
 14 intended to be thorough. Of course, they can't put down every
 15 possible detail, and sometimes officers can't anticipate what
 16 the lawyers will ultimately decide is critical that was in or
 17 not in the report, but I take his point that something that
 18 turns out to be potentially important is missing.

19 Nevertheless, the only evidence that I have is the testimony
 20 under oath of Detective Lopez who quite clearly and
 21 emphatically says that conversation occurred, there's no
 22 contrary evidence, and the Court finds that it's probable that
 23 that is exactly what did happen.

24 There was a question about the backpack. That makes
 25 sense to me that that would have been asked because they saw

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1 him go in with a backpack, and the defendant disclaimed having
2 a backpack. Even if you took the backpack conversation out of
3 the question, he was asked about personal belongings, and he
4 said he didn't have any. That would include the backpack. At
5 that point Porter is gone with the officers. Lopez comes back
6 in, and he asked Mr. Williamson about the backpack. They went
7 out jointly to the workstation, that is specifically Mr.
8 Porter's workstation, his table where he repaired pallets
9 looking for the backpack. They didn't find the backpack
10 there.

11 They had to scout around a little bit, and they
12 finally found the backpack in another employee's workstation.
13 The other employee was named Norman -- I'm sure I wrote down
14 his name. Here it is -- Marshbank, Norman Marshbank, who
15 apparently was at least acquainted with if not a friend of Mr.
16 Porter. Initially Norman was reluctant to agree that it was,
17 in fact, Mr. Porter's backpack. However, when pressed a
18 little further and other employees in the vicinity had said
19 it's not mine, Norman confirmed that the backpack, indeed, was
20 Mr. Porter's backpack.

21 Detective Lopez at some point picked up the backpack
22 and testified that he could feel that there was a heavy object
23 inside that he apparently suspected was the handgun that the
24 bulletin had informed him was attributable to Mr. Porter when
25 it said that he was believed to be armed and dangerous with a

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1 handgun. Detective Lopez asked Mr. Williamson if he could
 2 take the backpack. Mr. Williamson said yes. His reason,
 3 though, was not because Mr. Williamson had any suspicion
 4 himself that there was any gun or handgun -- or contraband in
 5 the backpack or Mr. Porter had violated the policies of the
 6 company which prohibited bringing handguns to work. He didn't
 7 have those suspicions.

8 He testified that he liked Mr. Porter and had
 9 everything else been equal, the backpack probably would have
 10 been left unopened, hung up on a hook for retrieval by a
 11 family member or even Mr. Porter himself if he were released,
 12 and if not picked up would have still been hung up on a hook
 13 outside the break room apparently indefinitely. But Mr.
 14 Williamson wanted to cooperate with the police and granted
 15 permission to take the backpack.

16 Mr. Lopez took it a step further, asked if he could
 17 look into the backpack. Mr. Williamson said he could.
 18 Detective Lopez unzipped the backpack and at least looked into
 19 it. He testified that he actually reached into it and moved
 20 things around a little bit until he saw the grip of a handgun
 21 at which time he zipped the backpack back up and went off
 22 ultimately for the police department to get a search warrant.
 23 According to Mr. Williamson, he didn't remember seeing Lopez
 24 stick his hand in there, but he himself was curious about what
 25 was in there that was of some interest to the cops. He looked

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1 in and he too could see a handgun or a part of a handgun
 2 visible in the backpack. Of course, the police eventually
 3 obtained a search warrant and retrieved the handgun that was
 4 in the backpack. Those are the facts.

5 So the question is on those facts did the police, and
 6 specifically Detective Lopez, have the right to do anything
 7 with the backpack, including seizing it or looking into it.
 8 The Government has made a number of arguments. The defendant
 9 has disputed the Government's arguments. They anticipated
 10 some the Government didn't even make, but I have to agree with
 11 Mr. McIntyre that the number one argument that is troubling to
 12 the Court is the abandonment issue. The position of the
 13 Government is that the defendant abandoned the backpack and
 14 relinquished any expectation of privacy that he otherwise had
 15 in its contents when he disclaimed, A, having any personal
 16 property, which would include the backpack; and, B,
 17 specifically having a backpack when, in fact, he did.

18 The leading case probably is *United States vs. Jones*,
 19 707 F.2d 1169, Tenth Circuit, 1983. In *Jones*, the police
 20 order a man to emerge from a home where they had identified a
 21 vehicle at the home that they knew was involved in a bank
 22 robbery, and the man emerged from the home carrying a satchel.
 23 They ordered him to stop, and this man fled. They caught up
 24 with him, but he didn't have the satchel. They found the
 25 satchel lying outside the building where he was hiding. They

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1 || opened it up and found a gun.

2 The defendant moved to suppress the fruits of this
3 warrantless search, but the Court held -- affirmed -- that the
4 warrantless search of voluntarily abandoned property doesn't
5 violate the Fourth Amendment. That's at page 1172. The mere
6 fact of a police investigation or contact at the time of
7 abandonment does not render abandonment involuntary. They
8 said that in the *Jones* case, and they also said it in *United*
9 *States vs. Hernandez*, 7 F.3d 994, 947, Tenth Circuit, 1993.
10 The Court said that the test is whether the individual has
11 retained a reasonable expectation of privacy in the object.

12 When Jones discarded the satchel, he might have hoped
13 that the police would not find it and that he could later
14 retrieve it. Quote, However, his ability to recover the
15 satchel depended entirely upon fate and the absence of
16 inquisitive and acquisitive passersby. When questioned by the
17 police he repeatedly disavowed any knowledge of the satchel.
18 The acts done objectively manifested Jones' clear intent to
19 relinquish his expectation of privacy and abandon his satchel.

20 Now, I, of course, agree with Mr. Kraut that there is
21 a difference, a factual difference between discarding a
22 satchel outside a building and then denying its existence on
23 the one hand and placing a backpack in another employee's
24 workstation, whether he placed it there or someone else placed
25 it there, and denying its existence. On the other hand, one

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1 has to wonder if an employee in the second situation might
2 have a greater expectation of privacy, especially because in
3 this particular case, as the evidence showed, there was some
4 history of Mr. Porter's wife, Ms. Hill, going to the workplace
5 and successfully retrieving items that Mr. Hill (sic) had --
6 or Mr. Porter had left there, personal belonging items. So
7 you have to think about the difference there.

8 As Mr. Kraut said, voluntary abandonment has both an
9 objective and subjective component. The defendant's objective
10 intent is unknown based on anything he has told us because he
11 has told us nothing, which is his right, but the facts suggest
12 that he subjectively intended to abandon because he said I
13 don't have a backpack. As for the objective component, the
14 question is would a reasonable officer believe the property
15 had been abandoned. I think so. Lopez saw Mr. Porter carry
16 the backpack out of his home and into the workplace, but
17 according to him the defendant disclaimed it.

18 And then I quoted before early in the argument the
19 passage from the *Denny* case, 441 F.3d 1220 at 1227, Tenth
20 Circuit, 2006, where the Court said, The defendant does not
21 cite and we have not found a case in which a defendant's
22 express disclaimer of ownership in response to a lawful police
23 inquiry did not constitute abandonment of property in the
24 Fourth Amendment context, closed quote.

25 In short, disclaimer of ownership of an item, which

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1 the evidence supports here and which the Court has found to be
2 the facts here, is a very strong objective indication of
3 abandonment, and so I conclude that on these facts the
4 defendant voluntarily did abandon the backpack and his
5 expectation of privacy in it.

6 But there's a second concern that I have, and that is
7 that based on what the detective knew from the briefing in the
8 bulletin about the defendant's being armed and dangerous or
9 believed to be armed and dangerous with a handgun, and the
10 charge that he was being arrested for, attempted murder based
11 on a shooting, when you put that fact together with the fact
12 that there was knowledge that the defendant had a backpack
13 when he went into the workplace but denied it, and the fact
14 that another employee was reluctant to acknowledge that the
15 backpack belonged to the defendant, and the fact that when
16 picked up, the backpack contained a heavy object, you put all
17 of that together, and my conclusion from those facts is that
18 there was reasonable suspicion that the backpack contained a
19 gun sufficient to justify seizure of the backpack.

20 And if you go that far and find that seizure was
21 justified in the circumstances, then even Mr. Kraut candidly
22 acknowledges that at that point it would have been inevitable
23 that according to its search policies the defendant police
24 department would have searched the belongings for the
25 protection not only of the defendant and his property, but for

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1 protection for the police against any possible claim of theft
 2 of property. It would have been inventoried, much like seized
 3 automobiles are inventoried in certain circumstances, and they
 4 would have found the gun. So pursuant to that type of
 5 inventory search, or the doctrine of inevitable discovery,
 6 whichever way you want to look at it, I think the fate of Mr.
 7 Porter was sealed. That gun was going to be found.

8 Notably I have not placed any emphasis on the fact
 9 that Mr. Williamson, the employer, granted consent for the
 10 detective to look into the backpack. That is a fact that
 11 consent was granted, and based on that consent he opened the
 12 backpack, but I'm troubled by the question whether an
 13 employer, even a private employer's right to search is
 14 reasonably necessary to protect the personnel or the property
 15 of the employer as provided in the handbook gives the plant
 16 manager the right to invite the cops to look in the backpack.
 17 I'm just not convinced of that, so that is not a part of my
 18 findings. But for the reasons I have stated in my findings
 19 and conclusions, my order is the motion to suppress is denied.

20 Now, where are we in this case, gentlemen?

21 MR. KRAUT: Your Honor, I believe the speedy trial
 22 period has been tolling since June 16th, and I show us as
 23 scheduled for a trial -- I don't have a trial date actually.

24 MR. MCINTYRE: I have it in my calendar beginning
 25 September 13th.

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UNITED STATES DISTRICT COURT

District of Colorado

UNITED STATES OF AMERICA) **JUDGMENT IN A CRIMINAL CASE**
 v.)
 AARON LEE PORTER) Case Number: 1:20-cr-00283-RBJ-1
) USM Number: 39495-509
) David Andrew Kraut
) Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 of the Indictment

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

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

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 922(g)(1)	Possession of a Firearm and Ammunition by a Felon	07/22/20	1

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

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

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

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

April 15, 2022
 Date of Imposition of Judgment



Signature of Judge

R. Brooke Jackson, Senior United States District Judge
 Name and Title of Judge

April 19, 2022

Date

DEFENDANT: AARON LEE PORTER
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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **forty-three (43) months**, concurrent to the sentence imposed in Denver County District Court, Case No. 2020CR4633. This sentence includes a 21-month adjustment, pursuant to §5G1.3(b), to take into account the defendant's undischarged term of imprisonment he is serving in Denver County District Court, Case No. 2020CR4633, which is relevant conduct to the instant offense, and because this period of imprisonment will not be credited by the Bureau of Prisons.

- The court makes the following recommendations to the Bureau of Prisons:
 The Court recommends the defendant be designated to a Colorado facility.

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

- The defendant shall surrender to the United States Marshal for this district:
 - at _____ a.m. p.m. on _____.
 - as notified by the United States Marshal.

- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on _____.
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
 at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
 DEPUTY UNITED STATES MARSHAL

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SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and a maximum of 20 tests per year of supervision thereafter.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

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

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STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, notify the person about the risk or require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

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

Defendant's Signature

Date

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SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of testing and/or treatment for substance abuse approved by the probation officer and follow the rules and regulations of such program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program as to modality, duration, and intensity. You must abstain from the use of alcohol or other intoxicants during the course of treatment. You must not attempt to obstruct, tamper with or circumvent the testing methods. You must pay for the cost of testing and/or treatment based on your ability to pay.
2. You must not knowingly associate with or have contact with any individuals you know to be or have reason to believe are gang members and must not participate in gang activity, to include displaying gang paraphernalia.
3. You must submit your person, property, house, residence, papers, or office, to a search conducted by a United States probation officer. Failure to submit to search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the following page.

TOTALS	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 0.00

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

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

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

Name of Payee	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ _____	\$ _____
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Restitution amount ordered pursuant to plea agreement \$ _____

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

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

the interest requirement is waived for the fine restitution.

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Publ. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

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

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

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

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

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

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

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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The defendant shall pay the cost of prosecution.

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

The defendant shall forfeit the defendant's interest in the following property to the United States:
 A .40 caliber Smith and Wesson, Model SD40 VE handgun, with serial number FBU9307; a Taurus G2c 9mm handgun, serial number TLN12841; and all recovered ammunition.

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

FILED

United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS

May 2, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 22-1134

AARON LEE PORTER,

Defendant - Appellant.

**Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CR-00283-RBJ-1)**

Kathleen Shen, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, Office of the Federal Public Defender, with her on the briefs), Denver, Colorado, for Defendant - Appellant.

Kyle Brenton, Assistant United States Attorney (Cole Finegan, United States Attorney, with him on the brief), Denver, Colorado, for Plaintiff - Appellee.

Before **EID**, **EBEL**, and **KELLY**, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant Aaron Lee Porter entered a conditional plea of guilty to one count of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and was sentenced to 43 months' imprisonment and three years' supervised release. He

reserved the right to appeal the denial of his motion to suppress a firearm found inside of his backpack. On appeal, he argues that the Denver police conducted a warrantless search of his backpack and that the district court erred in finding that (1) he had abandoned the backpack, and (2) the firearm would have been discovered pursuant to an inventory search. Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

Background

Mr. Porter was identified as a suspect in a July 22, 2020, shooting and a warrant was issued for his arrest. A wanted bulletin contained a physical description, a short account of his criminal history, and information that he was suspected of membership in the Crips gang. Mr. Porter was wanted for attempted murder and believed to be armed and dangerous and in possession of a handgun. Later that day, detective Jay Lopez found Mr. Porter at the warehouse where he worked. From his vehicle, Detective Lopez saw Mr. Porter walk into the building carrying a dark colored backpack.

Detective Lopez then entered the building. Once inside, he confirmed with office manager Scott Williamson that Mr. Porter worked there. Mr. Williamson then called Mr. Porter into his office and Mr. Porter was arrested. Detective Lopez asked Mr. Porter “if there were any personal belongings there at the job site that he wanted to bring with him.” 4 R. 14. Mr. Porter stated that “he didn’t have any personal

belongings.” Id. Detective Lopez then “asked him what about the backpack I watched you walk in with, and he responded he didn’t have a backpack.” Id.¹ Detective Lopez then went back into the warehouse and informed Mr. Williamson that Mr. Porter had entered the building carrying a backpack and asked where Mr. Porter kept his belongings. Mr. Williamson escorted Detective Lopez back to Mr. Porter’s workstation and after briefly searching the area, saw Mr. Porter’s backpack at a nearby workstation about 15 or 20 feet away. Mr. Williamson asked another employee if the backpack belonged to Mr. Porter. Reluctantly, the employee confirmed that it did. After confirming that the bag belonged to no one else, Mr. Williamson urged Detective Lopez to take it with him.

Detective Lopez picked up the backpack and shook it. Although fairly empty, he felt something compact and heavy — it felt like a gun. He then opened it looking for identification which revealed a handgun’s grip. At that point, Detective Lopez zipped up the backpack. Officers then applied for a search warrant and pursuant to that warrant discovered a Smith & Wesson .40 caliber handgun.

The district court denied Mr. Porter’s motion to suppress, finding that Mr. Porter had abandoned the backpack, and thereby renounced any expectation of privacy in it for purposes of the Fourth Amendment, and alternatively, that the gun would inevitably have been discovered pursuant to a valid inventory search.

¹ Although a factual discrepancy was recognized at the suppression hearing, Mr. Porter does not dispute this conversation occurred on appeal. 4 R. 24–25; Aplt. Br. at 8.

Discussion

In reviewing the denial of a motion to suppress, we uphold the district court's factual findings unless clearly erroneous and view the evidence in the light most favorable to the prevailing party, here the government. See United States v. Tafuna, 5 F.4th 1197, 1200 (10th Cir. 2021). Fourth Amendment reasonableness is reviewed de novo. United States v. Johnson, 43 F.4th 1100, 1107 (10th Cir. 2022).

Ordinarily the Fourth Amendment requires officers obtain a warrant before searching or seizing private property. Camara v. Mun. Ct., 387 U.S. 523, 528–29 (1967). The Fourth Amendment's protections do not apply, however, where a defendant has abandoned property prior to a warrantless search. United States v. Hernandez, 7 F.3d 944, 947 (10th Cir. 1993). Whether abandonment has occurred is an objective inquiry based in “words spoken, acts done, and other objective facts.” United States v. Jones, 707 F.2d 1169, 1172 (10th Cir. 1983) (quoting United States v. Kendall, 655 F.2d 199, 202 (9th Cir. 1981)). Overall, the court considers whether, in the eyes of a reasonable officer, the defendant manifested an intent to disavow ownership of the property. See Jones, 707 F.2d at 1172–73; United States v. Nowak, 825 F.3d 946, 948–49 (8th Cir. 2016) (per curiam); United States v. Basinski, 226 F.3d 829, 836 (7th Cir. 2000). We defer to the district court's findings absent clear error. Jones, 707 F.2d at 1172.²

² We recognize our cases have not always articulated the standard of review of abandonment findings in a unitary manner. See Jones, 707 F.2d at 1172 (clearly erroneous); United States v. Trimble, 986 F.2d 394, 399 (10th Cir. 1993) (same); United States v. Hernandez, 7 F.3d 944, 947 (10th Cir. 1993) (same); but cf. United

Mr. Porter faults the reasoning underlying the district court's abandonment determination for being unduly confined. He maintains that abandonment requires a clear, unambiguous, and unequivocal disclaimer of ownership. In doing so, Mr. Porter urges us to look at the entire context of his conversation with Detective Lopez. In his view, his response to Detective Lopez's question about whether he had a backpack is qualified by Detective Lopez's initial question "if there were any personal belongings there at the job site that he wanted to bring with him." 4 R. 14 (emphasis added). Read in context, Mr. Porter posits, his responses indicating he "didn't have any personal belongings" and "didn't have a backpack," cannot be understood to mean he does not have any backpack at all but rather none that he wanted to take with him to the station. Aplt. Br. at 10. The district court considered this argument at the suppression hearing and was unpersuaded. 4 R. 89–91, 93–94, 117–18. Rather, the facts suggested that Mr. Porter subjectively intended to disclaim any ownership of the backpack. Likewise, the court found that a reasonable officer would believe Mr. Porter had abandoned the bag. Id. 117.

States v. Austin, 66 F.3d 1115, 1118 (10th Cir. 1995); United States v. Garzon, 119 F.3d 1446, 1449 (10th Cir. 1997) (interpreting the abandonment finding as "subsum[ing] both a subjective and an objective component," the former being a factual finding reviewed for clear error and the latter, a question of law reviewed *de novo*); United States v. Juszczyk, 844 F.3d 1213, 1214 (10th Cir. 2017) (applying the standard as articulated in Garzon); United States v. Fernandez, 24 F.4th 1321, 1330 (10th Cir. 2022) (same). To the extent there is an apparent inconsistency, our earliest pronouncement controls. See Haynes v. Williams, 88 F.3d 898, 900 n.4 (10th Cir. 1996); see also Garzon, 119 F.3d at 1453 (Porfilio, J., dissenting).

The district court considered Mr. Porter's theory that he meant that he did not have any belongings he wanted to take with him to the station. But that was belied by Mr. Porter's next statement that he didn't have a backpack. Even if Mr. Porter's interpretation is plausible, choosing one of two plausible interpretations of the evidence cannot be clearly erroneous. Anderson v. Bessemer City, N.C., 470 U.S. 564, 574 (1985).

Mr. Porter nonetheless attempts to distinguish this case from our other abandonment cases, claiming that in those cases, the defendant's denial of ownership was clear and unequivocal. But it is hard to imagine a statement plainer than "I don't have a backpack." The statement is clearer still when viewed in conjunction with the fact that Detective Lopez saw Mr. Porter walk into the job site with a backpack. That ambiguity might be read into a statement does not mean it should. And certainly, plausible ambiguity does not yield clear error.

Mr. Porter also imparts significance to the fact that Detective Lopez did not ask if the bag "belonged" to Mr. Porter. But this is a distinction without a difference. An objectively reasonable officer would view Mr. Porter's statements as unequivocal. Indeed, these facts squarely align with those in United States v. Fernandez, 24 F.4th 1321 (10th Cir. 2022). There, the defendant "said that he did not have any luggage" and this court found it "reasonable for [the agent] to infer that there was no luggage on the bus being claimed by Mr. Fernandez." Id. at 1331 (emphasis in original).

Because Mr. Porter abandoned the backpack and thus surrendered an expectation of privacy therein, the subsequent search was reasonable. In light of our

holding, we need not address alternative theories relied upon by the district court or the government.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Denver, Colorado 80257
(303) 844-3157
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

May 02, 2023

Kathleen Shen
Office of the Federal Public Defender
Districts of Colorado and Wyoming
633 Seventeenth Street, Suite 1000
Denver, CO 80202

RE: 22-1134, United States v. Porter
Dist/Ag docket: 1:20-CR-00283-RBJ-1

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,



Christopher M. Wolpert
Clerk of Court

cc: Kyle W. Brenton

CMW/sds

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 13, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AARON LEE PORTER,

Defendant - Appellant.

No. 22-1134
(D.C. No. 1:20-CR-00283-RBJ-1)
(D. Colo.)

ORDER

Before **EID**, **EBEL**, and **KELLY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

September 1, 2023

Ms. Kathleen Shen
Office of the Federal Public Defender
633 17th Street
Suite 1000
Denver, CO 80202

Re: Aaron Lee Porter
v. United States
Application No. 23A189

Dear Ms. Shen:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on September 1, 2023, extended the time to and including October 11, 2023.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by 

Redmond K. Barnes
Case Analyst

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

**Scott S. Harris
Clerk of the Court
(202) 479-3011**

NOTIFICATION LIST

**Ms. Kathleen Shen
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Denver, CO 80202**

**Mrs. Elizabeth B. Prelogar
Solicitor General
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**Clerk
United States Court of Appeals for the Tenth Circuit
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