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OPINIONS AND ORDERS

OPINION, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT (MARCH 19, 2024)

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRUCE L. HAY,

Defendant-Appellant.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; FIRST AMENDMENT COALITION; FREEDOM OF THE PRESS FOUNDATION; THE MEDIA INSTITUTE; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; THE NEWS LEADERS ASSOCIATON; NEWS/MEDIA ALLIANCE; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; SOCIETY OF ENVIRONMENTAL JOURNALISTS,

Amici Curiae.

No. 22-3276

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:19-CR-20044-JAR-1)

Before: TYMKOVICH, MURPHY,
and CARSON, Circuit Judges.

TYMKOVICH, Circuit Judge.

Does the Fourth Amendment permit the government to surveil a home for months on end without a warrant? This case requires us to decide.

The Department of Veterans Affairs (VA) offers lifetime benefits to permanently disabled veterans. A Kansas jury convicted Bruce Hay of ten counts of stealing government property and six counts of wire fraud as part of a scheme to defraud the VA by exaggerating his disability. As part of its investigation, VA agents installed a pole camera across the street from his house to film his activities.

Mr. Hay appeals his conviction. He contends that (1) the evidence presented at trial is insufficient to support a conviction, (2) the VA's installation of a pole camera violated his Fourth Amendment rights, and (3) the district judge wrongfully admitted evidence to the extent that it deprived him of a fair trial.

We affirm the district court.

I. Background

Bruce Hay is a U.S. Army veteran. In 2005, while at home in Kansas, he was involved in a serious car accident. Doctors diagnosed him with "functional neurological disorder," or FND, a psychological disorder that impaired his mobility. Following this diagnosis, Mr. Hay applied for disability benefits from the VA. In 2006, the VA determined that Mr. Hay was permanently disabled and therefore entitled to benefits.

Six years later, the VA Inspector General's office received an anonymous tip alleging that Mr. Hay was not, in fact, permanently disabled. It initiated an investigation into Mr. Hay's disability status. Mr. Hay lived in Osawatomie, a small town in eastern Kansas. To investigate Mr. Hay's mobility, officers feigned an operation involving deer poaching on a nearby farm so that they could monitor Mr. Hay from a closer distance. They also tailed him to medical appointments and other events. For a more robust record of his daily activities, they installed a pole camera on a school rooftop across the street from Mr. Hay's house. The camera was remote-controlled and activated by motion, and it recorded near constant footage of Mr. Hay's house as visible from across the street. All told, the camera captured 15 hours of footage per day for 68 days.

Over the course of a six-year investigation, the VA finally developed enough evidence to suggest that Mr. Hay was faking his disability and that he was not entitled to disability benefits. Subsequently, a grand jury indicted Mr. Hay on ten counts of stealing government property in violation of 18 U.S.C. § 641 and six counts of wire fraud in violation of 18 U.S.C. § 1343. A jury found Mr. Hay guilty of all counts.

II. Analysis

Mr. Hay argues that he was entitled to a judgment of acquittal or a new trial for three reasons: (1) the evidence presented at trial was insufficient to support a conviction for stealing government property or for wire fraud; (2) the district court admitted pole camera footage that was obtained in violation of the Fourth Amendment; and (3) the district court admitted other

incriminating evidence and testimony in violation of the Federal Rules of Evidence.

A. Sufficiency of the evidence

1. Stealing government property

Mr. Hay first contends his conviction should be vacated because the government did not supply sufficient evidence to prove that he stole government property. In reviewing motions for a judgment of acquittal, we must consider whether "viewing the evidence in the light most favorable to the Government, any rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt." *United States v. Delgado-Uribe,* 363 F.3d 1077, 1081 (10th Cir. 2004).

Mr. Hay was charged with fraudulently taking government property under 18 U.S.C. § 641. That statute makes it a crime to take government property in four different ways. It applies to:

> Whoever [1] embezzles, [2] steals, [3] purloins, or [4] knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof

18 U.S.C. § 641 (brackets added).

Mr. Hay argues that because his scheme involved fraud and deception, but not theft, the statute does not cover his misconduct. The question, then, is whether

"steal[ing]," as used in the statute, encompasses acts of fraud and deception. It does.

The term "'steal' may denote the criminal taking of personal property either by larceny, embezzlement, *or false pretenses." United States v. Turley,* 352 U.S. 407, 412 (1957) (citing *Black's Law Dictionary* (4th ed. 1951)) (emphasis added). *See also Steal, Black's Law Dictionary* (3d ed. 1933) (defining "steal" as "the criminal taking of personal property by larceny, embezzlement, or false pretenses."). Accordingly, circuit courts have consistently affirmed convictions under 18 U.S.C. § 641 for submitting fraudulent paperwork to the government in order to obtain money. *See United States v. Ransom,* 642 F.3d 1285, 1289-1290 (10th Cir. 2011) (affirming conviction under 18 U.S.C. § 641 for falsification of government timesheets); *United States v. Rivera-Ortiz,* 14 F.4th 91, 101 (1st Cir. 2021) (affirming conviction under 18 U.S.C. § 641 for misrepresenting the defendant's occupation on a social security disability insurance application); *United States v. Oliver,* 238 F.3d 471, 472-473 (3d Cir. 2001) (similar); *and United States v. Dowl,* 619 F.3d 494, 501-502 (5th Cir. 2010) (affirming conviction under 18 U.S.C. § 641 for falsifying loan applications). Mr. Hay feigned a permanent disability to access government benefits. That qualifies as "stealing" under 18 U.S.C. § 641.

Mr. Hay resists this conclusion, arguing that "none of the offenses enumerated in the statute—embezzlement, theft, conversion—extend to offenses that require, as necessary elements, proof of both a material misrepresentation and an intent to deceive." Aplt. Br. at 23. According to Mr. Hay, the term "steal" refers to a "range of common-law theft offenses that all require the 'wrongful taking' of property without the consent

of the owner." *Id.* at 24-25 (citing *United States v. Hill,* 835 F.2d 759, 763 (10th Cir. 1987); *C.R.S. Recovery, Inc. v. Laxton,* 550 Fed. App'x 512, 513 (9th Cir. 2013); *and Steal, Merriam-Webster Dictionary).* Mr. Hay also distinguishes "stealing" from "fraud," which "requires proof that the defendant obtained property by means of 'false pretenses, representations, or promises' that is 'reasonably calculated to deceive persons of ordinary prudence.'" *Id.* at 25 (citing *United States v. Cochran,* 109 F.3d 660, 664 (10th Cir. 1997); *and Fraud, Black's Law Dictionary* (3d ed. 1933)).

Mr. Hay's definition of "stealing" is overly narrow and unsupported by the text of the statute or by precedent. As the Supreme Court explained in *Turley,* "steal[ing]" includes the "criminal taking of personal property . . . by . . . false pretenses." *Turley,* 352 U.S. at 412. "[T]he courts interpreting [stolen and steal] have declared that they do not have a necessary common-law meaning coterminous with larceny and exclusive of other theft crimes." *Id.* This reasoning forecloses Mr. Hay's argument.

Mr. Hay points to our decision in *United States v. Hill,* where we held that "while § 641 defines a broad crime against property, it nonetheless circumscribes the means by which that crime can be committed." 835 F.2d 759, 763 (10th Cir. 1987) (internal citation omitted). But *Hill* does not help Mr. Hay because its analysis turns on an intrinsic distinction between *conversion* and *stealing* regarding how possession is obtained: "[o]ne who gains possession of property by wrongfully taking it from another steals. One who comes into possession of property by lawful means, but afterwards wrongfully exercises dominion over that property against the rights of the true owner, commits

conversion." *Id.* at 764 (internal citations omitted). Thus, we concluded, "proof that the defendant *converted* property of the government is not proof that he *stole* it. The concepts of stealing and conversion are mutually exclusive." *Id.* (emphasis in original).

Unlike in *Hill,* the government does not argue here that Mr. Hay both came into possession of property in a lawful manner (*i.e.* conversion) *and also* wrongfully took the property (*i.e.* stealing). *Id.* Rather, the government argues that Mr. Hay's initial acquisition of government property was wrongful because it was obtained through false pretenses, thereby placing it within *Hill's* definition of stealing. And as *Turley* made clear, "fraud" and "stealing" are not mutually exclusive—stealing encompasses wrongfully obtaining property through "false pretenses." 352 U.S. at 412.

Separately, Mr. Hay argues that the absence of "fraud" in the statutory text implies that Congress did not intend for the statute to forbid stealing by means of fraud. He points to other statutes that forbid both "stealing" and "obtaining by fraud" as evidence that Congress treats these as two separate offenses. *See* 18 U.S.C. §§ 659, 665(a), 666(a)(1)(A), 668(b)(1), and 670(a). He notes that Congress did not place 18 U.S.C. § 641 in the section of the criminal code that criminalizes fraud offenses more generally.

Even if Congress considered "stealing" and "fraud" to be two separate offenses, the statute forbidding "stealing" would still forbid "fraud" wherever a defendant committed "fraud" as a strategy to steal. "Stealing," as explained by the Supreme Court, means the taking of property "by larceny, embezzlement, or false pretenses"—an expansive definition. *Turley,* 352 U.S. at 412 (discussing the definition of "stolen" in the National

Motor Vehicle Theft Act, 18 U.S.C. § 2312). And obviously, the *actus reus* of stealing can violate more than one federal criminal statute. For example, one might both steal explosives by wrongfully transporting them away and separately violate 18 U.S.C. § 842(a)(3)(A) (prohibiting possession of explosive materials without a license), or steal an armed vessel and also violate 18 U.S.C. § 964 by delivering it to a belligerent nation, or steal a drone while flying it off in a way that would recklessly interfere with the operation of a manned aircraft in violation of 18 U.S.C. § 39B(a)(2).

Since 18 U.S.C. § 641 prohibits stealing government property by means of fraud or deception, the government presented sufficient evidence to support Mr. Hay's conviction.

2. Wire fraud

The jury also found Mr. Hay guilty of six counts of wire fraud under 18 U.S.C. § 1343. He contends that the government presented insufficient evidence to show he intended to commit fraud.

The federal wire fraud statute applies to

> [w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice.

18 U.S.C. § 1343. Any falsehood must be material to the scheme, *Neder v. United States,* 527 U.S. 1, 24 (1999), and the defendant must have intended to defraud. *United States v. Hanson,* 41 F.3d 580, 583 (10th Cir. 1994).

At trial, the government presented evidence that Mr. Hay committed wire fraud by lying to the VA about the extent of his injuries to obtain benefits. While Mr. Hay does not dispute the statements alleged by the government, he argues that they were insufficient to establish materiality or intent.

We disagree. A reasonable factfinder could conclude that Mr. Hay's statements were material to the VA's decision to assign him disability benefits. "A false statement is material when it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Williams,* 934 F.3d 1122, 1128 (10th Cir. 2019) (internal quotation marks omitted). VA officials testified multiple times that the agency considered Mr. Hay's description of his disability when determining his disability status. *See, e.g.,* R. Vol. III at 325, 360, 398, and 412. Viewing this evidence in the light most favorable to the government, *see Delgado-Uribe,* 363 F.3d at 1077, a reasonable trier of fact could conclude that Mr. Hay's statements to the government were material.

Mr. Hay argues that the government has not met its burden of showing materiality since his "doctors also had access to his full medical records, including reports and test results" and it was "Mr. Hay's doctors, not Mr. Hay himself, [who] diagnosed him with FND based on the evidence before them, and there is no evidence that this diagnosis was based solely on Mr.

Hay's self-reporting his symptoms." Aplt. Br. at 36-37. This argument misapprehends the standard for materiality. The government did not bear the burden of proving that Mr. Hay's false statements were decisive to the VA's disability determination, only that they were "capable of influencing" that decision. *Williams,* 934 F.3d at 1128. Any negligence on the part of Mr. Hay's doctors in this determination is entirely consistent with the materiality of Mr. Hay's misstatements.

A reasonable factfinder could also conclude that the discrepancy between Mr. Hay's statements to the VA and his actual physical condition demonstrated an intent to defraud. The jury heard considerable evidence from agents and medical professionals that Mr. Hay systematically exaggerated his symptoms to obtain benefits. As one VA agent testified, Mr. Hay exhibited extreme mobility difficulties when at his benefits exams. He could only move with assistance from his wife and climbed stairs one step at a time, with both feet on each stair. After his exam, when he believed that he was out of the VA's sight, Mr. Hay drove over to a pawn shop, walked in without assistance of his cane or his wife, and walked out carrying a toolbox. As neurologist Dr. Danielle Baker put it, "there is a marked discrepancy in what both Mr. Hay and his wife have documented on forms and also demonstrated in evaluations, compensation benefit evaluations versus what was seen with actual every day daily functioning when surveillance was taken." R. Vol. III at 850. Viewing this evidence in the light most favorable to the government, a reasonable trier of fact could conclude that Mr. Hay intended to defraud the government. *See Delgado-Uribe,* 363 F.3d at 1077.

Mr. Hay also contends that the government has not carried its burden of showing intent, since he "was upfront with his doctors about his disabilities" and told his doctors that his "episodes only happened once or twice a week." Aplt. Br. at 37. These points, accepted as true, do not warrant reversal. The government proved fraud at trial by showing that the chasm between the symptoms that Mr. Hay reported to the VA and the mobility he exhibited out of sight was so great as to be misleading. Even if Mr. Hay acknowledged some aptitude for physical activity to his doctors, it does not follow that the government's exaggeration theory was unsupported by the evidence overall. That Mr. Hay admitted some ability to perform physical tasks is fully consistent with the jury's conclusion that he exaggerated his physical condition.

In sum, the evidence at trial was sufficient to support the convictions for theft of government property and wire fraud.

B. Fourth Amendment

Mr. Hay next argues that the district court should have suppressed evidence obtained from camera surveillance of his home under the Fourth Amendment. He contends that constant video surveillance of his home over several months constitutes an unreasonable search under emerging Supreme Court case law.

As part of its investigation, the VA installed a pole-mounted camera across the street from Mr. Hay's house. The camera was motion-activated and remote-controlled, and it produced footage of the front of Mr. Hay's property. The camera could only view Mr. Hay's property as visible from the street.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter v. United States,* 585 U.S. 296, 304 (2018). Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Grant,* 556 U.S. 332, 338 (2009).

"For much of our history, Fourth Amendment search doctrine was tied to common-law trespass and focused on whether the Government obtains information by physically intruding on a constitutionally protected area." *Carpenter,* 585 U.S. at 304. In the 1960s and 1970s, however, the Supreme Court expanded the Fourth Amendment's sphere of protection to situations where an individual "seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable." *Id.* (citing *Smith v. Maryland,* 442 U.S. 735, 740 (1979)). This "reasonableness" inquiry is the touchstone of modern Fourth Amendment analysis.

For decades, the Supreme Court has held that individuals do not have a reasonable expectation of privacy in activity that occurs in public view. "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *California v. Ciraolo,* 476 U.S. 207,

213 (1986). For instance, the Fourth Amendment does not require a warrant to view property from the air, if "[a]ny member of the public flying in this airspace who glanced down could have seen everything that the[] officers observed." *Id.* at 213-214; *see also Dow Chemical Co. v. United States,* 476 U.S. 227, 238-239 (1986) (holding that aerial view of an industrial plant did not violate the Fourth Amendment, even if "human vision is enhanced somewhat").

But the Supreme Court has required police obtain a warrant to view activities that are beyond public view and perceptible only through equipment outside of general commercial circulation. In *Kyllo v. United States,* the government surveilled a house using a thermal imaging camera. 533 U.S. 27, 34 (2001). In deeming this to be a search, the Court explained that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40; *see also id.* at 39 (thermal vision "might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate"). The Supreme Court's guideposts are clear: viewing of private settings, visible only with technology that is not in general public use, is considered a search; viewing settings that are in public view, or visible via generally available technology, does not constitute a search.

We have already concluded that the use of a pole camera does not constitute a search if the camera can only capture activity in public view. In *United States v. Jackson,* we held that "[t]he use of video

equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment." 213 F.3d 1269, 1280 (10th Cir. 2000) (citing *Dow Chem. Co.,* 476 U.S. at 239 *and Ciraolo,* 476 U.S. at 213). We reasoned that "activity a person knowingly exposes to the public is not a subject of Fourth Amendment protection" and that the pole cameras at issue in that case "were incapable of viewing inside the houses, and were capable of observing only what any passerby would easily have been able to observe." *Id.* at 1281. Although *Jackson* predates *Kyllo,* it is entirely consistent with the holding in *Kyllo* since videographic equipment is in general commercial circulation and available to the public at large.

The facts of this case are not meaningfully different from those in *Jackson.* Both cases involve the extensive use of cameras surreptitiously filming the front of the house. While Mr. Hay noted at oral argument that the pole camera incidentally captured activity in his house, that activity occurred at night in front of the window and was therefore visible to any passerby. Since the pole camera could not capture footage of any activity that was not in public view, it did not violate the Fourth Amendment.

To counter this, Mr. Hay argues that *Jackson* has been abrogated by the Supreme Court's *Carpenter* decision. He contends that while *limited* video surveillance might not violate the Constitution, the government's months-long, potentially *limitless* surveillance crosses the line. In *Carpenter,* the Supreme Court considered whether the government conducts a search when it accesses historical cell-site location information. There, the government subpoenaed cell phone data from the suspect's wireless provider to track the suspect's move-

ment before, during, and after a crime. The Court found this to be a search covered by the Fourth Amendment. It explained that whenever a cell phone connects to a cell site, "it generates a time-stamped record known as cell-site location information," the precision of which "depends on the size of the geographic area covered by the cell site." *Carpenter,* 585 U.S. at 301. Since many people carry their cell phones with them wherever they go, cell-site location information "chronicle[s] a person's past movements through the record of his cell phone signals." *Id.* at 309. The Court found this unreasonable since "[w]hoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment." *Id.* at 312.

The *Carpenter* court distinguished the case from *United States v. Knotts,* where it found that planting a transmitter in a suspect's car to aid in tracking the vehicle did not constitute a search. 460 U.S. 276, 282 (1983). There, the Court explained that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281. Although the officers "relied not only on visual surveillance, but on the use of the beeper to signal the presence of [the] automobile to the police receiver," "nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth" with the beeper. *Id.* at 282. The *Carpenter* court found that *Knotts* was not controlling on the question of cell site location information, since that opinion had acknowledged that "different constitutional principles

may be applicable if twenty-four hour surveillance of any citizen of this country were possible." *Carpenter,* 585 U.S. at 306-307 (citing *Knotts,* 460 U.S. at 283-284) (internal quotation marks and brackets omitted). It further noted that in a more recent case on vehicle tracking, "[a] majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements." *Id.* at 310 (citing *United States v. Jones,* 565 U.S. 400, 430 (2018) (Alito, J. concurring); and *Jones,* 565 U.S. at 415 (Sotomayor, J., concurring)).

The *Carpenter* court distinguished "pursu[ing] a suspect for a brief stretch," which fell within a societal expectation of privacy, from "secretly monitor[ing] and catalogu[ing] every single movement of an individual's car for a very long period," which fell outside of it. *Id.* (citing *Jones,* 565 U.S. at 429-430 (Alito, J., concurring)). It reasoned that "[a]llowing government access to cell-site records contravenes that expectation" because "[m]apping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts." *Id.* at 311. This in turn "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id.* citing *(Jones,* 565 U.S. at 415 (Sotomayor, J. concurring)). Further, unlike tracking devices in cars, "police need not even know in advance whether they want to follow a particular individual, or when," since cell site location data allows the Government to "travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers." *Id.* at 312. The *Carpenter* court concluded that accessing cell site location

information "invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements" and therefore constituted a search. *Id.* at 313.

Mr. Hay contends that he has a similar reasonable expectation of privacy in the whole of his physical movements coming and going from his home, plus a heightened expectation of privacy in the exterior to his home. According to Mr. Hay, the recording of his house for an extended period of time (68 days in this case) catalogs his habits, patterns, and visitors in a way that ordinary physical surveillance could not duplicate. As he puts it, "the footage obtained painted an intimate portrait of Mr. Hay's personal life," including "when he entered and exited his home; who visited him and his family," and "what Mr. Hay did on his own front porch." Aplt. Br. at 44. He acknowledges that this activity took place in public but argues that "[w]hile people subjectively lack an expectation of privacy in some discrete actions they undertake in unshielded areas around their homes, they do not expect that every such action will be observed and perfectly preserved for the future." *Id.* at 45 (citing *Commonwealth v. Mora,* 150 N.E.3d 297, 306 (Mass. 2020)).

This argument is precluded by *Jackson*. That the surveillance took place over an extended period of time does not change the basic logic of the opinion—camera surveillance of a home visible to passersby does not constitute a search. Nor does *Carpenter* change the equation. The Supreme Court expressly noted that its decision was "a narrow one:" "[w]e do not express a view on matters not before us: real-time CSLI or 'tower dumps' . . . or call into question conventional surveillance techniques and tools, *such as security cameras.*"

Carpenter, 585 U.S. at 316 (emphasis added). Our holding in *Jackson* that pole cameras trained on a house do not violate the Fourth Amendment remains binding law, and *Carpenter,* without more, does not disturb it. In so holding, we are not alone. No circuit court has concluded that extended video surveillance of a house is a search under *Carpenter*. *See United States v. Dennis,* 41 F.4th 732, 740-741 (5th Cir. 2022) (finding no Fourth Amendment violation in the installation of cameras directed at front and back of defendant's house); *United States v. Tuggle,* 4 F.4th 505, 523-524 (7th Cir. 2021) (finding no Fourth Amendment violation in government's prolonged, round-the clock use of cameras capturing the exterior of defendant's home); *and United States v. Trice,* 966 F.3d 506, 518-520 (6th Cir. 2020) (finding no Fourth Amendment violation in installation of camera across the hallway from entrance of defendant's apartment); *cf. Leaders of a Beautiful Struggle v. Baltimore Police Dep't,* 2 F.4th 330, 341-342 (4th Cir. 2021) *(en banc)* (finding a Fourth Amendment violation in use of planes to record movements across an entire city). An en banc First Circuit deadlocked on the question, with an even number of judges reaching opposite conclusions. *See United States v. Moore-Bush,* 36 F.4th 320 (1st Cir. 2022) (*en banc*).

Regardless, Mr. Hay's privacy interests fall outside *Carpenter's* rationale. *Carpenter* acknowledged that individuals have a privacy interest in "the whole of their physical movements." *Carpenter,* 585 U.S. at 310. The pole camera across the street from Mr. Hay came nowhere close to capturing "the whole of his physical movements." It could only capture his movements at a single location, outside his house. As soon as he left his house, the government could no longer

track him by this means. And the *Carpenter* majority was particularly concerned by retrospective police searches of previously unidentified individuals—*i.e.* where the government would "travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers." *Id.* at 312. In this case, the government did not delve into a preexisting data set on Mr. Hay's whereabouts. It set up the camera while Mr. Hay was already under investigation as a prospective, not retrospective, investigative measure. The surveillance here merely enhances what law enforcement could always do—monitor a suspect's movement in public view.

Mr. Hay attempts to divine a new privacy interest by merging the one articulated in *Carpenter* (a retrospective "all encompassing record of the holder's whereabouts," 585 U.S. at 311), with the one identified in *Kyllo* and *Ciraolo* (privacy connected to one's home). 533 U.S. at 31, 476 U.S. at 213; *see also Lange v. California,* 141 S. Ct. 2011, 2018 (2021) ("[W]hen it comes to the Fourth Amendment, the home is first among equals." (citing *Florida v. Jardines,* 569 U.S. 1, 6 (2013)).

But the Supreme Court's recognition of privacy interests in the home does not "require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Ciraolo,* 476 U.S. at 213. The government executes a search when it "uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion," *Kyllo,* 533 U.S. at 40, but "[n]ow more than ever, cameras are ubiquitous, found in the hands and pockets of virtually all Americans, on the doorbells and entrances of homes,

and on the walls and ceilings of businesses." *Tuggle,* 4 F.4th at 516. Mr. Hay retains some privacy interests in the whole of his physical movements and in the interior of his home, but the pole camera at issue did not infringe upon either of those interests.

The Supreme Court has defined a "search" under the Fourth Amendment not by a fixed point, but by "[w]hen an individual seeks to preserve something as private and his expectation of privacy is one that society is prepared to recognize as reasonable." *Carpenter,* 585 U.S. at 304 (citing *Smith,* 442 U.S. at 740) (internal quotation marks omitted). "Current Fourth Amendment jurisprudence admits of a precarious circularity: Cutting-edge technologies will eventually and inevitably permeate society. In turn, society's expectations of privacy will change as citizens increasingly rely on and expect these new technologies." *Tuggle,* 4 F.4th at 527 (upholding use of pole camera).

Few technologies have expanded more rapidly than the ubiquitous camera, which is worn by police officers, built into cellphones that the *Carpenter* court called "almost a feature of human anatomy," and strapped to front doors. *United States v. Moore-Bush,* 36 F.4th at 372 (Lynch, J., concurring) (citing *Carpenter,* 585 U.S. at 311). Cutting edge drone technology enables police to conduct discreet aerial investigations, *see State v. Stevens,* 210 N.E.3d 1154, 1157 (Ohio App. 2023), while satellite images of homes are free and readily available to citizens and law enforcement alike. *See In re Murphy,* No. 771 Sept. Term 2022, 2023 WL 2999975, at *6 (Md. App. 2023). Artificial intelligence software accelerates facial identification and pattern recognition to a previously unimaginable degree. As video cameras proliferate throughout society, regret-

tably, the reasonable expectation of privacy from filming is diminished.

In conclusion, Mr. Hay had no reasonable expectation of privacy in a view of the front of his house. The district court did not err in denying suppression of that footage.

C. Evidentiary rulings

Finally, Mr. Hay argues that he is entitled to a new trial because of three erroneous evidentiary rulings by the district court. "We review a trial court's evidentiary decisions for abuse of discretion. However, we subject to de novo review a trial court's legal conclusions about the Federal Rules of Evidence." *United States v. Cherry,* 217 F.3d 811, 814 (10th Cir. 2000).

First, Mr. Hay argues that the district court erred in permitting the VA agents to narrate the contents of video footage. He argues that this testimony bolstered the impact of the footage by allowing non-expert opinion testimony outside the agent's expertise. Federal Rule of Evidence 701(b), only permits lay testimony when it is:

> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. Mr. Hay argues that the agents' testimony did not satisfy the second condition, because

"their impressions of the footage itself were inappropriate." Aplt. Br. at 60.

But Rule 701 does not prohibit lay testimony of impressions if those impressions are helpful to determining a fact in issue. Fed. R. Evid. 701(b). The district court did not abuse its discretion in concluding that the VA agents' impressions of what was occurring in the video, informed by their deep familiarity with the footage, would help the jury determine a fact in issue.

Second, Mr. Hay argues that the district court erred by permitting the government to introduce his VA exam records, which included the doctors' assessment of his entitlement to disability benefits. According to Mr. Hay, these were out-of-court statements offered for their truth and therefore excludable under Fed. R. Evid. 801. The district court admitted these records under Fed. R. Evid. 803(4)'s exception for "medical diagnosis or treatment."[1] Mr. Hay contends that the exception does not apply, because a medical assessment for the purpose of determining disability is not a "diagnosis."

We disagree. The dictionary definition of "diagnosis" means "the discovery of a patient's illness or the determination of the nature of his disease from a study of his symptoms," or "[t]he art or act of recognizing the presence of disease from its symptoms, and deciding as to its character, also the decision reached, for de-

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[1] Rule 803(4) provides that "[a] statement that: (A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause" is an exception to the rule against hearsay evidence.

termination of type or condition through case or specimen study or conclusion arrived at through critical perception or scrutiny." *Diagnosis, Black's Law Dictionary* (4th rev. ed. 1968). Nothing in that definition suggests that making a disability determination for a given ailment precludes being "diagnosed" with that ailment. Indeed, it seems to require as much. Rule 803(4) authorizes admission of the VA records.

Third, Mr. Hay argues that the district court erred in admitting evidence from after the charging period. The indictment charged Mr. Hay with committing theft and fraud between 2011 and 2018. The district court, however, also admitted evidence of Mr. Hay's behavior from after that period—a mechanic's lien stating that he had worked as a farm manager from 1985 to 2020, and a video from 2021. Mr. Hay contends that this evidence was unduly prejudicial in violation of Fed. R. Evid. 403.

Rule 403 permits a district court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." "Assessing the probative value of the proffered evidence, and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403." *Sprint/United Management Co. v. Mendelsohn,* 552 U.S. 379, 384 (2008) (quoting *United States v. Abel,* 469 U.S. 45, 54 (1984)) (brackets omitted). "This is particularly true with respect to Rule 403 since it requires an on-the-spot balancing of probative value and prejudice, potentially to exclude as unduly prejudicial some evidence that already has been found

to be factually relevant." *Id.* (internal quotation marks omitted). Accordingly, a "trial court has broad discretion to determine whether prejudice inherent in otherwise relevant evidence outweighs its probative value." *United States v. Poole,* 929 F.2d 1476, 1482 (10th Cir. 1991).

The district court acted within its discretion in admitting evidence post-dating the charging period. The VA allotted benefits to Mr. Hay because it determined that he was "permanently disabled," so any evidence that Mr. Hay was able to perform physical labor after that determination—whether or not it was within the charged period—was probative as to whether he had defrauded the VA.

III. Conclusion

We affirm the district court's denial of a judgment of acquittal and admission of the contested evidence.

**JUDGMENT IN A CRIMINAL CASE,
U.S. DISTRICT COURT DISTRICT OF KANSAS
(DECEMBER 13, 2022)**

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

UNITED STATES OF AMERICA

v.

BRUCE L. HAY

Case Number: 2:19CR20044 – 001

USM Number: 29719-031

Before: Julie A. ROBINSON,
Senior U.S. District Judge.

THE DEFENDANT:

☒ was found guilty on count(s) 1-16 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section

18 U.S.C. § 1343

Nature of Offense

Wire Fraud, a Class C Felony

Offense Ended

08/01/2018

Count

1-6

Title & Section

18 U.S.C. § 641

Nature of Offense

Theft of Government Funds, a Class C Felony

Offense Ended

08/01/2018

Count

7-16

The defendant is sentenced as provided in pages 1 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ All original charging documents are dismissed on the motion of the United States.

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

12/13/2022
Date of Imposition of Judgment

/s/ Julie A. Robinson
Signature of Judge

Honorable Julie A. Robinson,
Senior U.S. District Judge
Name & Title of Judge

12/13/22
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 37 months for Counts 1-16 to run concurrently.

☒ The Court makes the following recommendations to the Bureau of Prisons: to be designated to MCFP Springfield to address medical issues.

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

☒ as notified by the United States Marshal.

[. . .]

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 3 years on Counts 1-16 to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.

☐ 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.)*

[. . .]

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.

{Standard Conditions of Probation, detail omitted}

{Schedule of payments detail omitted}

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

Assessment –	$ 1600
Restitution –	$ 537,915.87
Fine –	Waived
AVAA Assessment* –	Not applicable
JVTA Assessment** –	Not applicable

TOTALS

☒ The defendant shall make restitution (including community restitution) to the following payees in the amounts 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	The Veterans Administration
Total Loss***	
Restitution Ordered	$537,915.87
Priority or Percentage	
TOTALS	**$537,915.87**

☒ 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 restitution.

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

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

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

{Schedule of payments detail omitted}

MEMORANDUM AND ORDER DENYING MOTION TO SUPPRESS, U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS (MAY 5, 2022)

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRUCE L. HAY,

Defendant.

Case No. 19-20044-JAR

Before: Julie A. ROBINSON, U.S. District Judge.

MEMORANDUM AND ORDER

Suspecting that Defendant Bruce Hay had falsely claimed he was disabled to receive disability payments, federal agents surveilled him without a warrant to obtain evidence of his physical capabilities. The agents installed a pole camera on public property across the street from his residence and recorded nearly ten weeks' worth of footage. Before the Court is Hay's Motion to Suppress Pole Camera Footage (Doc. 49). He contends that the use of a pole camera to monitor the front of his residence constituted a warrantless search in vio-

lation of the Fourth Amendment to the U.S. Constitution, Tenth Circuit precedent to the contrary notwithstanding. The motion is fully briefed,[1] and the Court heard oral argument on December 21, 2021. For the following reasons, the Court denies Hay's motion.

I. Background

Hay is charged with four counts of theft of public money, in violation of 18 U.S.C. § 641. The charges stem from an investigation by the U.S. Department of Veterans Affairs, Office of Inspector General ("VA OIG"), Criminal Investigations Division, into allegations that Hay, a veteran receiving disability payments, falsely claimed disability. The following facts, drawn primarily from Hay's motion to suppress, are undisputed for purposes of the motion.[2]

As part of the investigation, VA OIG agents surveilled Hay to determine whether he engaged in activities that belied his claims of disability. In October 2016, agents installed a hidden surveillance camera outside a public high school across from Hay's residence on Parker Avenue in Osawatomie, Kansas. The camera faced the front of Hay's residence, including his porch, front yard, and driveway. Hay lives less than 200 feet from the high school.

Once installed, the pole camera monitored Hay's residence continuously for almost eight weeks, from October 6 to November 29, 2016. The agents then turned the camera off, but did not remove it. Then, in 2017,

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[1] Hay did not file a reply brief.

[2] Neither party asked this Court to conduct an evidentiary hearing.

the agents turned the camera back on twice, though for shorter periods: from March 24 to March 30, 2017, and from May 2 to May 8, 2017. The camera was motion-activated, and agents could remotely control its zoom, pan, and tilt features. "If a VA-OIG agent wished to zoom in on a license plate, for example, the investigating agent could call a tech agent who would then, working remotely, zoom the camera at the other agent's request."[3] Despite these features, the camera did not record audio or allow agents to see inside Hay's residence. All the camera's footage was stored, and agents could later download and replay it. The agents did not seek a warrant before installing the pole camera.

Hay now moves to suppress evidence obtained from the pole camera, arguing that the warrantless pole camera surveillance, which lasted "a cumulative period of 68 days," was a search that violated the Fourth Amendment.[4]

II. Discussion

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[5] Warrantless searches "are *per se* unreasonable under the Fourth Amendment—subject only

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[3] Doc. 49 at 2.

[4] *Id.* at 3.

[5] U.S. Const. amend. IV.

to a few specifically established and well-delineated exceptions."[6]

The Supreme Court has articulated two tests to determine when a search occurs within the meaning of the Fourth Amendment. The first, the common-law trespassory test, identifies a search when the government "obtains information by physically intruding on a constitutionally protected area."[7] The second, the reasonable-expectation-of-privacy test derived from Justice Harlan's concurrence in *Katz v. United States*, recognizes that a search can take place "even in the absence of a trespass."[8] Under this test, a search occurs when the government violates a person's "reasonable expectation of privacy."[9] Courts employ a "two-part inquiry" to assess the legitimacy of a privacy expectation: "first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?"[10]

Because there was no physical intrusion, Hay challenges the pole camera surveillance under the reasonable-expectation-of-privacy test. As Hay recog-

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[6] *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

[7] *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012); *see also United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring in the judgment).

[8] *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring).

[9] *Katz*, 389 U.S. at 360 (Harlan, J., concurring); *see also Kyllo v. United States*, 533 U.S. 27, 33 (2001); *Smith v. Maryland*, 442 U.S. 735, 740–41 (1979).

[10] *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

nizes, however, the Tenth Circuit has already conducted that analysis in a case with similar facts, *United States v. Jackson*, and it found no Fourth Amendment search.[11] There, the Tenth Circuit confronted a Fourth Amendment challenge to the use of pole cameras installed without a warrant to monitor residences. Law enforcement in *Jackson* had affixed "video cameras on the tops of telephone poles overlooking the residences of" suspected leaders of drug organizations.[12] "[B]oth of these cameras could be adjusted by officers at the police station, and could zoom in close enough to read a license plate, [but] neither had the capacity to record sound, and neither could view inside of the houses."[13]

In assessing whether the pole camera surveillance constituted a Fourth Amendment search, the Tenth Circuit asked "whether [the defendant] had a reasonable expectation of privacy in the area viewed by the cameras."[14] Relying on longstanding Supreme Court precedent, the Tenth Circuit stated: "The use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment. In addition, activity a person knowingly exposes to the public is not a subject of Fourth Amendment protection, and thus, is not constitutionally protected from observation."[15] Because the pole

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[11] 213 F.3d 1269 (10th Cir.), *vacated on other grounds*, 531 U.S. 1033 (2000).

[12] *Id.* at 1276.

[13] *Id.*

[14] *Id.* at 1280.

[15] *Id.* at 1280–81 (first citing *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986); then citing *California Ciraolo*, 476 U.S. 207,

cameras in *Jackson* "were incapable of viewing inside the houses, and were capable of observing only what a passerby would easily have been able to observe," the Tenth Circuit concluded that the government did not invade any reasonable expectation of privacy.[16] Almost two decades later, the Tenth Circuit in *United States v. Cantu*, a case with "quite similar" facts, affirmed a district court's reliance on *Jackson*'s holding in denying a motion to suppress evidence obtained from the warrantless use of a pole camera.[17]

Here, just like in *Jackson* (and *Cantu*), the pole camera could not view inside Hay's house; the camera could only capture the front of his residence, an area plainly visible to the public. Under *Jackson*, then, Hay lacked a reasonable expectation of privacy in the area viewed by the camera, so the pole camera surveillance was not a search under the Fourth Amendment.

Hay does not attempt to distinguish *Jackson*. Instead, he contends *Jackson* does not control the outcome of this case after *Carpenter v. United States*, where the Supreme Court found an expectation of privacy in historical cell-site location records,[18] because *Carpenter* "upended" *Jackson*'s reasoning.[19] Hay argues that, under *Carpenter* and the concurring opinions in

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213 (1986); and then citing *Katz v. United States*, 389 U.S. 347, 351 (1967)).

[16] *Id.* at 1281.

[17] 684 F. App'x 703, 703 (10th Cir. 2017) (unpublished).

[18] ___ U.S. ___, 138 S. Ct. 2206, 2220 (2018).

[19] Doc. 49 at 6.

United States v. Jones,[20] he has a "reasonable expectation of privacy in his movements over time."[21] And he urges this Court to find that the prolonged pole camera surveillance here invaded that privacy expectation. While Hay does not expressly use the term, his argument is premised on a "mosaic theory" of the Fourth Amendment, under which law enforcement activities that are not searches in isolation may nevertheless become a search when viewed in the aggregate.[22]

For the reasons explained below, the Court is not persuaded by Hay's argument that it may disregard *Jackson*'s no-search ruling in light of *Carpenter*. *Jackson* remains binding precedent in the Tenth Circuit, and it forecloses Hay's argument that the pole camera surveillance invaded a reasonable expectation of privacy. But even if the Tenth Circuit were to accept the mosaic theory, *Carpenter* and the *Jones* concurrences do not support finding a Fourth Amendment search here.

A. The Mosaic Theory of the Fourth Amendment

The Court begins by discussing the decisions on the mosaic theory in *Jones* and *Carpenter*, the two cases on which Hay relies. Broadly speaking, the mosaic theory "holds that, when it comes to people's reasonable expectation of privacy, the whole is greater

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[20] 565 U.S. 400 (2012).

[21] Doc. 49 at 3.

[22] *See* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311, 320 (2012).

than the sum of its parts."[23] "More precisely, it suggests that the government can learn more from a given slice of information if it can put that information in the context of a broader pattern, a mosaic."[24] Thus, under the mosaic theory, courts "apply the Fourth Amendment search doctrine to government conduct as a collective whole rather than in isolated steps," and consider "whether a set of nonsearches aggregated together amount to a search because their collection and subsequent analysis creates a revealing mosaic."[25]

The mosaic theory first appeared in Fourth Amendment jurisprudence in *United States v. Maynard*, the D.C. Circuit opinion later reviewed by the Supreme Court under a different name, *United States v. Jones*.[26] In *Maynard*, the D.C. Circuit held that the government's use of a GPS device to monitor a car's location for twenty-eight days was a Fourth Amendment search under the reasonable-expectation-of-privacy test.[27] The D.C. Circuit relied on the mosaic theory to explain why the month-long GPS monitoring of the car constituted a Fourth Amendment search:

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[23] *United States v. Tuggle*, 4 F.4th 505, 517 (7th Cir. 2021) (quoting Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 Sup. Ct. Rev. 205, 205 (2015)), *cert. denied*, 142 S. Ct. 1107 (2022).

[24] Kugler & Strahilevitz, *supra* note 23, at 205.

[25] Kerr, *supra* note 22, at 320.

[26] *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), aff'd sub nom. *United States v. Jones*, 565 U.S. 400 (2012).

[27] *Id.* at 568.

> [W]e hold the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.[28]

"The whole of one's movements over the course of a month is not constructively exposed to the public either," the D.C. Circuit explained, because the whole reveals more than the sum of its parts:

> Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's

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[28] *Id.* at 560.

> office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.[29]

The D.C. Circuit held that, considered in the aggregate, the prolonged GPS monitoring amounted to a Fourth Amendment search because it "reveal[ed] an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse."[30]

The Supreme Court in *Jones* unanimously agreed that a Fourth Amendment search took place but split on why.[31] Writing for the majority, Justice Scalia affirmed on a narrow trespass-based theory, holding that the GPS monitoring was a search because installing the device on the car constituted a common-law trespass.[32] Although the *Jones* majority did not endorse the mosaic theory, five justices—across two concurring opinions penned by Justices Alito and Sotomayor—embraced the D.C. Circuit's mosaic approach.[33]

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[29] *Id.* at 561–62.

[30] *Id.* at 563.

[31] *See United States v. Jones*, 565 U.S. 400 (2012).

[32] *Id.* at 404–411.

[33] Kerr, *supra* note 22, at 326–28.

Concurring in the judgment, Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, criticized Justice Scalia's reliance on what he described as an "18th-century tort law" approach to resolve questions of 21st-century surveillance.[34] Justice Alito would have applied the reasonable-expectation-of-privacy test and asked whether the GPS monitoring "involved a degree of intrusion that a reasonable person would not have anticipated":

> Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. . . .[35]

Where is the line? Justice Alito did not say: "We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark."[36] This section of Justice Alito's concurrence cites no authority,

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[34] *Jones*, 565 U.S. at 418 (Alito, J., concurring in the judgment).

[35] *Id.* at 430.

[36] *Id.*

but "scholars have read his opinion to 'echo[] the D.C. Circuit's mosaic approach in *Maynard*.'"[37]

Concurring separately, Justice Sotomayor explained that she joined the majority because she agreed that a search occurs, "at a minimum," when the government physically intrudes on a constitutionally protected area to obtain information.[38] But she also agreed with Justice Alito that the GPS monitoring was a search independent of the physical intrusion. Justice Sotomayor focused on the "unique attributes of GPS surveillance" that she found troubling, including its precision, efficiency, and inexpensiveness.[39] She emphasized that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[40] In Justice Sotomayor's view, these unique attributes implicate privacy interests:

> I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the government to ascertain, more or

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[37] *United States v. Tuggle*, 4 F.4th 505, 518 (7th Cir. 2021) (alteration in original) (quoting Kerr, *supra* note 22, at 327), *cert. denied*, 142 S. Ct. 1107 (2022).

[38] *Jones*, 565 U.S. at 413 (Sotomayor, J., concurring).

[39] *Id.* at 415–16.

[40] *Id.* at 415.

> less at will, their political and religious beliefs, sexual habits, and so on. . . . [41]

Like Justice Alito's concurrence, scholars recognize that "[t]his passage clearly echoes the mosaic theory."[42]

In 2018, the Supreme Court decided *Carpenter*, which concerned the government's acquisition of historical cell-site location information ("CSLI")—the time-stamped records a phone generates each time it connects to a cell site.[43] The Supreme Court held that "accessing seven days of CSLI constitute[d] a Fourth Amendment search" because it invaded the defendant's reasonable expectation of privacy "in the record of his physical movements as captured through CSLI."[44] In reaching this conclusion, the Court focused on the revealing nature of CSLI: when there is enough of it, CSLI "provides an all-encompassing record of the holder's whereabouts," opening "an intimate window into a person's life" that reveals "not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"[45] The *Carpenter* Court also pointed out that "a majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole

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[41] *Id.* at 416.

[42] *Tuggle*, 4 F.4th at 519 (alteration in original) (quoting Kerr, *supra* note 22, at 328).

[43] *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206, 2211 (2018).

[44] *Id.* at 2217 & n.3.

[45] *Id.* at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

of their physical movements," citing the *Jones* concurrences.[46] "Scholars describe the *Carpenter* majority as effectively 'endors[ing] the mosaic theory of privacy.'"[47]

As the Seventh Circuit recently stated in *United States v. Tuggle*, however, the Supreme Court's "passing endorsement" of the mosaic theory in *Carpenter* was not a "full and affirmative adoption."[48] The Seventh Circuit explained:

> At a minimum, the Supreme Court has not yet required lower courts to apply it. Moreover, many courts that have considered the theory have expressed disapproval, although not without exception. Additionally, the mainstream academic view has urged courts to reject the theory. Accordingly, whether or not the theory has merit from a theoretical or policy standpoint, Tuggle has not presented us with binding caselaw indicating that we *must* apply the mosaic theory.[49]

Hay has not pointed to any such binding precedent, either.

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[46] *Id.*

[47] *Tuggle*, 4 F.4th at 519 (alteration in original) (quoting Paul Ohm, *The Many Revolutions of* Carpenter, 32 Harv. J.L. & Tech. 357, 373 (2019)).

[48] *Id.*

[49] *Id.* (footnotes omitted).

B. *United States v. Jackson* remains binding precedent in the Tenth Circuit and precludes finding the pole camera surveillance was a Fourth Amendment search

The Court now turns to Hay's argument that *Jackson*'s no-search ruling no longer binds this Court because of *Carpenter*. Hay concedes that *Jackson* is on point, but he argues that its reasoning—that "activity a person knowingly exposes to the public is not a subject of Fourth Amendment protection"[50]—was "upended by *Carpenter*."[51] The Court disagrees.

The basic Fourth Amendment principle relied on by the Tenth Circuit in *Jackson* comes from *Katz*, which stated: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[52] Relatedly, the Tenth Circuit cited the portion of *California v. Ciraolo* that, itself citing *Katz*, explained "[t]he Fourth Amendment protection of the home has never extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."[53]

Hay argues that *Carpenter* "upended" these principles, but *Katz* and *Ciraolo* remain good law. As the First Circuit explained in *United States v. Moore-*

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[50] 213 F.3d 1269, 1281 (10th Cir.), *vacated on other grounds*, 531 U.S. 1033 (2000).

[51] Doc. 48 at 6.

[52] *Katz v. United States*, 389 U.S. 347, 351 (1967)).

[53] 476 U.S. 207, 213 (1986).

Bush, which reversed a district court decision that departed from circuit precedent holding that eight months of pole camera surveillance did not constitute a search, *Carpenter* "leaves intact" these two cases.[54] The First Circuit continued, "[n]owhere in the *Carpenter* opinion does the Court suggest that [these] cases, or any part of the Court's existing Fourth Amendment framework involving the lack of Fourth Amendment protection for places a defendant knowingly exposes to public view, has been overruled or modified."[55] The *Carpenter* Court also emphasized that its ruling was "a narrow one," limited to the specific question presented in that case, and it did not "call into question conventional surveillance techniques and tools, such as security cameras."[56] This Court therefore cannot read *Jackson* as relying on reasoning that *Carpenter* has upended.

Still, Hay urges that "*Carpenter* compels the reconsideration" of the constitutionality of warrantless pole camera surveillance of private property when, as here, it is prolonged.[57] Hay argues that although he could expect to be seen when he left his home, the same cannot be said of his public movements over time in the aggregate. In other words, Hay thinks this Court

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[54] 963 F.3d 29, 41 (1st Cir.), *reh'g en banc granted, opinion vacated*, 982 F.3d 50 (1st Cir. 2020) (mem.) (granting en banc review to consider whether to overrule *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009)).

[55] *Id.*

[56] *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206, 2220 (2018).

[57] Doc. 49 at 4.

should apply the mosaic theory and treat long-term pole camera surveillance differently than short-term surveillance when considering the existence of a reasonable expectation of privacy— something *Jackson* (and *Cantu*) did not do.

Hay may well be right that the Tenth Circuit should, in light of *Carpenter*, reconsider *Jackson* and broaden the application of *Carpenter*'s mosaic reasoning to pole camera surveillance. But this Court's role is to apply Tenth Circuit precedent, not to reconsider it. In the absence of clear Supreme Court precedent overruling *Jackson*, this Court will "follow the case which directly controls, leaving to the [Tenth Circuit] the prerogative of overruling its own decisions."[58] Thus, the Court concludes that *Jackson*'s no-search ruling remains binding on district courts in the Tenth Circuit and compels this Court to find that the warrantless pole camera surveillance here did not constitute a Fourth Amendment search.

C. The pole camera surveillance was not a Fourth Amendment search under the mosaic theory either

Even if the Court were to apply the mosaic theory, it would not help Hay. In *Jones* and *Carpenter*, the justices were concerned about the government's use of surveillance tools that could "generate[] a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associa-

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[58] *Agostini v. Felton*, 521 U.S. 203, 207 (1997).

tions."[59] Because the GPS and CSLI technologies at issue in those cases could reveal the whole of a person's movements, the *Jones* concurrences and *Carpenter* majority found the Fourth Amendment implicated. Relying on those two cases, Hay argues that VA OIG agents violated his reasonable expectation of privacy in the record of his movements because, for weeks, the pole camera recorded "each and every step he took," which in turn revealed "intimate, personal details" about his relationships and associations.[60]

But that is not what happened here. The pole camera was fixed in place, so it could view only what happened in front of it. While it is true that the camera could record every movement Hay made within its view, the camera could not track his movements anywhere else. Unlike the GPS and CSLI technologies in *Jones* and *Carpenter*, the camera "exposed no details about where [Hay] traveled, what businesses he frequented, with whom he interacted in public, or whose homes he visited, among many other intimate details of his life."[61] Far from revealing the "whole of his physical movements,"[62] the pole camera surveillance revealed just a small part of that much larger whole, even if an important one.

Hay raises legitimate concerns about the duration of the pole camera surveillance. But the pole camera

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[59] *United States v. Jones*, 565 U.S. 415 (2012). (Sotomayor, J., concurring); *Carpenter* 138 S. Ct. at 2217.

[60] Doc. 49 at 4, 6.

[61] *United States v. Tuggle*, 4 F.4th 505, 524 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1107 (2022).

[62] *Carpenter*, 138 S. Ct. at 2219.

surveillance in this case does not present the same privacy concerns that animated the majority in *Carpenter* and the concurrences in *Jones*. Thus, even applying the mosaic theory, the prolonged pole camera surveillance did not invade any reasonable expectation of privacy.!

For these reasons, the Court concludes that no Fourth Amendment search took place here. The Court therefore need not consider the government's alternative argument that, even if the pole camera surveillance amounted to a search, the good-faith exception to the exclusionary rule would prevent suppression. Hay's motion to suppress is denied.

IT IS THEREFORE ORDERED BY THE COURT that Defendant Bruce Hay's Motion to Suppress (Doc. 49) is denied.

IT IS SO ORDERED.

Dated: May 5, 2022

/s/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE