APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. SYLVESTER CUNNINGHAM, Defendant.	Case No. 20-cr-104-CJW **REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO SUPPRESS AND MOTION TO DISMISS**

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I. INTRODUCTION

On November 18, 2020, the Grand Jury charged Defendant with one count of Possession of a Firearm by a Felon in violation of 18 U.S.C. Sections 922(g)(1) and 924(a)(2). (Doc. 2.) On April 14, 2021, the Grand Jury issued a superseding indictment charging Defendant with Possession of a Firearm by a Felon in violation of 18 U.S.C. Sections 922(g)(1) and 924(a)(2); Possession with Intent to Distribute a Controlled Substance in violation of 21 U.S.C. Sections 841(a)(1) and (b)(1)(C); and Possession of a Firearm During and in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. Section 924(c)(1).[1] (Doc. 29.)

The matters before the Court are Defendant's Motion to Suppress (Doc. 15) and Motion to Dismiss (Doc. 16). The Honorable Charles J. Williams, United States District Court Judge, referred the motions to me for a Report and Recommendation. The Government timely filed a response to each motion. (Docs. 22 and 23.) I held a hearing on Monday, March 22, 2021. (Doc. 24.)

[1] While the Superseding Indictment issued after the hearing on the instant motions, neither party has suggested it changes the issues before the Court and I conclude it does not. (Doc. 29.)

At the March 22, 2021 hearing, the Government offered the following exhibits, which were admitted without objection:

1. Officer Matthes's investigation report;
2. Officer Curtis Buckles's investigation report;
3. Sergeant Aaron Leisinger's investigation report; and
4. Officer Matthes's body camera video.

Defendant offered the following exhibits in support of the motion to dismiss, which were admitted without objection:

A. A Henry County, Illinois computer-generated report regarding Defendant's 2005 conviction for "aggravated DUI/3rd + DUI." Also included is the State of Illinois statute that supported that conviction: 625 ILCS Section 11-501; and

B. Defendant's previous indictment in this Court in matter 12-CR-02 for being a Prohibited Person in Possession of a Firearm in violation of 18 U.S.C. Sections 922(g)(1) and 924(a)(2). (Doc. 24.)

The Government called one witness: Officer Lea Matthes of the Cedar Rapids Police Department.

At the conclusion of the hearing, in lieu of oral arguments, the parties elected to submit supplemental briefs, which were timely submitted. (Docs. 25-27.)

II. FINDINGS OF FACT

The instant motions arise from Defendant's alleged possession of a firearm at a Walmart store in Southwest Cedar Rapids on August 7, 2020. Defendant's possession of the firearm in question, a Weihracuh Hermann .357 caliber revolver, is made illegal, according to the indictment, by virtue of his following convictions:

1. Driving under the influence of alcohol, in the Circuit Court for of [sic] the 14th Judicial Circuit, Henry County, Illinois, on or about April 21, 2005, in case number 04CF160; and

2. Being a prohibited person (felon) in possession of a firearm, in the United States District Court for the Northern District of Iowa, on or about August 16, 2012 in case number 12-CR-00002.

(Doc. 2 at 1; Doc. 29 at 2.)

Officer Matthes testified to the following facts. I found Officer Matthes to be a credible witness. Other facts are found in the exhibits admitted at the hearing.

At about 11:00 a.m. on August 7, 2020, Officer Matthes was working an extra job assignment at the Walmart store. During these "extra job assignments," police officers are fully uniformed and equipped, including their service weapons and marked police vehicles; however, they are paid by Walmart to provide security, take direction from Walmart, and are considered Walmart employees.[2] Officer Matthes has been an officer with the Cedar Rapids Police Department ("CRPD") for a little under two years and is currently assigned to patrol. Officer Matthes completed her training with the Iowa Law Enforcement Academy and has an associate degree in corrections.

Officer Matthes was in her patrol vehicle preparing to begin her shift when she was approached by a Walmart employee, Penny Spencer, who requested immediate assistance because someone in the store had a gun in a wheelchair. (Matthes Hr'g Test.; Gov. Ex. 1 at 1.) Ms. Spencer had been helping a customer look for a lost cell phone when she lifted up a cushion on the customer's wheelchair and saw the gun. A Walmart manager, Lisa Schmitt, had also seen the gun in the wheelchair.

After this brief conversation, Officer Matthes entered the store and activated her body camera. She approached the area in the vestibule of the store where shopping carts

[2] While this presents an interesting factual scenario, neither party raises it as a basis for any particular relief. That is, the Government does not argue, for example, that there was no state action in conducting the search discussed herein. Nor does Defendant argue Officer Matthes was not authorized to make the search by virtue of this relationship. This relationship will figure into my discussion of whether there was consent for the search.

are collected for use by store patrons. Later in the video, it becomes apparent that a store security office is located on the opposite side of the vestibule. As Officer Matthes entered the vestibule, her video showed Ms. Schmitt pointing down at the wheelchair in question. (Def. Ex. 4 at 11:05:52 a.m.) Although Ms. Schmitt stood by the wheelchair, presumably to keep people away from it, the vestibule was bustling with employees and customers, including children.

Defendant was seated in a motorized shopping cart. Defendant's wheelchair appeared to be several feet away from Defendant, but the wide-angle lens of Officer Matthes's body camera makes distances somewhat difficult to judge. When the audio commenced, Officer Matthes was asking Defendant about whether he had a permit to carry a firearm. (*Id.* at 11:06:07-10 a.m.) Defendant denied having a permit to carry a firearm. While digging in his pockets for identification, he denied having a weapon and denied having placed a weapon in the wheelchair. Defendant explained that when he entered Walmart with the wheelchair there was nothing in it or on it. Defendant told Officer Matthes that no one else uses the wheelchair. (*Id.* at 11:07:52 a.m.) Officer Matthes lifted a cushion from the seat of the wheelchair with one hand and removed a revolver from the seat with her other hand. At the time of the seizure, Officer Matthes was the only police officer present. Defendant continued to deny knowledge of the weapon or ever having a permit to carry.

During the ensuing conversation, Defendant admitted that he was currently on federal "probation" for a prior gun conviction.[3] Defendant explained that he had driven to the store and assembled his wheelchair to enter the store. Defendant also explained to Officer Matthes and other CRPD officers who arrived at the scene that he had been paralyzed because of a gunshot. Toward the end of this conversation, Defendant was

[3] Defendant was serving a term of supervised release following a prior felony conviction.

allowed to transfer from the Walmart motorized cart to his wheelchair, and was then escorted into the store security office on the other side of the vestibule. The remainder of the body camera video shows Officer Matthes's further investigation at the store, including the provision of *Miranda* warnings to Defendant and his decision to remain silent.[4] Defendant was searched incident to his arrest and officers found a blue latex glove containing thirteen individually wrapped bags of cocaine in his undergarment. Officer Matthes had further discussions with store employees and then transported Defendant to the Linn County Correctional Center.

Officer Matthes's report indicates that she later interviewed the Walmart employee who first found the firearm, Penny Spencer. (Gov. Ex. 1 at 1.) Ms. Spencer was working near the front door and had helped Defendant with a motorized shopping cart. Defendant had to switch carts when the first one did not work. Defendant seemed to have misplaced his cell phone when switching carts. He had entered the store on the motorized shopping cart and came back to the vestibule a few minutes later looking for his phone. Defendant then told Ms. Spencer he was going to check his vehicle for his phone. During this time, Defendant left his personal wheelchair near the front of the store pushed against the wall. According to Ms. Spencer, while Defendant was in the store and switching carts, his personal wheelchair was never out of sight and no one touched it. (*Id.* at 3.) When Defendant went to his vehicle to look for his phone, Ms. Spencer suspected that the phone could have been under the wheelchair's seat cushion. (*Id.*) Ms. Spencer notified Ms. Schmitt that she saw a firearm and Ms. Schmitt then approached the wheelchair and also saw the firearm. (*Id.*)

[4] There are times during the body camera video (Gov. Ex. 4) where Office Matthes leaves the store building to secure evidence in her squad car and to place Defendant in the squad car.

Defendant was charged with being a felon in possession of a firearm and other offenses related to the possession of controlled substances. Additional facts will be discussed as necessary.

III. DEFENDANT'S MOTION TO SUPPRESS

A. The Parties' Positions

Defendant contends Officer Matthes conducted a warrantless search and seizure of the firearm beneath the cushion of his wheelchair. Defendant further contends there is no applicable exception to the warrant requirement that justified this search and seizure. Defendant denies he consented to the search or that exigent circumstances permitted law enforcement to conduct a search and seizure. Defendant also argues that the statements he made to Officer Matthes following seizure of the firearm are fruits of the poisonous tree.

The Government contends Officer Matthes did not violate Defendant's reasonable expectation of privacy because her search did not exceed the scope of the prior search by the Walmart employees. (Doc. 23 at 4 (relying on *United States v. Jacobsen*, 466 U.S. 109 (1984)).) The Government further contends the controlled substances found during the search of Defendant's person should not be suppressed because they were found during a search incident to a lawful arrest. (*Id.* at 6.)

In his post-hearing brief, Defendant first explains why he believes the wheelchair is protected as a personal effect under the Fourth Amendment. (Doc. 27 at 2 (citing *United States v. Chadwick*, 433 U.S. 1 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 579 (1991)).) Defendant then attempts to distinguish *Jacobsen* and its progeny. First, Defendant asserts that Officer Matthes exceeded the scope of the invasion by the Walmart employees. (*Id.* at 4-6.) In *Jacobsen*, Federal Express ("FedEx") employees seized a package apparently containing drugs and turned it over to law enforcement. 466 U.S. at 111. In contrast, in the instant case, Walmart employees

merely observed the firearm and reported it to law enforcement. Defendant alleges Officer Matthes went beyond that scope when she seized the firearm. Defendant further argues that even if Walmart retained some right to inspect the wheelchair because it was on Walmart property or it was somehow in Walmart's custody or control, Officer Matthes did not request or obtain Walmart's consent for the search and seizure. Finally, Defendant questions the limits of the private search exception, likening the instant case to a private party reporting the presence of a firearm in a felon's home as justification for a warrantless entry and seizure of a firearm by law enforcement.

B. Whether the Firearm Found in Defendant's Wheelchair Should be Suppressed

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." U.S. Const. amend. IV. Warrantless seizures are per se unreasonable unless one of the carefully drawn exceptions applies. *See Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *United States v. Lewis*, 864 F.3d 937, 943 (8th Cir. 2017). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Jacobsen*, 466 U.S. at 113; *United States v. Demoss*, 279 F.3d 632, 635 (8th Cir. 2002).

The parties' arguments focus on *Jacobsen*, 466 U.S. 109. In *Jacobsen*, FedEx employees opened a package that had been damaged by a forklift to examine its contents pursuant to a company insurance policy. 466 U.S. at 111. The employees removed a tube that held plastic bags containing a white powder. *Id.* The employees notified the DEA, replaced the plastic bags in the tube, and put the tube and packing materials back in the original box. *Id.* A DEA agent removed the plastic bags from the box without a warrant and field tested the powder, which turned out to be cocaine. *Id.* at 111-12.

Jacobsen held that a police intrusion that stays within the limits of a private search is not a search for Fourth Amendment purposes. *Id.* at 120-21. The Court reasoned that

"[t]he agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment." *Id.* at 119-20 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487-490 (1971); *Burdeau v. McDowell*, 256 U.S. 465, 475-476 (1921)). Thus, *Jacobsen* held that although the agent's "assertion of dominion and control over the package and its contents . . . constitute[d] a seizure," the seizure was reasonable because the package "could no longer support any expectation of privacy." *Id.* at 120-21. *Jacobsen* further held that the agent did not exceed the scope of the original private search by conducting the field test on the powder. *Id.* at 123-26.

1. Whether Defendant had a Reasonable Expectation of Privacy in his Wheelchair

Defendant argues that his wheelchair is protected as a personal effect under the Fourth Amendment. (Doc. 27 at 2 (citing *Chadwick*, 433 U.S. 1).)[5] *Chadwick* suppressed contraband seized from a locked footlocker seized from the trunk of an automobile because a person's expectation of privacy in effects such as luggage is "substantially greater" than in an automobile because luggage is not open to public view like an automobile and luggage is a repository for personal effects. 433 U.S. at 13. The Court reasoned that once the footlocker was seized, its inherent mobility did not justify dispensing with the Fourth Amendment's warrant requirement. *Id.* *Chadwick* also held that the footlocker search was not justified as a search incident to arrest because the search was remote in time and place from the arrest and no exigency existed. *Id.* at 15-16.

The Government responds that although it, too, was unable to find any caselaw directly on point, any privacy interest Defendant had in his wheelchair was "thwarted" by the Walmart employees' private search of his wheelchair prior to Officer Matthes's

[5] Defendant notes that he was unable to find any caselaw directly on point on this issue and I, likewise, have been unable to find any caselaw addressing the issue of a person's reasonable expectation of privacy in a wheelchair.

search. (Doc. 26 at 2.) The Government notes that it is not arguing that Defendant abandoned his wheelchair when he left the vestibule to search his van for his cell phone. (*Id.* at n.1.)

I find that Defendant had some privacy interest in his wheelchair and agree with Defendant that the automobile exception is not directly on point because while wheelchairs have some mobility, that mobility is limited when compared to automobiles. (Doc. 27 at 3.) On the other hand, Defendant's analogy between a locked footlocker, which clearly indicates an attempt to keep its contents free from prying eyes and his wheelchair that did not, as Defendant admits, contain a storage compartment such as a bag or purse, is not perfect. *See United States v. Reyes*, 922 F. Supp. 818, 833 (S.D.N.Y. 1996) (declining, under *Chadwick*, to suppress pager seized from bag attached to defendant's wheelchair in search incident to arrest). That being said, for purposes of this analysis, I find that Defendant's wheelchair was an effect that required law enforcement to obtain a warrant to search it unless some exception to the warrant requirement applied. I also find that Defendant had not abandoned the wheelchair and, by leaving the wheelchair at the front of the store, he did not forfeit his expectation of privacy in it.

2. Whether Officer Matthes Exceeded the Search Conducted by Walmart Employees Without a Proper Reason

a. Whether Walmart Employees Acted at the Behest of the CRPD

The facts resulting in seizure of the firearm are largely undisputed. Walmart employees first saw the firearm in Defendant's wheelchair. At that point, the Fourth Amendment was not implicated unless the employees were acting at the behest of the CRPD or some other governmental entity.

> The Fourth Amendment "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge

> of any governmental official.'" *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed.2d 85 (1984), *quoting Walter v. United States*, 447 U.S. 649, 662, 100 S. Ct. 2395, 65 L. Ed.2d 410 (1980). Three factors determine whether a private individual is acting as, or with the participation of, a government official: "(1) whether the government had knowledge of and acquiesced in the intrusive conduct; (2) whether the citizen intended to assist law enforcement or instead acted to further his own purposes; and (3) whether the citizen acted at the government's request." *United States v. Highbull*, 894 F.3d 988, 992 (8th Cir. 2018) (cleaned up). Avalos "bears the burden of proving by a preponderance of the evidence" that the Creighton University security officers acted as, or participated with, government officials. *Id.*

United States v. Avalos, 984 F.3d 1306, 1307–08 (8th Cir. 2021).

Applying the *Highbull* factors to the facts of this case, the Walmart employees who conducted the original search of Defendant's wheelchair did not act at the behest of, or participate with, the CRPD. The CRPD had no knowledge of the intrusive conduct until after Walmart employees completed their search of Defendant's wheelchair by lifting the cushion and seeing the firearm. Walmart employees did not intend to assist law enforcement when they searched Defendant's wheelchair; rather, they intended to assist Defendant find his missing cellphone. Finally, Walmart employees were not acting at the request of the CRPD, but searched for the cellphone pursuant to their customer service responsibilities. Thus, Walmart employees were not acting at the behest of, or participating with, the CRPD.

b. Whether Walmart Employees Consented to Officer Matthes's Search

Defendant argues that Walmart employees never granted Officer Matthes permission to search the wheelchair.[6] (Doc. 27 at 4-5 (citation omitted).) Defendant

[6] To be clear, the ultimate issue is not whether Walmart employees have authority to provide law enforcement consent to search the effects of patrons in the store over a patron's objection. For example, a law enforcement officer cannot constitutionally search patrons merely at the

asserts that this fact distinguishes the instant case from *United States v. Miller*, 152 F.3d 813 (8th Cir. 1998), upon which the Government relies. (*Id.*) In *Miller*, employees of a drug treatment facility entered a resident's apartment because they smelled cigarette smoke, which was a violation of house rules, saw evidence of illegal drug use in plain view, called law enforcement, whom they admitted to the apartment, and who saw only what the employees had seen before obtaining a search warrant for the apartment. 152 F.3d at 815. *Miller* held that there was "no question" the employees acted in a private capacity when they entered the apartment and that the police intrusion went no further than the employees' intrusion, and therefore "no Fourth Amendment search occurred at all, so the drug evidence in [the] case was lawfully obtained." *Id.* at 816.

"The Fourth Amendment's 'central requirement' is one of reasonableness, which is measured in objective terms by examining the totality of the circumstances." *United States v. Farnell*, 701 F.3d 256, 261 (8th Cir. 2012) (quoting *Illinois v. McArthur,* 531 U.S. 326, 330 (2001) (citation omitted); *Ohio v. Robinette,* 519 U.S. 33, 39, (1996)) (internal citations moved to parenthetical).

In the case at bar, Officer Matthes testified that she did not ask for consent from any Walmart employee prior to searching the wheelchair. However, Officer Matthes also testified that Ms. Spencer approached her while she was in her squad car as she was

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request of a store management. Patrons generally retain the expectation of privacy in their effects while shopping. Thus, a store patron may refuse consent to a search, even if Walmart consented. (The differing rights of stores and their customers in this area is far beyond the scope of this Report and Recommendation, let alone this footnote. A store owner – or other enterprise – might, for example, make a search a condition of entry.) The narrower issue here is whether Walmart consented to the search either as the owner of the store or, possibly, in its role as caretaker of the wheelchair left in the front of the store. While it has not been thoroughly briefed, Defendant's attempt to distinguish *Miller* raises the issue of Walmart's role in permitting the search. More particularly the issue appears to be whether Officer Matthes acted with Walmart's consent when she searched for and seized the firearm. Defendant argues "even assuming that Wal-Mart had some right to inspect the wheelchair, Officer Matthes did not ask the consent of Wal-Mart to search the wheelchair and seize the gun." (Doc. 27 at 4-5.)

preparing to begin her shift at Walmart and told Officer Matthes, "[T]hey needed me inside the store immediately. . . . that they had someone inside the store who had a gun in their wheelchair." When Officer Matthes entered the vestibule of the store, she saw Ms. Schmitt standing beside Defendant's wheelchair, pointing down at the chair. (Matthes Hr'g Test.; Gov. Ex. 4 at 11:05:52 a.m.)

I respectfully disagree with Defendant that Walmart employees did not consent to Officer Matthes's search of the wheelchair. Ms. Spencer told Officer Matthes that she was needed in the store "immediately." Moreover, as Government's Exhibit 4 shows, Ms. Schmitt was not only standing beside Defendant's wheelchair, she was pointing down at the wheelchair, seemingly to make sure Officer Matthes could see her. (Gov. Ex. 4 at 11:05:52-11:06:04 a.m.) Although the audio had not commenced on Officer Matthes's body camera video, Officer Matthes's arms are visible as she seems to acknowledge Ms. Schmitt and point to the wheelchair, herself. (*Id.* at 11:05:56 a.m.) Moreover, once Officer Matthes started moving behind Defendant and toward the wheelchair, Ms. Schmitt moves away from the wheelchair, watches the events for a bit, then begins doing work tasks such as helping to pick up hand-held shopping baskets. (*Id.* at 11:07:57-11:09:10 a.m.) These facts and Ms. Schmitt's body language make it reasonable to conclude that the employees were not only consenting to have Officer Matthes search the wheelchair, but also that they were somewhat relieved to have her take over the responsibility to do so.[7] It was unnecessary for Ms. Schmitt, Ms. Spencer, or another employee to say "magic words" to indicate a grant of consent or permission. Officer Matthes testified that when she is working at Walmart, she is paid by Walmart and is

> at the store to assist in anything that the store needs, whether it be minor disturbances, thefts. It can really be anything that the store needs us. [I'm]

[7] *See* Gov. Ex. 4 at 11:41:42-47 (Ms. Schmitt saying, "Thank God; Thank you, Jesus," as she recalls her reaction to Officer Matthes arriving at Walmart just when employees found the firearm in Defendant's wheelchair.)

> under the direction of them and their loss prevention and management, what they would like [me] to do.

(Matthes Hr'g Test.) Given that Officer Matthes works "under the direction" of Walmart employees; that there were two Walmart employees at the scene at the time of the search, at least one of whom was a manager; and that the employees not only requested her immediate assistance, but also turned the situation over to Officer Matthes once she entered the vestibule, it was reasonable for Officer Matthes or any reasonably objective officer in her position to interpret these facts as consent by Walmart to search Defendant's wheelchair, insofar as such consent was necessary.

In contrast, it would be illogical to conclude that, having hired a sworn police officer to assist with security and having called the officer to deal with an emergent situation, Walmart would require some more formal expression of consent to undertake the search and seizure of the firearm.

c. Whether Officer Matthes's Search of Defendant's Wheelchair Exceeded the Scope of the Walmart Employees' Search

Defendant argues that Officer Matthes exceeded the parameters of the search conducted by the Walmart employees by "touching, picking up, and seizing the firearm when the Walmart employees had not done so." (Doc. 27 at 4.) Defendant asserts that once Officer Matthes saw the firearm, she should have secured the wheelchair and sought a warrant. Defendant distinguishes this case from *Jacobsen* because in *Jacobsen*, the FedEx employees exercised "dominion and control" over the package that the Walmart employees here did not exercise over the firearm before contacting Officer Matthes. (*Id.*)

United States v. Va Lerie, 424 F.3d 694 (8th Cir. 2005) (en banc) is helpful in explaining the important difference between a search and a seizure.

> Not surprisingly, the Supreme Court has recognized the Search Clause is wholly distinct from the Seizure Clause, such that courts applying these clauses must understand they provide different protections against

> government conduct. *See Segura v. United States*, 468 U.S. 796, 806, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984) ("Different interests are implicated by a seizure than by a search."). According to the Supreme Court, a Fourth Amendment search "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). On the other hand, a Fourth Amendment seizure of property "occurs when there is some meaningful interference with an individual's possessory interests in that property." *Jacobsen*, 466 U.S. at 113, 104 S. Ct. 1652. While the Search Clause protects an individual's expectation of privacy, the Supreme Court has indicated the Seizure Clause relates, in part, to freedom of movement: "While the concept of a 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment-meaningful interference, however brief, with an individual's freedom of movement." *Id.* at 113 n. 5, 104 S. Ct. 1652; see also *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) ("The initial detention necessary to procure [ ] evidence may be a seizure of the person if the detention amounts to a meaningful interference with his freedom of movement. Obtaining and examining the evidence may also be a search if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable.") (citations omitted). The Court also has stated "not every governmental interference with an individual's freedom of movement raises such constitutional concerns that there is a seizure of the person." *Skinner,* 489 U.S. at 618, 109 S. Ct. 1402. It necessarily follows that not every governmental interference with a person's property constitutes a seizure of that property under the Constitution.

Va Lerie, 424 F.3d at 701.

In the instant case, Officer Matthes was called into Walmart after Ms. Spencer and Ms. Schmitt conducted a private search of the wheelchair for Defendant's cellphone. Officer Matthes then spoke with Defendant for a short time, walked over to Defendant's wheelchair, lifted the wheelchair's seat cushion, and saw the firearm. The first question is whether that search was valid.

United States v. Rouse, 148 F.3d 1040 (8th Cir. 1998) is helpful in understanding the limits of a governmental search after a private search. In *Rouse*, an airline employee had been advised by employees from a plane's departure city to be on the alert for two bags to arrive on the plane. 148 F.3d at 1041. Although there was some indication the employee may have been looking for identification to return the bags, she also may have been looking for drugs or money, and her ultimate motive for searching the bags is unclear. *Id.* Whatever her motivation, she searched the bags and found a number of identification cards and blank social security cards. *Id.* The employee called law enforcement who searched the bags and discovered not only the items the employee found, but also a laminating machine and material for laminating cards. *Id.* The defendant was indicted on two counts of possessing a counterfeit social security card with intent to alter it, and one count of counterfeiting a social security card, all in violation of 42 U.S.C. Section 408(a)(7)(C),d. *Id.* at 1040. *Rouse* declined to suppress the identification and social security cards because law enforcement had "already been informed by airline officials that the bags contained multiple identification cards and blank social security cards." *Id.* at 1041 (citing *Jacobsen* generally). However, *Rouse* suppressed the laminating machine and materials. *Id.* The Eighth Circuit reasoned,

> [t]hese were not items with respect to which the officers had had any previous information, and they were therefore not objects with respect to which Mr. Rouse had already had his expectations of privacy frustrated. There is no evidence that these items were in plain view when the officers arrived or that [the employee] had discovered them prior to that time.

Id.; *see also United States v. Runyan*, 275 F.3d 449, 461, 467-68 (5th Cir. 2001) (law enforcement search exceeded private search when ex-wife found child pornography on computer and some computer disks, turned computer and several disks over to law enforcement, and law enforcement viewed more disks than ex-wife viewed before obtaining search warrants for the computer and all the disks; however case remanded for

trial court to consider independent source doctrine), *evidence held admissible as product of independent source*, 290 F.3d 223 (5th Cir. 2002); *United States v. Bowman*, 215 F.3d 951, 956, 963 (9th Cir. 2000) (law enforcement search exceeded private search when search by owner of storage locker revealed silencer parts, a bulletproof vest, a police scanner, a book of disguises, a baseball cap, and some videotapes, and an ATF agent viewed the video tapes and dusted contents for prints, which the owner did not do);[8] *United States v. Kinney*, 953 F.2d 863, 866 (4th Cir. 1992) (holding there was no "analytically significant reason to view the recording of gun serial numbers in the present case any differently from the drug field tests in *Jacobsen*" when officers took guns merely seen by private citizen out of locked closet and bags to read serial numbers on guns). *But see United States v. Guindi*, 554 F. Supp. 2d 1018, 1023-25 (N.D. Cal. 2008) (gathering cases and distinguishing the case from *Rouse*); *United States v. Gricco*, No. CR.A. 01-90, 2002 WL 393115, at *11 (E.D. Pa. Mar. 12, 2002) (adopting "*Runyun* rule"[9] that police may examine more items in closed containers than private citizens examined because doing otherwise would "over-deter the police, preventing them from engaging in lawful investigation of containers where any reasonable expectation of privacy has already been eroded.") (quotation omitted; distinguishing *Rouse*, 148 F.3d at 1041).

Thus, the question is whether Officer Matthes's search exceeded the private search conducted by the Walmart employees by accessing evidence that the employees did not tell her about. *See Runyan*, 275 F.3d at 461 (evidence on certain disks not known to law

[8] Although this evidence exceeded the private search, contents of video tapes were harmless error because they not used in the prosecution and although the fingerprints were used in a subsequent warrant application, there was sufficient untainted information in the affidavit to support probable cause. *Bowman*, 215 F.3d at 963.

[9] *Runyun* also held that the police were allowed to view more files on the disks the defendant's ex-wife viewed, "reject[ing] the reasoning in *Rouse*" and allowing law enforcement to conduct a thorough search of closed containers, even though the private search of containers was limited. 275 F.3d at 464-65.

enforcement before they conducted their own search); *Bowman*, 215 F.3d at 963 (evidence contained on video tapes and revealed by finger prints not known to law enforcement before they conducted their own search); *Rouse*, 148 F.3d at 1041 (laminating machine and materials were not known to law enforcement before they conducted their own search). The answer is "no." Officer Matthes's search under the cushion of the wheelchair revealed only the gun that Walmart employees told her was under the cushion. Thus, I find that Officer Matthes's search did not exceed the scope of the private search conducted by the Walmart employees in this case and was valid under both *Jacobsen* and *Rouse*.

3. Whether Officer Matthes's Seizure of the Firearm Violated Defendant's Fourth Amendment Rights

The gravamen of Defendant's argument is that Officer Matthes should not have "touch[ed], pick[ed] up, and seiz[ed]" the firearm. (Doc. 27 at 4.) Again, *Va Lerie* is instructive:

> After announcing a seizure of property "occurs when there is some meaningful interference with an individual's possessory interests in that property," the Court concluded in *Jacobsen* that law enforcement's exertion of dominion and control over private property for its own purposes constituted a seizure in that case. Thus, the facts of *Jacobsen* shed some light on how to apply the Supreme Court's seizure standard. . . . The field tests revealed the white substance was cocaine. Other DEA agents also field tested the white substance. When determining whether the agents unlawfully seized and searched the package, the Court concluded the DEA "agents' assertion of dominion and control over the package and its contents did constitute a 'seizure.' " *Id.* at 120, 104 S. Ct. 1652. After recognizing "the Magistrate and the District Court found that the agents took custody of the package from Federal Express after they arrived" even though the package's owners "had entrusted possession of the items to Federal Express," the Court held "the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a 'seizure.'" *Id.* n. 18, 104 S. Ct. 1652. Notwithstanding the Court's seizure decision, the Court concluded the seizure was not

unreasonable because the agents had probable cause to believe the package contained contraband. *Id.* at 121–22, 104 S. Ct. 1652.

We do not believe the Court meant to express two different standards-i.e., meaningful interference with a person's possessory interests and dominion and control-when instructing courts how to apply Fourth Amendment seizure principles. Instead, we believe the Court referenced dominion and control when applying the seizure standard. That is, we believe the Court concluded law enforcement's exertion of dominion and control over the package for its own purposes-and in contravention to Federal Express's custody of the package-constituted a seizure under the Fourth Amendment because it constituted some meaningful interference with a person's possessory interests. Thus, the seizure standard prohibits the government's conversion of an individual's private property, as opposed to the mere technical trespass to an individual's private property. *See, e.g.*, *United States v. Karo*, 468 U.S. 705, 712–13, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984) (explaining the existence of a mere technical physical trespass to an individual's property "is only marginally relevant to the question of whether the Fourth Amendment has been violated," as "[a] 'seizure' of property occurs when 'there is some meaningful interference with an individual's possessory interests in that property'") (quoting *Jacobsen*, 466 U.S. at 113, 104 S. Ct. 1652); *Jacobsen*, 466 U.S. at 124–25, 104 S. Ct. 1652 (stating "the field test [of the white substance] did affect respondents' possessory interests protected by the [Fourth] Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one"); W. Page Keeton, et al., *Prosser and Keeton on The Law of Torts* § 15 at 92, 102 (5th ed.1984) (recognizing the tort of conversion differs from the tort of trespass in that conversion requires "an intent to exercise a dominion or control over the goods which is in fact inconsistent with the [owner]'s rights," and noting "[t]he gist of conversion is the interference with control of the [owner's] property"). Because we do not believe *Jacobsen* enunciated separate standards for seizure cases, we will not concern ourselves with trying to apply "both" standards. Instead, we will focus on whether the NSP's conduct constituted some meaningful interference with Va Lerie's possessory interests in his checked luggage.

424 F.3d at 701–03 (brackets in original).

Defendant is correct that Officer Matthes exerted some dominion and control over the wheelchair by lifting the cushion and certainly over the firearm that was seized.[10] *See Jacobsen*, 466 U.S. at 121. This brief exertion of dominion and control over the wheelchair worked some slight deprivation of Defendant's possessory interests in the wheelchair. Picking up the gun also constituted a seizure. *Va Lerie*, 424 F.3d at 702. However, the seizure was reasonable.

Officer Matthes was called into Walmart by Ms. Spencer because she and Ms. Schmitt had seen a firearm under the cushion. When Officer Matthes entered the vestibule and questioned Defendant, she learned that he did not have a permit to carry a firearm. Therefore, she knew that any gun she found under the wheelchair's seat cushion would be contraband. *See* Iowa Code § 724.4(4)(i) (Iowa's firearms permit statute). I have already found that Officer Matthes did not conduct a search that was beyond the scope of the search conducted by Ms. Spencer and Ms. Schmidt. Thus, the only question

[10] Unlike the package in *Jacobsen*, the status of the wheelchair *vis-à-vis* Walmart is somewhat unclear. (Gov. Ex. 1 at 3 (Officer Matthes Investigative Report recounting interview with Ms. Spencer wherein Ms. Spencer stated, "[A]t no time throughout Cunningham being in the store and switching carts was it ever out of sight and no one touched Cunningham's personal wheelchair.").) When someone entrusts a package to FedEx for shipping, a more formal relationship is established between the sender and the carrier. It seems likely that a person who leaves a wheelchair at the front of department store expects employees present in the vestibule will discourage obvious interference with the property. It also seems likely, however, that a person in Defendant's position assumes some risk the chair could be tampered with by third parties with little recourse to the store for failing to protect it. It also does not appear that in so leaving the chair in the vestibule, that Defendant had relinquished control of the wheelchair to Walmart as though to a bailee. *See, e.g., United States v. Fuller*, 374 F.3d 617, 621 (8th Cir. 2004) ("a person's interest in his or her loaned effects is not identical to the possessory interest of the bailee who has direct control of the effects, and the lender cannot assert the bailee's independent fourth amendment right to have the bailee's interest protected from unreasonable government interference.")

remaining is whether Officer Matthes's actual seizure of the firearm was constitutional when the Walmart employees had not previously "touched, picked up, or seized" it.

I find that the seizure of the firearm was constitutional for three reasons. First, as discussed above, *Rouse* and its progeny did not address whether the airline employee touched or manipulated the contraband cards in anyway prior to calling law enforcement. 148 F.3d at 1041; *Kinney*, 953 F.2d at 866 (no evidence that private citizen touched firearms, only that she saw them before calling police). Thus, as discussed above, physical contact is not the issue. It is safe to assume that law enforcement in *Rouse* seized the contraband cards just as Officer Matthes seized the contraband firearm in this case. Seizing contraband that a legal search has revealed is not an illegal seizure. This leads me to the second reason the seizure of the firearm was constitutional.

Once Officer Matthes lifted the cushion, the firearm was in plain view and, based on the totality of the circumstances, its illegal nature—at least as to Defendant—was readily apparent. The plain view doctrine "permits an officer to 'seize an object in plain view provided the officer is lawfully in the position from which he or she views the object, the object's incriminating nature is immediately apparent, and the officer has a lawful right of access to the object.'" *United States v. Hastings*, 685 F.3d 724, 729 (8th Cir. 2012) (quoting *United States v. Darr*, 661 F.3d 375, 379 (8th Cir. 2011) (quoting *United States v. Bustos-Torres*, 396 F.3d 935, 944 (8th Cir. 2005)). "'Plain view' is perhaps better understood, therefore, not as an independent 'exception' to the warrant clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." *PPS, Inc. v. Faulkner Cnty., Ark.*, 630 F.3d 1098, 1103 (8th Cir. 2011) (citing *Texas v. Brown,* 460 U.S. 730, 738-39 (1983) (plurality opinion)). Moreover, "[w]here the elements of the plain view doctrine are met, the fact that the officers could have left and obtained a warrant does not invalidate the justification for seizing the property." *Id.* at 1106.

Here, Officer Matthes was lawfully in the Walmart vestibule executing the search of the wheelchair not only in her capacity as a Walmart employee, but also based on probable cause she developed by speaking to Defendant that any firearm she would find would be illegal. The incriminating nature of the firearm was immediately apparent due to Defendant admitting he did not have a permit to carry a firearm. Thus, Officer Matthes lawfully seized the firearm. That Defendant thinks Officer Matthes should have sought a warrant before seizing the firearm does not change the fact that the seizure was constitutional. *Id.*

Moreover, exigent circumstances also justified seizure of the firearm. Although Officer Matthes would obtain more information from Walmart employees in subsequent interviews regarding their fears about children accessing the gun (Gov. Ex. 4 at 11:41:08-45 a.m.) and Defendant's level of disability (*Id.* at 11:11:17-20 a.m.), at the time she seized the firearm, she knew the following facts that provided exigent circumstances requiring seizure of the firearm. The Walmart vestibule continued to be busy with employees and shoppers, including children, coming and going. (*Id.* at 11:05:52-11:08:12.) Even when Officer Matthes's body camera video does not show people, the audio includes the continual sound of voices and shopping carts, which indicates the presence of people in the vestibule. Moreover, Officer Matthes was the only officer on scene and did not know the extent of Defendant's disability at the time of the seizure. If Defendant's expression of surprise at the presence of the firearm and his denial of possession of it are to be credited at all, Officer Matthes was a lone officer in a busy vestibule with a possibly loaded and abandoned weapon. Thus, although all her interactions with Defendant had been cordial, it was reasonable for Officer Matthes to seize the firearm for public safety and to preserve evidence. *See United States v. Stephen*, 984 F.3d 625, 631 (8th Cir. 2021), *reh'g denied* (Feb. 5, 2021) (affirming warrantless seizure of USB drive "to prevent the disappearance of evidence" and "to ensure that the

hard drive was not tampered with before a warrant was obtained") (quoting *United States v. Clutter*, 674 F.3d 980, 985 (8th Cir. 2012)); *United States v. Wells*, 702 F.2d 141, 144 (8th Cir. 1983) (after receiving tip from tavern employee, police seized gun from defendant in tavern where other patrons were present to ensure safety of patrons and officer).

4. Conclusion

This part of Defendant's motion should be denied.

C. Whether Defendant's Statements Made Post-Seizure of the Firearm Should be Suppressed

Defendant argues that his statements made to Officer Matthes after she seized the firearm should be suppressed because the statements, like his arrest, were fruit of the poisonous tree. (Doc. 17 at 5.) Defendant does not tell the Court what specific statements he wants suppressed and does not proffer any specific argument other than the broad "fruit of the poisonous tree" to support suppression. (*Id.*) Neither party addresses Defendant's custodial status during this time and, in fact, the Defendant raises no Fifth Amendment challenge.

Officer Matthes's body camera video, shows that between 11:08:05 a.m., when Officer Matthes seized the firearm, and 11:18:02 a.m., when Defendant invoked his *Miranda* right to remain silent, he made statements to Officer Matthes on the following subjects: (1) denying knowledge of who owned the firearm or how it came to be in his wheelchair; (2) explaining the process for putting his wheelchair together and for transferring from his own wheelchair into a Walmart motorized shopping cart; (3) telling Officer Matthes he did not have and never had a permit to carry a firearm; (4) explaining to Officer Matthes that he was on "federal probation" for a gun; and (5) telling police officers that he was paralyzed because he had been shot.

I find that the statements are not fruits of a poisonous tree. Because the search of the wheelchair and seizure of the firearm were constitutional, there was no poisonous tree to bear fruit. *See Wong Sun*, 371 U.S. at 487-89. However, because the District Court may disagree with me, I will analyze whether Defendant's statements must be suppressed.

Evidence obtained as a result of an unconstitutional search or seizure must be suppressed as well as any evidence later discovered to be an illegal "fruit of the poisonous tree." *Segura v. United States*, 468 U.S. 796, 804 (1984) (citing *Wong Sun v. United States*, 371 U.S. 471, 484 (1963)). "Any evidence secured through an unreasonable, hence illegal, search and seizure may not be used in a federal prosecution, nor may the fruit of such tainted evidence be admitted against the defendant whose privacy rights were originally violated." *United States v. Conner*, 948 F. Supp. 821, 829 (N.D. Iowa 1996) (citing *Weeks v. United States*, 232 U.S. 383 (1914); *Wong Sun*, 371 U.S. at 484-88). However, the evidence must be suppressed only if the "illegality is at least a but-for cause of obtaining the evidence." *United States v. Riesselman*, 646 F.3d 1072, 1079 (8th Cir. 2011) (quoting *United States v. Olivera-Mendez*, 484 F.3d 505, 511 (8th Cir. 2007)).

Statements that are sufficiently attenuated from the original taint need not be suppressed. *See id.* at 1080. In *Riesselman*, a defendant's Fourth Amendment rights were violated when officers searched his person while conducting a search of his home pursuant to a valid search warrant that did not authorize searches of persons. *Id.* at 1075. The officers found contraband on the defendant's person. The defendant was given a *Miranda* warning and said he would speak to officers and made incriminating statements. *Id.* The defendant sought to suppress the statements he made as fruit of the poisonous tree. *Id.* at 1079. The prosecution conceded that the original search of the defendant violated his right to be free from unreasonable

searches and seizures. *Id.* The Eighth Circuit affirmed the district court's holding that the defendant offered "no convincing evidence to show he was influenced by the finding of drugs on his person to make incriminating statements to the officers." *Id.* *Riesselman* reasoned that the defendant freely spoke with the officer about legal issues beyond the contraband that was found on his person. *Id.* at 1079-80. Based on this evidence, the court held that the defendant "failed the but-for test because he did not provide sufficient evidence to prove a nexus between the illegal search of his person and his statements made to the officers" and affirmed the district court's decision. *Id.* at 1080.

The first issue is whether there was a sufficient factual nexus between the constitutional violation and the challenged evidence. *See United States v. Yorgensen*, 845 F.3d 908, 913 (8th Cir. 2017) (citation omitted). The alleged constitutional violation here was the seizure of the firearm by Officer Matthes.

I find that like the constitutional violation in *Riesselman*, seizing the firearm here was not the but-for cause of Defendant's statements. After Officer Matthes seized the firearm, Defendant merely continued the same line of denial he had begun when Officer Matthes first encountered him. Finding the firearm did not change the tone, tenor, or even content of Defendant's statements. In fact, Defendant had already shared the arguably most incriminating piece of information with Officer Matthes prior to her touching the firearm—that he did not have a permit to carry a firearm. However, should the District Court disagree with me, I will continue to the second part of the analysis.

"The second question is whether the attenuation doctrine applies." *Yorgensen*, 845 F.3d at 914. Evidence is admissible when the connection between the constitutional violation and the evidence is "remote or has been interrupted by some intervening circumstance." *Id.* (citing *Utah v. Strieff*, –– U.S. ––, 136 S. Ct. 2056, 2061, (2016)).

To show that statements after an illegal search or seizure were voluntary to purge the taint, courts consider (1) whether *Miranda* warnings were given, (2) the "temporal proximity" between the constitutional violation and the statements, (3) intervening circumstances, and (4) the "'purpose and flagrancy of the official misconduct.'" *Riesselman*, 646 F.3d at 1080 (quoting *United States v. Lakoskey*, 462 F.3d 965, 975 (8th Cir. 2006)). *Riesselman* held that even if the district court had erred in finding no nexus between the Fourth Amendment violation and the defendant's later statements, it would have still affirmed because the government also showed that the statements were sufficiently attenuated from the constitutional violation that they were voluntary. *See id.* at 1081.

1. Whether* Miranda *Warnings Were Given

Defendant was not *Mirandized* during the relevant time period. This factor weighs against attenuation.

2. The Temporal Proximity Between the Alleged Constitutional Violation and the Statements

When addressing temporal proximity, a short time between the constitutional violation and the statement may be enough to indicate that the statement was voluntary if other circumstances indicate the statement was "sufficiently an act of free will to purge the primary taint." *United States v. Palacios-Suarez*, 149 F.3d 770, 772-73 (8th Cir. 1998) (holding that consent was sufficiently an act of free will to purge the taint of the initial stop where the officer asked the defendant several times if he could search the vehicle nine minutes after the initial stop) (quotation omitted); *United States v. Herrera-Gonzalez*, 474 F.3d 1105, 1112 (8th Cir. 2007) (assuming defendant's consent was given only ten minutes after illegal stop does not "compel the conclusion that the consent was insufficient to purge the taint" without analyzing other factors). Here, there was little or no time lapse between the alleged constitutional violation and when Defendant began

making statements. However, Defendant did not make statements only in response to questions. He also offered information without being asked. For example, he volunteered that he did not have a gun permit. (Gov. Ex. 4 at 11:09:26 a.m.) The only seemingly relevant questions Officer Matthes asked Defendant during this time are, again, whether he had a permit to carry a firearm (*Id.* at 11:08:23-28 a.m.), whether he was on probation (11:09:53 a.m.), and whether he was the only person who used the wheelchair (*Id.* at 11:10:35 a.m.). However, Defendant had already told Officer Matthes prior to her discovery of the firearm that he did not have a permit and that he was the only person who used the wheelchair (*Id.* at 11:06:07-10 a.m.; 11:07:52 a.m.). *See United States v. Griffin*, 922 F.2d 1343, 1355 (8th Cir. 1990) (inculpatory information provided prior to questioning admissible). That being said, these statements are arguably more akin to ones made "immediately on the heels" of a constitutional violation than ones purged of taint by passing time. *See United States v. Lakoskey*, 462 F.3d 965, 975 (8th Cir. 2006), *as amended on reh'g* (Oct. 31, 2006) (quoting *United States v. Duchi*, 906 F.3d 1278, 1285 (8th Cir. 1990)). Defendant did not have time to pause "to contemplate his situation and reconsider his decision to [provide incriminating statements.]" *United States v. Hernandez-Hernandez*, 384 F.3d 562, 565 (8th Cir. 2004); *Yorgensen,* 845 F.3d at 914 (citing *Hernandez-Hernandez*, 384 F.3d at 565). This factor weighs against attenuation.

3. Whether There Were Intervening Circumstances

A change of location or questioning by a different person from the one who committed the constitutional violation constitute intervening circumstances. *Hernandez-Hernandez*, 384 F.3d at 566; *Yorgensen,* 845 F.3d at 914 (citing *Hernandez-Hernandez*, 384 F.3d at 566); *see also United States v. Griggs*, No. 19-CR-2062-CJW-MAR, 2020 WL 7079136, at *19 (N.D. Iowa Dec. 3, 2020) (citing *Strieff*, 136 S. Ct. at 2062 (discovering the suspect had an outstanding warrant "entirely unconnected with the stop"

was an intervening circumstance); *Segura v. United States*, 468 U.S. 796 (1984) (obtaining warrant "wholly unconnected with the illegal entry" was an intervening circumstance)).

I find that no intervening circumstances existed under the facts of this encounter. As discussed above, Officer Matthes merely continued the same discussion she was having with Defendant before she seized the firearm. There was no change of location or any other intervening circumstance that made the questioning after Officer Matthes found the firearm "a new and distinct experience" from the questioning that began when she walked into Walmart. *Hernandez-Hernandez*, 384 F.3d at 566. This factor weighs against attenuation.

4. The Purpose and Flagrancy of any Official Misconduct

Finally, the purpose of Officer Matthes's conduct was to find and secure a firearm her Walmart manager had seen in a wheelchair. The firearm was in a public place that was occupied by customers and employees. This was not flagrant behavior. Rather, it was reasonable behavior both for an officer of the law and for an officer who worked for Walmart who was given the task of dealing with the situation by her Walmart manager. This factor weighs in favor of attenuation.

5. Conclusion

In the end, one factor weighs in favor of attenuation and three factors weigh against attenuation. The conclusion that Officer Matthes's alleged constitutional violation was not flagrant does not outweigh the lack of *Miranda* warnings, the temporal proximity of the violation and the questioning, and the absence of intervening circumstances. Therefore, I find that the statements were not attenuated from the original alleged constitutional violation.

Accordingly, if the District Court finds that Officer Matthes's search of the wheelchair and/or seizure of the firearm was unconstitutional and the "but for" cause of Defendant's following statements, the statements should be suppressed.

D. Whether the Cocaine Found on Defendant's Person Should Be Suppressed

As detailed above, after Officer Matthes seized the firearm, she continued her conversation with Defendant, who told her that he was on "federal probation." (Gov. Ex. 4 at 11:09:56 a.m.) Officer Matthes and another officer then helped Defendant transfer to his wheelchair and escorted him to the Walmart security office. (*Id.* at 11:11:39 a.m.) When Defendant was searched incident to his arrest, a rubber glove filled with individual baggies of cocaine was found on his person. (*Id.* at 11:25:48-57 a.m.) Defendant seeks to have this cocaine suppressed as fruit of the poisonous tree. (Doc. 17 at 5.)

Evidence obtained as a result of an unconstitutional search or seizure must be suppressed as well as any evidence later discovered to be an illegal "fruit of the poisonous tree." *Segura*, 468 U.S. at 804. But for Officer Matthes's search of his wheelchair and seizure of the firearm, Defendant would not have been searched and cocaine would not have been found on his person. Therefore, if the District Court finds that Officer Matthes's search of the wheelchair and/or seizure of the firearm was unconstitutional, the cocaine found on his person should also be suppressed as fruit of the poisonous tree.

However, it is well-settled that police officers may conduct warrantless searches of criminal defendants "incident to a lawful arrest." *United States v. Perdoma*, 621 F.3d 745, 750 (8th Cir. 2010) (citation omitted). These warrantless searches are justified on the basis of officer safety and the preservation of evidence. *Id.* Therefore, the cocaine on Defendant's person was found in a search incident to a valid arrest. "Probable cause to make a warrantless arrest exists when police officers have trustworthy information that would lead a prudent person to believe that the suspect has committed a crime." *United*

States v. Sherrill, 27 F.3d 344, 347 (8th Cir. 1994); *see also Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (holding that when a "felony[ ] or a misdemeanor [is] committed in the officer's presence," and is supported by probable cause, a warrantless arrest is constitutional). Defendant had just been caught with an illegal firearm and was about to be transported to the Linn County Jail, which made officer safety a primary concern. Accordingly, this part of Defendant's motion should be denied.

E. Recommendation

For all of the reasons discussed above, I recommend the District Court deny Defendant's Motion to Suppress.

IV. DEFENDANT'S MOTION TO DISMISS

The instant motion follows in the wake of *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), which found a ban on possession of a handgun in a home to be unconstitutional under the Second Amendment.

A. The Parties' Positions

Defendant moves to dismiss the indictment arguing that the statute is unconstitutional as applied to him because it deprives him of his right to bear arms under the Second Amendment. Defendant has been charged under 18 U.S.C. Section 922(g)(1), which prohibits the possession of firearms by an individual convicted of a crime punishable by more than one year's imprisonment. Defendant urges the Court to follow *United States v. Woolsey*, 759 F.3d 905 (8th Cir. 2014), which he contends left open the possibility of an as-applied Second Amendment challenge. (Doc. 16-1 at 14.) He contends *Woolsey* permits him to establish Second Amendment protection by showing either that his prior felony conviction was for a nonviolent offense *or* that he is no more dangerous than a typical law-abiding citizen. (Doc. 27 at 6-7 (citing *Woolsey*, 759 F.3d at 909) (emphasis in original).)

Defendant contends that the Eighth Circuit's subsequent discussion of the issue in *United States v. Adams*, 914 F.3d 602 (8th Cir. 2019) is not controlling. Furthermore, Defendant contends *Adams* went "off on an irrelevant tangent" when it considered whether the specific conduct at issue in that case, the defendant's carrying of a concealed weapon in an automobile, was protected under the Second Amendment. (Doc. 16-1 at 15.) Defendant contends *Woolsey* established an "or" test; that is, that he need only establish the he meets one of the two prongs of the test: that the prior conviction was nonviolent *or* that he is no more dangerous than a typical law-abiding citizen. (Doc. 27 at 6-7.)

Defendant asserts that his prior convictions do not meet the "dangerousness" test; however, his argument vacillates somewhat regarding whether the Court should focus on whether the prior offense was violent or shows him to be dangerous. (Doc. 16-1 at 17.) Defendant asserts his OWI conviction was aggravated because it was his third offense, not because his conduct contained an element of recklessness. Defendant touches only very lightly on his prior federal conviction under 18 U.S.C. section 922(g)(1). Without citation to authority, Defendant concludes that his prior conviction under Section 922 arose from the same OWI conviction and, thus, he "should never have been convicted of this offense." (*Id.*)

While the Government concedes that the Eighth Circuit has left open the theoretical possibility of an as-applied challenge to the constitutionality of Section 922(g), it notes that the court has never upheld such a challenge. (Doc. 22-1 at 3-4.) The Government stresses *District of Columbia v. Heller's* emphasis that its holding "should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." 554 U.S. 570, 626 (2008). The Government urges the Court to follow the majority opinion in *Adams* and require that Defendant establish that his particular conduct is protected by

the Second Amendment. The Government argues that Defendant cannot show that his specific conduct (i.e., carrying a firearm concealed in his wheelchair) is so protected.

The Government argues that, even if the Court entertains Defendant's as-applied challenge, Defendant's prior conviction for third offense driving under the influence is sufficient to prohibit him from possessing a firearm without violating the Second Amendment. The Government relies principally on Judge Kelly's concurrence in *Adams*, which states that "the Second Amendment reflects 'a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens,' a group that would not include those with felony convictions." 914 F.3d at 610 (Kelly J., concurring) (quoting *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011)); (Doc. 22-1 at 7.)

The Government points to an inconsistency in Defendant's argument: Defendant contends the Eighth Circuit analyzes underlying offenses with a "dangerousness" test, but then argues his third offense for driving under the influence is not a "violent offense." (Doc. 16-1 at 17.) The Government asserts Defendant's repeated offenses for driving under the influence demonstrate he is a danger to the community and, relying on *Holloway v. Attorney Gen. United States*, 948 F. 3d 164, 172-78 (3rd Cir. 2020), argues such a conviction is sufficiently serious and dangerous to bar him from possessing firearms.

In his post-hearing brief, Defendant argues that the Court must follow the test he contends was established in *Woolsey* and that he believes would make the statute unconstitutional as applied to him merely because the underlying OWI conviction was a nonviolent offense. (Doc. 27). Defendant contends the Court must follow the earlier decision of *Woolsey* and ignore *Adams* because "faced with conflicting panel opinions, we must follow the earliest opinion." (*Id.* at 7 (citing *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc)).) Defendant argues that in applying the *Woolsey* test, the Court should conclude that his underlying offense is not the type that would have

historically divested a person of the right to possess firearms. Defendant contends the alternative prong of the *Woolsey* test can be used by individuals who have been convicted of a historically disqualifying offense but who have become law-abiding citizens and, therefore, should no longer be prohibited from possessing firearms by virtue of the prior conviction.

Finally, Defendant contends that even if the Court were to consider the "law-abiding citizen" alternative test, there is no evidence to show Defendant is more dangerous than a typical law-abiding citizen. Defendant contends he elected not to present any additional evidence on this issue and, in his view, the only evidence before the Court is his prior conviction. Defendant believes this satisfies the law-abiding citizen test.

In its post-hearing brief, the Government urges the Court to apply the first prong of the *Adams* test to conclude Defendant's possession of a firearm concealed in his wheelchair is not conduct protected by the Second Amendment. The Government also argues that Defendant has failed to establish that he is no more dangerous than a law-abiding citizen. (Doc. 25). In the Government's view, the evidence before the Court is substantially more than Defendant's underlying OWI conviction. The Government points to Defendant's prior conviction for being a felon in possession of a firearm and the facts pertaining to the instant offense: that while on a term of federal supervised release Defendant carried a loaded handgun and cocaine into a busy Walmart and left the loaded handgun near the entrance of the store concealed beneath the cushion of his wheelchair.

B. Analysis

District of Columbia v. Heller held unconstitutional a ban on possession of a handgun in the home as a violation to the Second Amendment right to keep and bear arms. 554 U.S. 570, 635 (2008). In reaching this conclusion, *Heller* stated:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons* and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and Government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626-27 (emphasis added). This statement was accompanied by a footnote that states, "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

Despite these admonitions, individuals, including Defendant, continue to try and cast doubt on the constitutionality of laws seeking to prohibit them from possessing firearms. In essence, the Court must decide whether *Heller* left the door open to the instant challenge, determine the proper standard applicable to deciding the challenge, and ascertain whether that standard has been met.

1. Is the door open?

I am perfectly willing to take *Heller* at its word; that is, that the statute is a presumptively lawful regulatory measure and that *Heller* should not be the occasion for casting doubt on the long-standing prohibition on felons possessing guns set forth in Section 922(g). Furthermore, I would conclude, for the reasons set forth in Judge Kelly's concurrence in *Adams* (and discussed in more detail below), that barring Defendant from possessing a firearm because of his conviction for a crime punishable by more than one year in prison does not violate his Second Amendment rights. In other words, I would find the door closed.

This, however, is not the approach the Eighth Circuit has taken. The Eighth Circuit has declined to tell defendants charged under Section 922(g) if the door is open or how far. Rather, the Eighth Circuit in *Adams* and *Woolsey* (as well as in some unpublished opinions) has only told certain felons they do not fit through. Because this

holds out the possibility for a meritorious felon to successfully assert a Second Amendment challenge to Section 922(g), I find it prudent to continue the analysis.

2. What is the applicable standard?

Defendant is correct that if *Woolsey*, 759 F.3d 905 and *Adams,* 914 F.3d 602 cannot be distinguished from each other, the standard articulated in *Woolsey* controls because *Woolsey* was decided prior to *Adams*. *See Free the Nipple - Springfield Residents Promoting Equal. v. Springfield, Missouri*, 923 F.3d 508, 511 (8th Cir. 2019) ("Because *Ways* is not distinguishable, it controls this panel unless an intervening Supreme Court decision supersedes it.") (citing *United States v. Anderson*, 771 F.3d 1064, 1066–67 (8th Cir. 2014)) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.") (noting internal citations omitted). Thus, the issue becomes whether *Woolsey* and *Adams* can be distinguished from each other.

Woolsey was a garden-variety[11] gun possession case in which the defendant, a convicted felon, purchased a gun at a yard sale to protect himself from bears and to shoot at tin cans. *Woolsey*, 759 F.3d at 906-07. The defendant brought an as-applied challenge and the Eighth Circuit held that facts of the case were similar to the facts of other unsuccessful as-applied challenges because the defendant's prior felonies for aggravated assault and resisting arrest were violent felonies and the defendant had not shown he was "no more dangerous than a typical law-abiding citizen." *Id.* at 909. In support of its decision, *Woolsey* quoted the following reasoning from *United States v. Brown*, 436 Fed. App'x 725, 726 (8th Cir. 2011) (per curiam) (unpublished):

> [The defendant] has not presented "facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections." *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011). He does not allege, for example,

[11] I consider the possession "garden variety" because the defendant generally possessed the gun for relatively innocuous purposes. There was, for example, no reference to any attempt to conceal the gun or carry it into a protected location.

> that his stipulated prior felony conviction was for a non violent offense or that he is "no more dangerous than a typical law-abiding citizen." *Id.* [The defendant's] assertion that he possessed the gun for self defense is insufficient to successfully challenge his conviction under the felon in possession statute.

Id.

Adams, on the other hand, addressed an as-applied challenge where the defendant's prior felony was carrying a concealed weapon and the felony at issue was possession of a firearm that was found under the seat of defendant's car. 914 F.3d at 604-05. The Court articulated the test for an as-applied challenge in the following way.

> At a minimum, to succeed on an as-applied challenge, Adams must establish (1) that the Second Amendment protects his particular conduct, and (2) that his prior felony conviction is insufficient to justify the challenged regulation of Second Amendment rights.

Id. at 605.

Adams held that the defendant forfeited his claim by failing to address the first requirement and that the district court could have denied the defendant's motion on this basis. *Id.* The defendant had to show that the Second Amendment protected the right to carry a weapon concealed under his driver's seat, something he made no attempt to do in the district court, instead merely assuming "the existence of a constitutional right to carry a concealed weapon in a vehicle." *Id.* at 605-06. In the district court, the defendant argued only that his particular felony conviction could not justify a lifetime ban on possessing firearms. *Id.* at 606. Thus, for the first time on appeal, the defendant argued that the Second Amendment protected a right to carry a concealed firearm outside his home. *Id.*

To obtain relief on a forfeited claim, the Eighth Circuit required the defendant to "show that the district court made an obvious error that affected substantial rights and seriously affected the fairness, integrity, or reputation of the judicial proceedings." *Id.*

(citing *United States v. Olano*, 507 U.S. 725, 724-36 (1993)). *Adams* noted, however, "[a]n asserted legal error does not meet this standard if the proposition is 'subject to reasonable dispute.'" *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). Applying this standard, *Adams* held that it was not "plain or obvious" that the Second Amendment protects the right to carry a concealed weapon in a vehicle. *Id.* at 606-07 (reviewing history of decisions on the issue).

Judge Kelly concurred in the *Adams* judgment, but disagreed with how the majority analyzed the defendant's Second Amendment challenge. *Id.* at 607 (Kelly, J., concurring). Judge Kelly would have applied what she called "our sister circuits' . . . sensible, two-pronged approach to consider whether application of § 922(g)(1) to a particular individual comports with the Constitution's protection of the right to keep and bear arms." *Id.* "They 'ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.' If the law does, they 'evaluate the law under some form of means-end scrutiny.'" *Id.* at 610 (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)) (internal citation omitted).

Judge Kelly concluded that the Third Circuit's most recent decision in *Binderup v. Attorney Gen.*, 836 F.3d 336, 349 (3rd Cir. 2016), which held that "the right to bear arms may be nonexistent not just for 'violent felons,' but for 'any person who has committed a serious criminal offense, violent or nonviolent,'" comports with the Eighth Circuit's conclusion that "the Second Amendment reflects 'a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens,' a group that would not include those with felony convictions." *Id.* (citing *Bena*, 664 F.3d at 1184). In doing so, Judge Kelly acknowledged that *Binderup* overruled the standard announced in *Barton v. Attorney Gen.*, 836 F.3d 336, 349 (3d Cir. 2016) (en banc), which suggested that individuals convicted of nonviolent felonies may be able to establish they are not dangerous under Section 922(g)(1), and that the Eighth Circuit cited with approval in

Brown, 436 F. App'x at 726. *Id.* Judge Kelly concluded that the defendant failed to satisfy the first step of the *Marzarella* test because felon in possession of firearm statutes are akin to other historical exceptions that allow those convicted of felonies to fall outside of the Second Amendment's protections. *Id.* at 611.

I find that *Woolsey* and *Adams* can be distinguished from each other. Nothing about the *Woolsey* facts called into question whether the Second Amendment protected the defendant's activities of possessing a firearm to protect himself from bears and shoot tin cans. *Woolsey* never addressed that issue and decided the case based on the similarity between the defendant's prior felonies and the violent felonies of defendants in precedent cases. 759 F.3d at 909. It should also be remembered that both cases were "as-applied" challenges and did "not contend that [the] law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *Adams*, 914 F.3d at 605 (quoting *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010)). *Adams*, likewise, was faced with an as-applied challenge where it was "not plain or obvious that the Second Amendment protect[ed the defendant's] conduct." *Id.* at 606. Thus, I do not read *Adams* as being in conflict with *Woolsey*. Rather, *Adams* simply extended the discussion of *Heller* into new territory.

Moreover, I find that Defendant reads too much into *Woolsey* when he presumes it created an "alternative" test; i.e., a test that he can meet by proving either "prong": that his stipulated prior felony conviction was for a nonviolent offense *or* that he is "no more dangerous than a typical law-abiding citizen." Certainly *Woolsey* does not describe what it did in those terms. *Woolsey's* fact-based analysis cannot be read to establish a definitive statement that proof of either prong is sufficient to make the statute unconstitutional as applied to a future criminal defendant. Rather, *Woolsey*, like *Barton*, on which it relies, simply notes that the defendant had failed to allege his prior convictions

were for nonviolent offenses or that he is no more dangerous than a typical law-abiding citizen. 759 F.3d at 909 (quoting *Barton*, 633 F.3d at 174).

Furthermore, as Judge Kelly noted in her *Adams* concurrence, *Barton* has been overruled by the Third Circuit, sitting en banc. 914 F.3d at 611 (Kelly, J., concurring) (describing the opinion in *Binderup*, 836 F.3d 336 as "fractured"). *Barton* held that individuals convicted of "nonviolent" felonies may be able to establish that they are not "dangerous" and may be able to take advantage of the Second Amendment's protections. 633 F.3d at 174 ("[A] felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society.") However,

> In *Binderup*, the controlling plurality opinion concluded that *Heller* recognized that the right to bear arms may be nonexistent not just for "violent felons" but for "any person who has committed a serious criminal offense, violent or nonviolent." [836 F.3d] at 348; *see also id.* at 349 ("[A]nyone who commits a serious crime loses the right to keep and bear arms . . . .").

Id. Judge Kelly noted that the Eighth Circuit had cited the same language from *Barton* with approval in *Brown* that the *Woolsey* court cited. *Id.* at 610.

As previously stated, in spite of this, Judge Kelly opined that *Binderup* comports with the Eighth Circuit's "conclusion that the Second Amendment reflects 'a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens,' a group that would not include those with felony convictions." *Id.*

Had the defendant in *Woolsey* alleged facts to support either prong, *Woolsey* might have gone on to discuss whether it was sufficient and, if so, proof would have also been required on the other prong. Instead, *Woolsey* seems to have sensibly and simply pointed

out that the Eighth Circuit had previously denied claims from defendants with similar criminal histories. 759 F.3d at 909.

Therefore, both *Woolsey* and *Adams* are good law. However, only *Adams* is factually on point and will, therefore, be applied in this case.

3. Application of **Adams** *to the Facts of this Case*

a. Whether Defendant's Conduct was Protected by the Second Amendment

In *Adams*, the defendant was pulled over for failure to stop at a stop sign and consented to a search of his vehicle, during which law enforcement discovered a handgun under the driver's seat. As mentioned above, *Adams* found it was neither plain nor obvious that the Second Amendment protected the defendant's conduct and engaged in a lengthy discussion of the history of the regulation of carrying concealed weapons before ultimately concluding that "a party who raises an as-applied constitutional challenge to a statute must show that the statute as applied in the particular circumstances of his case infringed on conduct that was constitutionally protected." 914 F.3d at 607.

Here, Defendant has expressly declined to address the issue, insisting the first prong of the *Adams* test, that he is no more dangerous than a typical law-abiding citizen, is inapplicable. Thus, since I have concluded that *Adams* is applicable and even controlling in this case, I could simply find that Defendant has waived his argument on this issue. If anything, it is even less plain and obvious there is protected Second Amendment conduct in the instant case than in *Adams*. Defendant was not on a public street or in his automobile but on private property that was nevertheless opened to the public when he carried a concealed firearm without a permit. Officer Matthes was unaware of the store policy regarding patrons possessing firearms on the premises, concealed or otherwise. We do know, however, that at least two store employees were concerned enough about the presence of a firearm to summon a police officer to confront

Defendant.[12] Here, I recommend the Court find that Defendant has failed to show that the statute as applied in these particular circumstances infringes upon protected conduct.[13]

b. Whether Defendant's Predicate Offenses Disqualify Him From Possessing a Firearm

The District Court may disagree with my conclusion that Defendant did not show that his conduct was protected by the Second Amendment. The *Adams* majority declined to determine whether the defendant's prior felony conviction was sufficient to disqualify him from protection under the Second Amendment. 914 F.3d at 607. Because the District Court may disagree with my conclusion that Defendant has failed in this regard, and because *Adams* held that an as-applied challenger must establish *both* that (1) the Second Amendment protects his particular conduct and (2) that his prior felony conviction was insufficient to justify regulating his Second Amendment rights, *Id.* at 605, I will address whether Defendant's previous criminal convictions are of the type that bar his possession of a firearm despite the Second Amendment.

Defendant asserts that this third OWI conviction is not a violent offense that can support a ban on his possession of firearms. (Doc. 16-1 at 17 (citing *Leocal v. Ashcroft*,

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[12] Although Officer Matthes was not aware of it and no employee mentioned it, Walmart allows customers to carry concealed weapons in its stores as long as they have proper permits, which is in concert with Iowa law. *See* Iowa Code § 724.4; Abha Bhattarai, *"The Status Quo is Unacceptable": Walmart Will Stop Selling Some Ammunition and Exit the Handgun Market* (Sept. 3, 2019), https://www.washingtonpost.com/business/2019/09/03/status-quo-is-unacceptable-walmart-will-stop-selling-some-ammunition-exit-handgun-market/. The parties' briefs do not explore the nature of the second amendment right Defendant seeks to protect. I am hesitant to embark on a discussion of the Defendant's right in this context where Defendant himself has declined to elaborate.

[13] Part of Judge Kelly's concern in her concurrence in *Adams* was that the defendant would have had no reason to know he had to address how the particular conduct at issue was protected. 914 F.3d at 608. Having cited *Adams*, Defendant was clearly aware of its existence. Rather than attempt to show his particular conduct is protected, Defendant instead argues the *Adams* standard is inapplicable. (Doc. 16-1 at 14-16.)

543 U.S. 1 (2004) for the proposition that a state OWI offense that does not have an element of recklessness is not a crime of violence); Doc. 27 at 7 (same).)

The Government responds that Defendant's focus on "violence" is at odds with his own argument that the Eighth Circuit endorsed a "dangerousness" test in *Woolsey*. (Doc. 22-1 at 8.) According to the Government, Defendant's recharacterization of the dangerousness test to a violence test with no support is improper. (*Id.*) The Government asserts that Defendant's recidivist behavior of driving under the influence proves Defendant is a danger to the community. (*Id.* (citing *Holloway*, 948 F.3d at 172-78); Doc. 25 at 4-5).)

I agree with the Government that Defendant incorrectly recasts the standard as one of violence. Both *Woolsey* and Judge Kelly's concurrence in *Adams* rely on a standard requiring a defendant to show he is no more *dangerous* than a typical law-abiding citizen. *Adams*, 914 F.3d at 610-11 (Kelly, J. concurring); *Woolsey*, 759 F.3d at 909; *see also Brown*, 436 F. App'x at 726 (stating that the defendant did not present facts about himself that distinguished him from others historically barred from Second Amendment protections by, for example, showing his previous crimes were nonviolent or that he was "no more dangerous than a law-abiding citizen") (quoting *Barton*, 633 F.3d at 174). Therefore Defendant's reliance on *Leocal* is misplaced.

Defendant cannot satisfy that test. The Eighth Circuit noted in *United States v. Hughley* that Section 922(g)(1) addresses not only those who have committed violent felonies, but rather those whom society deems ineligible to possess firearms because they have committed serious crimes. 691 F. App'x 278, 279-80 (8th Cir. 2017) (per curiam) (unpublished).

> Section 922(g)(1)'s purpose reaches beyond felons who have proven themselves violent—that is, those who have already committed violent felonies. In enacting this statute, "Congress sought to keep guns out of the hands of those who have demonstrated that they may not be trusted to

> possess a firearm without becoming a threat to society." *Small v. United States*, 544 U.S. 385, 393, 125 S. Ct. 1752, 161 L. Ed. 2d 651 (2005) (internal quotation marks omitted). "[T]he principal purpose of the federal gun control legislation . . . was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Schrader*, 704 F.3d at 989–90 (ellipsis in original) (quoting *Huddleston v. United States*, 415 U.S. 814, 824, 94 S. Ct. 1262, 39 L. Ed. 2d 782 (1974)). The statute's objective therefore includes keeping firearms from "persons, such as those convicted of serious crimes, who might be expected to misuse them." *Id.* at 990 (quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119, 103 S. Ct. 986, 74 L. Ed. 2d 845 (1983)). Indeed, the statute does not mention violent crimes, but rather serious ones—those deserving punishment of more than a year in prison. 18 U.S.C. § 922(g)(1).

Id. (alterations in original). Although *Hughley* is an unpublished case, the precedent upon which it relies is not. Moreover, its reasoning is sound and was cited with approval by Judge Kelly in her concurrence in *Adams*. 914 F.3d at 611 (Kelly, J., concurring). The defendant in *Hughley* had been convicted of possessing a user-amount of crack cocaine and unlawfully using a weapon in the mid-1990s and was sentenced to 20 months in prison. 691 F. App'x at 278. His record was clean until 2014 when he was charged with illegally possessing two pistols in violation of 18 U.S.C. Section 922(g)(1). *Id.* *Hughley* held that the defendant failed to prove he was no more dangerous than a typical law-abiding citizen. *Id.* at 279. The Eighth Circuit reasoned that although his prior crimes were nonviolent, in 1995, he concealed a shotgun while possessing illegal drugs and in 2014 when he was arrested for trespassing, he had two firearms, ammunition, and illegal drugs in his car. *Id.* In addition, possessing a firearm to protect oneself while possessing illegal drugs "stand[s] in sharp contrast" to "restricting citizens who have not been convicted of serious offenses from having guns in their homes for self-defense." *Id.*

Therefore, there is precedent for finding that nonviolent predicate offenses can support a Section 922(g)(1) indictment and not violate the Second Amendment. In *Holloway*, the Third Circuit succinctly explained why driving under the influence is a serious crime under Section 922(g)(1).

> As previously stated, *Heller* embraced the "longstanding prohibitions on the possession of firearms by felons." 554 U.S. at 626, 128 S. Ct. 2783. Because Holloway's DUI misdemeanor conviction carries a maximum penalty of five years' imprisonment, it is deemed a disqualifying felony under § 922(g)(1). Thus, the application of § 922(g)(1) is presumptively lawful. *See Binderup*, 836 F.3d at 348 (Ambro, J.).
>
> We next examine whether Holloway's crime was nonetheless "not serious enough to strip [him] of [his] Second Amendment rights." *Id.* at 351. Under *Binderup*, "a person who did not commit a serious crime retains his Second Amendment rights," because "a non-serious crime does not demonstrate a lack of 'virtue' that disqualifies an offender from exercising those rights." *Id.* at 349.
>
> A crime that presents a potential for danger and risk of harm to self and others is "serious." *See* "Serious," Black's Law Dictionary (11th ed. 2019) (defining "serious" as, among other things, "dangerous; potentially resulting in death or other severe consequences"). "There is no question that drunk driving is a serious and potentially deadly crime. . . . The imminence of the danger posed by drunk drivers exceeds that at issue in other types of cases." *Virginia v. Harris*, 558 U.S. 978, 979-80, 130 S. Ct. 10, 175 L. Ed. 2d 322 (2009) (Mem.) (Roberts, C.J., dissenting from denial of writ of certiorari); *see Mitchell*, 139 S. Ct. at 2541 (Sotomayor, J., dissenting) ("[D]runk driving poses significant dangers that [states] must be able to curb."); *Begay*, 553 U.S. at 141, 128 S. Ct. 1581 ("Drunk driving is an extremely dangerous crime.").
>
> All three branches of the federal government have recognized as much. The Supreme Court has described individuals "who drive with a BAC significantly above the . . . limit of 0.08% and recidivists" as "the most dangerous offenders." *Birchfield v. North Dakota*, –– U.S. ––, 136 S. Ct. 2160, 2179, 195 L. Ed. 2d 560 (2016). Congress and the Executive Branch have also recognized the dangers posed by drunk driving. Congress

> requires states to implement highway safety programs "to reduce injuries and deaths resulting from persons driving motor vehicles while impaired by alcohol." 23 U.S.C. § 402(a)(2)(A)(iii). The Secretary of Transportation conditions the receipt of certain highway-related funds on states' implementation of programs with impaired driving countermeasures that will "effective[ly]" "reduce driving under the influence of alcohol." § 405(a)(3), (d). Thus, all branches of the federal government agree that DUIs are dangerous, and those who present a danger may be disarmed.

948 F.3d at 172–74 (alterations in original); *see also United States v. McCall*, 439 F.3d 967, 972 (8th Cir. 2006) ("Unlike other acts that may present some risk of physical injury, . . . the risk of injury from drunk driving is neither conjectural nor speculative. Driving under the influence vastly increases the probability that the driver will injure someone in an accident. . . . Drunk driving is a reckless act that often results in injury. . . ."") (first two sets of ellipses in original) (quoting *United States v. Rutherford*, 54 F.3d 370, 376–77 (7th. Cir. 1995)), *opinion & judgment vacated & reh'g granted*, 523 F.3d 902 (8th Cir. 2008). The Iowa Court of Appeals also recognizes that multiple convictions for driving under the influence of alcohol pose a danger to the public. *See State v. Hanson*, 872 N.W.2d 198 (Iowa Ct. App. 2015) (unpublished table decision) (affirming five-year sentence for fourth OWI offense given to 50-year-old defendant with steady employment history, family, and no other criminal history where sentencing judge stated that the defendant's repeated drunk driving constituted "bad judgment" and a "danger to the public"; court held that the judge did not overemphasize the nature of the crime and recognized the "danger to the public it creates").

Defendant argues that the only reason his third OWI was "aggravated," was that it was his third, not because the offense was violent. Defendant misses the point. While one, or even two, OWI convictions might indicate that a person occasionally imbibed too much at a party, three convictions tend to indicate an inability, or unwillingness, to learn from past mistakes, change behavior, and mitigate the threat one poses to the public. As

the *Hanson* court stated, repeated drunk driving constitutes not only bad judgment, but also a danger to the public. Defendant's recidivist drunk driving behavior makes him one of "the most dangerous offenders." *Holloway*, 948 F.3d at 174 (quoting *Birchfield v. North Dakota*, -- U.S. --, 136 S. Ct. 2160, 2179 (2016)).

Furthermore, Defendant's focus on his OWI conviction fails to take into account his subsequent felon in possession of a firearm conviction from this Court. Defendant's focus on the OWI implies that if that charge and conviction is somehow minimized, his prior history of being a felon in possession of a firearm will cease to exist. However, I find it important not to lose sight of the fact that Defendant committed that crime while under the same restriction that resulted in the initial indictment in this case: he was prohibited from possessing a firearm. And, yet, he did possess a firearm. The manner in which the issue is presented to the Court is noteworthy. Defendant did not apply for a permit to purchase or carry a firearm and, upon rejection, seek to challenge the denial in a civil proceeding. Rather, Defendant appears to have simply disregarded the prohibition on his possession of a weapon and carried a loaded firearm, along with a supply of cocaine, into a crowded Walmart. These are not the hallmarks of a typical law-abiding citizen.

In addition, Defendant has produced no evidence related to his character, current employment, community service or volunteer work, community ties, rehabilitation efforts, or anything else that would allow me to conclude that he is not any more dangerous than a typical law-abiding citizen. In fact, Defendant's multiple OWI convictions and disrespect for the law as demonstrated by his twice possessing a firearm as a prohibited person and then possessing illegal narcotics while on federal supervised release show, if anything, a lack of rehabilitation efforts.

Therefore, Defendant has not presented facts about himself and his background that distinguish his circumstances from those of persons historically barred from the

protections of the Second Amendment or show that he is no more dangerous than a typical law-abiding citizen. Accordingly, Defendant has not proven that his prior felony convictions are insufficient to justify the challenged regulation of his Second Amendment rights. *Adams*, 914 F.3d at 605; *see also United States v. Williams*, No. 8:19CR40, 2020 WL 2476188, at *2 (D. Neb. Mar. 16, 2020), *R. & R. adopted,* 2020 WL 2467229 (D. Neb. May 13, 2020) (applying first prong of *Adams* test).

I recommend the District Court find that Defendant has not proven that his prior convictions are insufficient to justify regulating his Second Amendment rights.

C. Conclusion

Defendant has failed to distinguish his circumstances from those persons historically barred from the protections of the Second Amendment. Therefore, his as-applied challenge fails under *Adams*. Accordingly, I recommend that the District Court deny Defendant's Motion to Dismiss. (Doc. 16.)

V. CONCLUSION

For the reasons set forth above, I respectfully recommend the District Court **DENY** Defendant's Motion to Suppress **(Doc. 15)** and **DENY** Defendant's Motion to Dismiss **(Doc. 16)**.

Objections to this Report and Recommendation in accordance with 28 U.S.C. Section 636(b)(l) and Fed. R. Crim. P. 59(b) must be filed within fourteen (14) days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* Fed. R. Crim. P. 59. Failure to object to the Report and Recommendation waives the right to *de novo* review by the district court of any portion of the Report and Recommendation as well as the right to

appeal from the findings of fact contained therein. *United States v. Wise,* 588 F.3d 531, 537 n.5 (8th Cir. 2009).

DONE AND ENTERED at Cedar Rapids, Iowa, this 29th day of April, 2021.

Mark A. Roberts, United States Magistrate Judge
Northern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. SYLVESTER CUNNINGHAM, Defendant.	No. 20-CR-104-CJW-MAR **ORDER**

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I. INTRODUCTION

This matter is before the Court on defendant's Objections (Doc. 40) to the Report and Recommendation (Doc. 37) of the Honorable Mark A. Roberts, United States Magistrate Judge. On March 4, 2021, defendant filed a Motion to Suppress (Doc. 15) and a Motion to Dismiss (Doc. 16). The government timely resisted both motions. (Docs. 22, 23). On March 22, 2021, Judge Roberts held a hearing on the motions and requested supplemental briefing from the parties. (*See* Doc. 24). The parties submitted supplemental briefing (Docs. 25, 26, 27), and on April 29, 2021, Judge Roberts issued his Report and Recommendation ("R&R"), recommending that the Court deny defendant's motions. (Doc. 37). On May 13, 2021, defendant timely filed his objections to the R&R. (Doc. 40).

For the following reasons, the Court **sustains in part and overrules in part** defendant's objections, **adopts** Judge Roberts' R&R with modification, and **denies** defendant's Motion to Suppress and Motion to Dismiss.

II. STANDARD OF REVIEW

The Court reviews Judge Roberts' R&R under the statutory standards found in Title 28, United States Code, Section 636(b)(1):

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

See also FED. R. CIV. P. 72(b) (stating identical requirements). While examining these statutory standards, the United States Supreme Court explained:

> Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue de novo if no objections are filed, it does not

> preclude further review by the district judge, sua sponte or at the request of a party, under a de novo or any other standard.

Thomas v. Arn, 474 U.S. 140, 154 (1985). Thus, a district court may review de novo any issue in a magistrate judge's report and recommendation at any time. *Id.* If a party files an objection to the magistrate judge's report and recommendation, the district court must review the objected portions de novo. 28 U.S.C. § 636(b)(1). In the absence of an objection, the district court is not required "to give any more consideration to the magistrate [judge]'s report than the court considers appropriate." *Thomas*, 474 U.S. at 150.

De novo review is non-deferential and generally allows a reviewing court to make an "independent review" of the entire matter. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991); *see also Doe v. Chao*, 540 U.S. 614, 620–19 (2004) (noting de novo review is "distinct from any form of deferential review"). The de novo review of a magistrate judge's report and recommendation, however, only means a district court "'give[s] fresh consideration to those issues to which specific objection has been made.'" *United States v. Raddatz*, 447 U.S. 667, 675 (1980) (quoting H.R. Rep. No. 94–1609, at 3, reprinted in 1976 U.S.C.C.A.N. 6162, 6163 (discussing how certain amendments affect Section 636(b))). Thus, although de novo review generally entails review of an entire matter, in the context of Section 636 a district court's required de novo review is limited to "de novo determination[s]" of only "those portions" or "specified proposed findings" to which objections have been made. 28 U.S.C. § 636(b)(1).

Consequently, the Eighth Circuit Court of Appeals has indicated de novo review would only be required if objections were "specific enough to trigger de novo review." *Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989). Despite this "specificity" requirement to trigger de novo review, the Eighth Circuit Court of Appeals has "emphasized the necessity . . . of retention by the district court of substantial control

over the ultimate disposition of matters referred to a magistrate [judge]." *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994). As a result, the Eighth Circuit Court of Appeals has concluded that general objections require "full de novo review" if the record is concise. *Id.* Even if the reviewing court must construe objections liberally to require de novo review, it is clear to this Court that there is a distinction between making an objection and making no objection at all. *See Coop. Fin. Ass'n, Inc. v. Garst*, 917 F. Supp. 1356, 1373 (N.D. Iowa 1996).

In the absence of any objection, the Eighth Circuit Court of Appeals has indicated a district court should review a magistrate judge's report and recommendation under a clearly erroneous standard of review. *See Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996); *see also Taylor v. Farrier*, 910 F.2d 518, 520 (8th Cir. 1990) (noting the advisory committee's note to Federal Rule of Civil Procedure 72(b) indicates "when no timely objection is filed the court need only satisfy itself that there is no clear error on the face of the record"); *Branch*, 886 F.2d at 1046 (contrasting de novo review with "clearly erroneous standard" of review, and recognizing de novo review was required because objections were filed).

The Court is unaware of any case that has described the clearly erroneous standard of review in the context of a district court's review of a magistrate judge's report and recommendation to which no objection has been filed. In other contexts, however, the Supreme Court has stated the "foremost" principle under this standard of review "is that '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985) (citation omitted). Thus, the clearly erroneous standard of review is deferential, *see Dixon v. Crete Med. Clinic, P.C.*, 498 F.3d 837, 847 (8th Cir. 2007), but a district court may still reject the magistrate judge's report and recommendation

when the district court is "left with a definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Even though some "lesser review" than de novo is not "positively require[d]" by statute, *Thomas*, 474 U.S. at 150, Eighth Circuit precedent leads this Court to believe that a clearly erroneous standard of review should generally be used as the baseline standard to review all findings in a magistrate judge's report and recommendation that are not objected to or when the parties fail to file any timely objections, *see Grinder*, 73 F.3d at 795; *Taylor*, 910 F.2d at 520; *Branch*, 886 F.2d at 1046; *see also* FED. R. CIV. P. 72(b) advisory committee's note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."). In the context of the review of a magistrate judge's report and recommendation, the Court believes one further caveat is necessary: a district court always remains free to render its own decision under de novo review, regardless of whether it feels a mistake has been committed. *See Thomas*, 474 U.S. at 153–54. Thus, although a clearly erroneous standard of review is deferential and the minimum standard appropriate in this context, it is not mandatory, and the district court may choose to apply a less deferential standard.

III. FACTUAL BACKGROUND

Defendant "generally accepts the factual findings" as recited in Judge Roberts' R&R, with three notable exceptions: (1) the finding that Officer Matthes was the sole officer present at the scene, (2) the finding that Officer Matthes "did not know the extent of Defendant's disability at the time of the seizure," and (3) the finding that Walmart manager Lisa Schmitt's act of pointing at defendant's wheelchair constituted consent to search the wheelchair. (Doc. 40, at 1–2). Although defendant styles this third objection as a factual objection, it has more to do with Judge Roberts' legal conclusion about what

behavior constitutes consent to search in this context. Accordingly, the Court will address this objection in the sections below.

Defendant's other factual objections are overruled. These objections relate to facts that are crucial to Judge Roberts' finding that exigent circumstances existed to seize the weapon *at the time of the seizure* because "Officer Matthes was the only officer on scene and did not know the extent of Defendant's disability." (Doc. 37, at 23). The Court emphasizes the temporal framing of Judge Roberts' finding because it is crucial to whether the findings are factually accurate. Defendant correctly points out that another officer arrived on scene approximately 90 seconds after the seizure. (Doc. 40, at 1). At the time of the seizure, however, Officer Matthes was the sole officer on scene. Defendant's first objection is therefore **overruled**.

Defendant also correctly notes that there was at least some indication of defendant's disability observable by Officer Matthes. At the time of the seizure, Officer Matthes had observed the wheelchair, but also saw defendant seated in a motorized shopping cart some distance away from his wheelchair. Officer Matthes therefore had reason to believe that defendant suffered *some* degree of disability and certainly had no reason to doubt that defendant was disabled. There is a vast distinction between having knowledge of a disability and fully comprehending the extent of a person's disability. At the time of the seizure, for example, Officer Matthes had no way of knowing whether defendant was able to return to his wheelchair under his own strength. Defendant's second objection is therefore **overruled**.

After reviewing the record, the Court finds that Judge Roberts accurately and thoroughly summarized the relevant facts in his R&R. (Doc. 37, at 4–8). Thus, the Court adopts and incorporates the R&R's factual findings without modification.

> The instant motions arise from Defendant's alleged possession of a firearm at a Walmart store in Southwest Cedar Rapids on August 7, 2020. Defendant's possession of the firearm in question, a [Weihrauch] Hermann

.357 caliber revolver, is made illegal, according to the indictment, by virtue of his following convictions:

1. Driving under the influence of alcohol, in the Circuit Court for of [sic] the 14th Judicial Circuit, Henry County, Illinois, on or about April 21, 2005, in case number 04CF160; and
2. Being a prohibited person (felon) in possession of a firearm, in the United States District Court for the Northern District of Iowa, on or about August 16, 2012 in case number 12-CR-00002.

(Doc. 2 at 1; Doc. 29 at 2.)

Officer Matthes testified to the following facts. I found Officer Matthes to be a credible witness. Other facts are found in the exhibits admitted at the hearing.

At about 11:00 a.m. on August 7, 2020, Officer Matthes was working an extra job assignment at the Walmart store. During these "extra job assignments," police officers are fully uniformed and equipped, including their service weapons and marked police vehicles; however, they are paid by Walmart to provide security, take direction from Walmart, and are considered Walmart employees. Officer Matthes has been an officer with the Cedar Rapids Police Department ("CRPD") for a little under two years and is currently assigned to patrol. Officer Matthes completed her training with the Iowa Law Enforcement Academy and has an associate degree in corrections.

Officer Matthes was in her patrol vehicle preparing to begin her shift when she was approached by a Walmart employee, Penny Spencer, who requested immediate assistance because someone in the store had a gun in a wheelchair. (Matthes Hr'g Test.; Gov. Ex. 1 at 1.) Ms. Spencer had been helping a customer look for a lost cell phone when she lifted up a cushion on the customer's wheelchair and saw the gun. A Walmart manager, Lisa Schmitt, had also seen the gun in the wheelchair.

After this brief conversation, Officer Matthes entered the store and activated her body camera. She approached the area in the vestibule of the store where shopping carts are collected for use by store patrons. Later in the video, it becomes apparent that a store security office is located on the opposite side of the vestibule. As Officer Matthes entered the vestibule, her video showed Ms. Schmitt pointing down at the wheelchair in question. (Def. Ex. 4 at 11:05:52 a.m.) Although Ms. Schmitt stood by the wheelchair, presumably to keep people away from it, the vestibule was bustling with employees and customers, including children.

Defendant was seated in a motorized shopping cart. Defendant's wheelchair appeared to be several feet away from Defendant, but the wide-angle lens of Officer Matthes's body camera makes distances somewhat difficult to judge. When the audio commenced, Officer Matthes was asking Defendant about whether he had a permit to carry a firearm. (*Id.* at 11:06:07-10 a.m.) Defendant denied having a permit to carry a firearm. While digging in his pockets for identification, he denied having a weapon and denied having placed a weapon in the wheelchair. Defendant explained that when he entered Walmart with the wheelchair there was nothing in it or on it. Defendant told Officer Matthes that no one else uses the wheelchair. (*Id.* at 11:07:52 a.m.) Officer Matthes lifted a cushion from the seat of the wheelchair with one hand and removed a revolver from the seat with her other hand. At the time of the seizure, Officer Matthes was the only police officer present. Defendant continued to deny knowledge of the weapon or ever having a permit to carry.

During the ensuing conversation, Defendant admitted that he was currently on federal "probation" for a prior gun conviction. Defendant explained that he had driven to the store and assembled his wheelchair to enter the store. Defendant also explained to Officer Matthes and other CRPD officers who arrived at the scene that he had been paralyzed because of a gunshot. Toward the end of this conversation, Defendant was allowed to transfer from the Walmart motorized cart to his wheelchair, and was then escorted into the store security office on the other side of the vestibule. The remainder of the body camera video shows Officer Matthes's further investigation at the store, including the provision of *Miranda* warnings to Defendant and his decision to remain silent. Defendant was searched incident to his arrest and officers found a blue latex glove containing thirteen individually wrapped bags of cocaine in his undergarment. Officer Matthes had further discussions with store employees and then transported Defendant to the Linn County Correctional Center.

Officer Matthes's report indicates that she later interviewed the Walmart employee who first found the firearm, Penny Spencer. (Gov. Ex. 1 at 1.) Ms. Spencer was working near the front door and had helped Defendant with a motorized shopping cart. Defendant had to switch carts when the first one did not work. Defendant seemed to have misplaced his cell phone when switching carts. He had entered the store on the motorized shopping cart and came back to the vestibule a few minutes later looking for his phone. Defendant then told Ms. Spencer he was going to check his vehicle for his phone. During this time, Defendant left his personal

> wheelchair near the front of the store pushed against the wall. According to Ms. Spencer, while Defendant was in the store and switching carts, his personal wheelchair was never out of sight and no one touched it. (*Id.* at 3.) When Defendant went to his vehicle to look for his phone, Ms. Spencer suspected that the phone could have been under the wheelchair's seat cushion. (*Id.*) Ms. Spencer notified Ms. Schmitt that she saw a firearm and Ms. Schmitt then approached the wheelchair and also saw the firearm. (*Id.*)
>
> Defendant was charged with being a felon in possession of a firearm and other offenses related to the possession of controlled substances.

(Doc. 37, at 4–8) (footnotes omitted).

IV. ANALYSIS

A. Motion to Suppress

The Fourth Amendment protects people from unreasonable searches and seizures of their person or property. *See* U.S. CONST. amend. IV. Our understanding of what constitutes a search is rooted in two distinct legal foundations: property and privacy. Thus, a search may occur when the government physically intrudes upon "persons, houses, papers, and effects," *Florida v. Jardines*, 569 U.S. 1, 5 (2013), or infringes on an expectation of privacy that society is willing to recognize as reasonable. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). A seizure occurs whenever the government meaningfully interferes with an individual's possessory interest in property. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Warrantless searches and seizures are presumptively unreasonable and therefore precluded by the Fourth Amendment, subject to a handful of "jealously and carefully drawn" exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971) (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)).

As with any other expectation of privacy, it must yield to a warrant or to recognized exceptions. Additionally, although the Fourth Amendment strictly proscribes government action, "it is wholly inapplicable to a search or seizure, even an unreasonable

one, effected by a private individual not acting as an agent of the [g]overnment or with the participation or knowledge of any government official." *Jacobsen*, 466 U.S. at 113 (internal quotations and citations omitted).

In his motion to suppress, defendant argues that Officer Matthes' search of his wheelchair violated his Fourth Amendment right to be free from unreasonable searches because Officer Matthes did not have consent or a warrant and because no recognized exception to the warrant requirement applies. (Doc. 17, at 3–4). Consequently, defendant argues that not only should the Court suppress the firearm, but also the cocaine found on defendant's person and statements made by defendant subsequent to the discovery of the firearm as fruits of the poisonous tree. (*Id.*, at 5).

Judge Roberts found that defendant had a reasonable expectation of privacy in his wheelchair and that law enforcement required a warrant prior to searching it unless an exception to the warrant requirement applied. (Doc. 37, at 11). Judge Roberts found that the Walmart employee who initially discovered the firearm was not acting as a government agent, that the employee granted consent—at least tacitly—for Officer Matthes to search the wheelchair, and that Officer Matthes did not exceed the scope of the initial search by the Walmart employee when she searched the wheelchair herself. (*Id.*, at 11–19). Because the firearm was obviously contraband and was discovered subsequent to a lawful search, Judge Roberts concluded that Officer Matthes' seizure of the firearm was reasonable under the circumstances. (*Id.*, at 19–22). Judge Roberts further found that the search of the wheelchair and the seizure of the firearm were independently justified by the plain view doctrine or, alternatively, the exigent circumstances exception to the warrant requirement. (*Id.*, at 22–24).

Based on these findings, Judge Roberts found that defendant's post-*Miranda* statements do not constitute fruit of the poisonous tree and should not be suppressed. (*Id.*, at 24–25). Judge Roberts also found, however, that if this Court disagreed with his

conclusion about the initial alleged Fourth Amendment violation, then the statements were not sufficiently attenuated from the alleged violation and should be suppressed. (*Id.*, at 24–30). Similarly, Judge Roberts found that the cocaine found on defendant's person should not be suppressed as fruit of the poisonous tree because it was discovered as a result of a search incident to lawful arrest. (*Id.*, at 30–31). For these reasons, Judge Roberts recommended that the Court deny defendant's motion to suppress. (*Id.*, at 31).

Defendant now lodges six objections to the R&R. Specifically, defendant objects to the finding that (1) Walmart employees consented to a search of his wheelchair, (2) Officer Matthes' seizure of the firearm was reasonable, (3) the search of his wheelchair was justified by exigent circumstances, (4) the seizure was otherwise reasonable, (5) his post-*Miranda* statements should not be suppressed, and (6) the search of defendant incident to arrest was justified and the cocaine found on his person should not be suppressed. (Doc. 40, at 2–3). The Court will address each objection in turn.

1. Walmart Employee's Consent to a Search of the Wheelchair

In his post-hearing supplemental brief, defendant argued that Officer Matthes did not have a right to search the wheelchair because the Walmart employee did not consent to the search (Doc. 27, at 4–5) and reasserts that argument in his objection to the R&R. In support of its argument against suppression, the government argued that the Walmart employee acted in a private capacity and was therefore not constrained by the Fourth Amendment, citing *United States v. Jacobsen*, 466 U.S. 109 (1984), *United States v. Miller*, 152 F.3d 813 (8th Cir. 1998), and *United States v. Starr*, 533 F.3d 985 (8th Cir. 2008). (Doc. 23, at 4-6).

Defendant's argument appears to conflate two similar but distinct threads of Fourth Amendment jurisprudence, namely, the private search doctrine and the third-party consent doctrine. The private search doctrine holds that a search conducted by a private individual not bound by the Fourth Amendment frustrates a person's expectation of

privacy to some degree and justifies an identical warrantless search by law enforcement. *Jacobsen*, 466 U.S. at 117. *Jacobsen* involved drugs discovered in a package by FedEx employees, *Miller* dealt with a search of a defendant's room at a halfway house after employees of the halfway house discovered contraband in defendant's room, and *Starr* addressed evidence delivered to law enforcement by the defendant's wife. The third-party consent doctrine has evolved over the years, but the generally accepted theoretical basis for the proposition that someone other than the defendant can consent to a search is that the third party exercises some common authority over the place or item searched. *See United States v. Matlock*, 415 U.S. 164 (1974); *but see Chapman v. United States*, 365 U.S. 610 (1961) (describing the rule having commonality with, but being broader than, traditional property law); *Stoner v. California*, 376 U.S. 483 (1964) (analogizing the third-party relationship to an agency relationship).

These cases are distinguishable from the instant case in that they all involve a degree of control or authority exercised by the third party over the evidence at issue. No such common authority or control existed here. Defendant did not leave his wheelchair in the custody of Walmart, as did the defendant in *Jacobsen* when he shipped his package via FedEx. Nor did Walmart possess any legal authority to access defendant's wheelchair as did the third-party halfway house employees in *Miller*. Nor could Walmart claim to have a joint right to access defendant's wheelchair or possess the items therein as could the third-party spouse in *Starr*. The mere physical presence of defendant and his wheelchair on Walmart property is insufficient to confer any authority to Walmart to consent to a search of defendant.

Defendant's focus on the issue of consent is misplaced, however. The right of law enforcement to conduct a search under the private search doctrine flows not from the consent of the private searcher but from the destruction of defendant's expectation of privacy occasioned by the private search. Thus, the only question at issue in a private

search case is whether law enforcement expands the scope of the private search into areas where the expectation of privacy has not already been frustrated. *Id.* Indeed, the holding in *Miller* was expressly predicated on a repudiation of the parties' third-party consent arguments. 152 F.3d. at 815 (ignoring parties' briefing on third-party consent and exercising discretion to *sua sponte* analyze appeal under private search rule). Accordingly, to answer the question of whether the Walmart employee consented to a search of defendant's wheelchair would bring the Court no closer to determining the constitutionality of the search.

As a factual matter, however, the Court agrees with Judge Roberts' conclusion that the Walmart employee's actions were clearly intended to signal to Officer Matthes that she had the Walmart employee's permission to search the wheelchair. The employee alerted Officer Matthes to the presence of the firearm, walked Officer Matthes directly to the location of the firearm, and gestured quite insistently to the seat of the wheelchair as if to say, "Here it is, please do something about it." (Gov't Ex. 4). Thus, to the extent that consent from the Walmart employee was necessary, Officer Matthes obtained consent, albeit nonverbally. Defendant's objection on this ground is **overruled**.

2. The Scope of Officer Matthes' Search

In his R&R, Judge Roberts found that Officer Matthes did not exceed the scope of the private search conducted by the Walmart employee and therefore did not violate defendant's Fourth Amendment rights. (Doc. 37, at 15–18). Defendant objects to this finding arguing that Officer Matthes exceeded the scope of the private search when she "touched, picked up and seized the firearm, exercising dominion and control over the firearm." (Doc. 40-1, at 4).

Under the standards of the private search rule, the issue of the scope of Officer Matthes' search is of critical importance. *See Jacobsen*, 466 U.S. at 115 (holding that subsequent invasion of privacy by government is limited by the extent of the initial private

search). Defendant's argument again stems from a conflation of doctrines, however. The distinction between a search and a seizure—perhaps a narrow one in this case, factually speaking—is of profound legal significance. Officer Matthes undoubtedly searched defendant's wheelchair when she lifted the cushion and visually observed the firearm. Defendant correctly notes that at the point when Officer Matthes lifted the seat of the wheelchair and observed the firearm she had not yet exceeded the scope of the initial private search. (*Id.*). Defendant then claims that Judge Roberts "bootstraps that finding into a conclusion that the firearm, now being in plain view, was properly seized by Officer Matthes" and asserts that the touching and handling of the firearm is part of the search. (*Id.*).

This argument elides the crucial distinction between a search and a seizure and overlooks the important practical concerns faced by law enforcement when confronted with a firearm. Unlike the search conducted in *Jacobsen*, the physical handling of the firearm was not intended to further any investigatory aims. The discovery of a firearm is a very different matter than the discovery of "mere evidence." *See Warden of Maryland Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967) (holding that the seizure of otherwise innocuous items that may have evidentiary value requires a showing of probable cause).

Because Officer Matthes initiated the search under the suspicion of the presence of a firearm and then did in fact discover a firearm, the private search doctrine is not an especially apt framework to challenge the search and seizure. In any event, the search performed by Officer Matthes consisted of no more than the elevation of the seat cushion and in that respect did not exceed the scope of the private search performed by the Walmart employee. As the Court will discuss below, the actual seizure of the firearm is more properly analyzed in the context of *Terry v. Ohio*, 392 U.S. 1 (1968), but insofar

as a private search was involved, Officer Matthes did not exceed the scope of that search. Defendant's objection on this ground is **overruled**.

3. Exigent Circumstances

Judge Roberts found that Officer Matthes' seizure of the firearm was lawful because (1) "seizing contraband that a legal search has revealed is not an illegal seizure," (2) the plain view doctrine applies, and (3) exigent circumstances justified the seizure. (Doc. 37, at 22–23). Defendant does not specifically object to the first two findings. Rather, he specifically objects to the third finding that exigent circumstances justified the seizure and then generally objects to the conclusion that the seizure was reasonable. (Doc. 40, at 2). The Court interprets this to mean that defendant asserts that the seizure was unreasonable because Judge Roberts erred in finding exigent circumstances present.

The Court reviews specific objections *de novo* because they direct the Court "to a specific error in the [M]agistrate [J]udge's proposed findings and recommendations." When objections are "[c]onclusory" and "do not direct the reviewing court to the issues in controversy," then a district court reviews the Magistrate Judge's findings for clear error. *Velez–Padro v. Thermo King De Puerto Rico, Inc.*, 465 F.3d 31, 32 (1st Cir. 2006); *see also Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994); LCrR 59 (requiring "specific, written objections to" a Magistrate Judge's R&R). The Federal Rules require a district court judge to address only specific objections to a magistrate judge's report and recommendation. *Cf.* FED. R. CIV. P. 72 (requiring the court to review de novo any portions of the report and recommendation to which a specific written objection has been made). Appellate courts have affirmed district courts' denial of de novo review when a party's objections lack specificity. *See, e.g.*, *United States v. Prather*, 79 F. App'x 790, 792 (6th Cir. 2003). A "bare statement, devoid of any reference to specific findings or recommendations to which [defendant] objected *and why*, and unsupported by legal authority, [is] not sufficient" to constitute an objection. *Mario v. P & C Food Markets,*

Inc., 313 F.3d 758, 766 (2d Cir. 2002) (emphasis added); *Thompson v. Nix*, 897 F.2d 356, 357–58 (8th Cir. 1990) (reminding parties that "objections must be timely and specific to trigger de novo review by the District Court of any portion of the magistrate's report and recommendation."). Accordingly, the Court reviews Judge Roberts' first two findings regarding the seizure for plain error. Finding none, the Court adopts Judge Roberts' conclusions that the seizure of contraband found subsequent to a legal search does not violate the Fourth Amendment and, alternatively, that the plain view doctrine justified the seizure here.

Either of Judge Roberts' first two findings would independently justify the seizure of defendant's handgun. Defendant's objection to the third finding—that exigent circumstances justified the seizure—is therefore moot to some extent. Even if the Court sustained defendant's objection and found that exigent circumstances did not exist at the time of the seizure, the ultimate conclusion that the seizure was reasonable would remain undisturbed. Exigent circumstances did exist, however, and for the following reasons the Court denies defendant's objection.

Judge Roberts found that the circumstances which confronted Officer Matthes in the Walmart vestibule on August 7, 2020, constituted grounds for excepting her behavior from the regular constraints of the Fourth Amendment. (Doc. 37, at 23–24). Specifically, Judge Roberts found that at the time of the seizure (1) the area was busy with employees, shoppers, and children, (2) Officer Matthes was the only officer on scene, (3) Officer Matthes did not know the extent of defendant's disability. (*Id.*) (citing *United States v. Wells*, 702 F.2d 141, 144 (8th Cir. 1983)). Acting on a tip from a bartender, the law enforcement officers in *Wells* seized a firearm hidden in a brown paper bag underneath a table in a bar. *Wells*, 702 F.2d at 142–43. The district court held that this seizure was reasonable, finding that the officers possessed at least a reasonable suspicion that the defendant was in possession of a firearm and that the need to ensure

the safety of the officers and members of the public constitute exigent circumstances. *Id.* at 144. The Eighth Circuit Court of Appeals affirmed this conclusion. *Id.*

Here, Officer Matthes was informed of the presence of a firearm by an eye witness. The dangerous nature of the firearm was immediately apparent, and Officer Matthes took reasonable measures to ensure her safety and preserve the status quo at the scene. *See Adams v. Williams*, 407 U.S. 143 (1972) (holding that police may seize a firearm from defendant even where the presence of a firearm was not apparent and police only knew of its existence based on informant's tip). Given the circumstances at the scene, the exigent circumstances exception to the warrant requirement justified the seizure of the firearm from defendant's wheelchair. Neither defendant's physical distance from the handgun nor his as-yet unspecified degree of disability degrades the reasonableness of Officer Matthes' decision. *See United States v. Antwine*, 873 F.2d 1144, 1147 (8th Cir. 1989) (finding exigent circumstances to enter house and seize firearm for safety of children present after defendant was arrested). Here, as in *Antwine*, Officer Matthes' "search did not exceed what was necessitated by the exigency. It is significant that [she] did not look for [other items of contraband but rather] simply located the gun and seized it." 873 F.2d at 1147. Thus, the seizure of the firearm was justified by the exigent circumstances exception to the warrant requirement. Defendant's objection on this ground is **overruled**.

4. The Seizure

As discussed above, even if exigent circumstances were not present, the seizure of defendant's firearm would be reasonable under either of Judge Roberts' alternative findings. The Court takes this opportunity to introduce a third alternative that is more apt given the factual circumstances present here.

A law enforcement officer armed with reasonable suspicion that criminal activity may be in progress may stop a person to investigate the suspected criminal activity.

Terry, 392 U.S. at 25–31. Although considered a seizure for Fourth Amendment purposes, such a warrantless stop is justified in light of its minimally intrusive nature and the reasonable suspicion of the officer. *Id.* To justify a so-called *Terry* stop, the officer "must be able to point to specific and articulable facts which, taken together with the rational inferences drawn from those facts, reasonably warrant that intrusion." *Id.* at 21. Incident to the *Terry*-style seizure of a person suspected of criminal activity, an officer may conduct a search for weapons for the sole purpose of protecting herself and other officers during the investigation, and only if the officer has reason to believe the subject of the stop is armed. *Id.* at 28. Such a search must "be strictly circumscribed by the exigencies which justify its initiation." *Id.* at 26. In other words, the intrusion must be executed in a manner reasonably calculated to locate weapons and must not devolve into a general search. *Id.*

The principles elucidated in *Terry* have since been extended beyond the pedestrian/beat cop context. Reasonable suspicion may justify the seizure of a moving vehicle and its occupants, *United States v. Cortez*, 449 U.S. 411, 417–418 (1981), a subsequent search of the vehicle for weapons, *Michigan v. Long*, 463 U.S. 1032, 1049–50 (1983), the seizure not only of weapons but of contraband discovered incident to the search, *id.*, as well as additional measures taken to ensure officer safety and maintain the status quo during the stop—such as placing the suspect in handcuffs. *United States v. Navarrete-Barron*, 192 F.3d 786, 791 (8th Cir. 1999). Officers may take all of these measures absent the level of evidence required to justify a formal arrest of the suspect, so long as such measures are carefully calculated to ensure officer safety and are supported by reasonable suspicion.

Here, an eyewitness alerted Officer Matthes to the presence of a firearm concealed in defendant's wheelchair. The witness, a uniformed Walmart employee, was visibly agitated and conveyed her concern about the safety of staff and patrons. Although she

could not be sure at the time, it was reasonable for Officer Matthes to credit the employee's assertion as true. Given the public nature of the scene and the potential for serious harm, Officer Matthes was under no obligation to presume defendant's possession of the firearm was lawful and was fully entitled to investigate further to rule out criminal conduct. Based on the reasonable suspicion established by the eyewitness, it was reasonable for Officer Matthes to suspect the presence of weapons both in defendant's wheelchair and on defendant's person, necessitating a search of both. Once she confirmed the presence of the firearm, it was reasonable for Officer Matthes to seize the firearm to protect herself and others at the scene, at least until she could confirm that defendant was carrying lawfully.

Defendant suggests that Officer Matthes should have "guarded" the wheelchair until a warrant could be obtained. (Doc. 40-1, at 7). Setting aside the practical pitfalls of denying a disabled person access to their wheelchair indefinitely while awaiting a warrant—particularly when that person may in fact be innocent of criminal conduct—Officer Matthes was under no obligation to elect any one particular reasonable course of action when several are available. The reasonable suspicion standard implicitly contemplates the possibility of multiple acceptable courses of action and is expressly structured to allow responding officers the flexibility to exercise their own judgment in the face of multifarious and often quickly shifting factual situations. To pass constitutional muster, Officer Matthes' intrusions into defendant's privacy must only have been reasonable in their own right. That defendant can conceive of alternate reasonable possibilities after-the-fact is simply not relevant. The search of the wheelchair and seizure of the firearm were reasonable steps taken to ensure officer safety and maintain the status quo at the scene while Officer Matthes investigated suspected criminal activity. Thus, the Court further finds that the seizure of defendant's firearm was justified under *Terry*

and its progeny, irrespective of any other exception to the warrant requirement. Defendant's objection on this ground is **overruled**.

5. Defendant's Post-Miranda Statements and Search Incident to Arrest

Defendant initially moved to suppress statements he made after Officer Matthes seized the firearm and the cocaine found on his person after officers arrested him. (Doc. 15; Doc. 17, at 5). In light of his findings *vis-à-vis* the search and seizure, Judge Roberts found that the statements were not fruit of the poisonous tree and that the cocaine was discovered as the result of a search incident to a lawful arrest. (Doc. 37, at 24–25, 30–31). Accordingly, the statements and cocaine should not be suppressed. (*Id.*).

In the event the Court disagreed with his findings, Judge Roberts went on to analyze defendant's statements under the attenuation doctrine. (*Id.*, at 25–29). Judge Roberts concluded that if the search and seizure were ultimately found to be unconstitutional, then defendant's statements were not sufficiently attenuated from the seizure and should be suppressed. (*Id.*, at 29–30). Similarly, he found that the search incident to arrest would not save the discovery of the cocaine because the arrest would not then be lawful. (*Id.*, at 30–31).

In his objections, defendant addresses these findings but does not necessarily object to them. (Doc. 40, at 9). Defendant merely reiterates Judge Roberts' conclusions and emphasizes that if Officer Matthes' search of his wheelchair and seizure of his firearm violated the Fourth Amendment, then his subsequent statements and the cocaine discovered on his person should also be suppressed. (*Id.*).

The Court has already found that Judge Roberts' findings with respect to the search and seizure were not in error. Because defendant does not raise any new objection to Judge Roberts' findings or object at all to Judge Roberts' conclusions on the attenuation of defendant's statements or the search incident to arrest, the Court reviews these findings

for clear error. Finding none, the Court adopts Judge Roberts' recommendations without modification.

6. Conclusion

For the reasons described above, defendant's objections to the R&R (Doc. 40) are **overruled**. The Court adopts Judge Roberts' R&R (Doc. 37) and modifies it to include the Court's analysis under *Terry v. Ohio*, 392 U.S. 1 (1968). Defendant's motion to suppress is **denied**. (Doc. 15).

B. Motion to Dismiss

Defendant also moved to dismiss the indictment on the ground that the enforcement of Section 922(g)(1) is unconstitutional as applied to him because it denies him the right to bear arms for the purpose of self-defense. (Doc. 16-1, at 14). To be sure, there are undoubtedly some circumstances where the application of Section 922(g) could be unconstitutional, *see Miller v. Sessions*, 356 F. Supp. 3d. 472, 481–484 (E.D. Penn. 2019), and the Eighth Circuit Court of Appeals has left open the possibility of such an outcome. *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014). Defendant's circumstances here do not fit the bill, however.

"Both the text and history" of the Second Amendment leave "no doubt" that Americans enjoy "an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). The "core protection" guaranteed by the Second Amendment is the right to self-defense. *Id.* at 630, 634. This right is fundamental and applies with equal force against federal, state, and local governments. *McDonald v. City of Chicago*, 561 U.S. 742, 750, 778 (2010). Although the right to bear arms is at its zenith within the home, the precise contours of the Second Amendment have yet to be definitively delineated. *See Heller*, 554 U.S. at 635 ("[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the

right of law-abiding, responsible citizens to use arms in defense of hearth and home."). In dicta, the Supreme Court emphasized that:

> Like most rights, the right secured by the Second Amendment is not unlimited. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626–27. Characterizing such regulations as "presumptively lawful," the Court did not undertake a comprehensive analysis of how, why, whether, or by whom such a presumption may be overcome. *Id.* at 627 n.26; *see also McDonald*, 561 U.S. at 758 (Alito, J., writing for the plurality) (holding that the Second Amendment constrains state behavior through the Due Process Clause of the Fourteenth Amendment); *id.* at 805–58 (Thomas, J., concurring in part and concurring in the judgment) (arguing that the Second Amendment is enforceable through the Privileges and Immunities Clause).

Guided only by the Supreme Court's admonition that some longstanding restrictions are presumptively lawful—and by the Court's assurance that the Court would "expound upon the historical justifications for the exceptions" it references if and when those exceptions come before the Court, *Heller*, 554 U.S. at 635—lower courts have struggled to develop and implement a coherent, workable standard when addressing Second Amendment challenges. *See Binderup v. Attorney General of the United States of America*, 836 F.3d 336, 387 (3d Cir. 2016) (Fuentes, J., concurring in part) (examining disparate circuit rulings and concluding that "federal judges face an almost complete absence of guidance from the Supreme Court about the Scope of the Second Amendment right."). In the absence of a concrete standard or authoritative analysis of the many extant firearms regulations, most circuits have adopted a two-step approach

where the court first asks whether the law in question imposes a burden on conduct protected by the Second Amendment. If it does, the court then applies some form of means-end scrutiny. *See Adams*, 914 F.3d at 610 (Kelly, J., concurring in the judgment) (collecting cases and describing tests applied in Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits).

Ordinarily, the Government bears the burden of proving that the regulated activity is not protected by the Second Amendment. "If the government demonstrates that the challenged statute 'regulates activity falling outside the scope of the Second Amendment . . . then the analysis can stop there." *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (citing *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011)). By contrast, the presumptive lawfulness of some regulations as described in *Heller* shifts the burden at this first stage to the defendant. *Binderup*, 836 F.3d at 347.

The Third Circuit's approach is instructive when it comes to Second Amendment challenges to those "longstanding" laws *Heller* characterized as presumptively lawful. First, the court asks "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *United States v. Marzarella*, 614 F.3d 85, 90 (3d. Cir. 2010). To succeed at the first step of this analysis, a defendant "must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class." *Binderup v. Attorney General of the United States*, 836 F.3d 336, 347 (3d Cir. 2016) (citing *United States v. Barton*, 633 F.3d 168, 173–74 (3d Cir. 2011)). Step one therefore contains "two hurdles that an individual presumed to lack Second Amendment rights must overcome to rebut the presumption." *Id*. at 346.

Once a defendant rebuts the presumption in favor of the lawfulness of the challenged regulation as described in *Heller* at step one, the court then evaluates the law

"under some form of means-end scrutiny." *Marzarella*, 614 F.3d at 90. The court must then test "the law or regulation under heightened scrutiny at step two." *Id.* Under any form of heightened scrutiny, the government—not the defendant—is compelled to justify its regulation by citing its interest in promulgating the regulation and the extent to which the regulation actually addresses that interest. *See, e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440–41 (1985) (describing strict and intermediate scrutiny standards).

When addressing the constitutionality of Section 922(g) as applied to any particular defendant, the Eighth Circuit Court of Appeals has adopted a somewhat unique approach. Rather than engage in the fulsome analysis describe above, the Eighth Circuit does not fully analyze a defendant's claim when the claim fails any of the hurdles at step one. *See United States v. Brown*, 436 F. App'x 725, 726 (8th Cir. 2011) (per curiam) (unpublished) (citing *Barton*, 633 F.3d at 174). In *Brown*, law enforcement officers executing an arrest warrant located a handgun underneath defendant's bedroom mattress. *Id.* The court, quoting directly from *Barton*, denied defendant's as-applied challenge on the grounds that the defendant failed to present "'facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections.' He does not allege, for example, that his stipulated prior felony was for a non-violent offense or that he is 'no more dangerous than a typical law-abiding citizen.'" *Id.* After finding that the defendant did not overcome the *Barton* hurdles the court held that the defendant's "assertion that he possessed the gun for self-defense is insufficient to successfully challenge his conviction under the felon in possession statute." *Id.* The court reached this conclusion despite the fact that the defendant possessed the firearm in his home where Second Amendment protections are at their height and without any further discussion about the core right protected by the Second Amendment or governmental interests at work in Section 922(g)(1).

It must be noted that although the Eighth Circuit imported some language from *Barton* quoted above, *Barton* itself did not establish its own framework for as-applied challenges to Section 922(g)(1). As the Third Circuit later clarified, *Barton* and its predecessor case, *United States v. Marzarella*, 614 F.3d 85 (3d. Cir. 2010), taken together, establish the "framework for deciding as-applied challenges to gun regulations" in the Third Circuit. *Binderup v. Attorney General of the United States*, 836 F.3d 336, 346 (3d Cir. 2016). *Brown* is unpublished and is therefore not afforded precedential weight. The same rationale that undergirded the decision in *Brown*, however, provided principle support for the court's conclusion in *Woolsey* three years later. Although the circumstances of the defendant in *Woolsey* differed greatly from those encountered in *Brown*, the court again declined to further analyze the competing rights and interests involved in the application of Section 922(g)(1). Instead, the court "left open the possibility that a person could bring a successful as-applied challenge to" Section 922(g)(1) but rejected the defendant's as-applied challenge there due to his multiple violent felony convictions. 759 F.3d at 909. The court took into account both that these were violent crimes and that defendant had "not shown that he is 'no more dangerous than a typical law-abiding citizen.'" *Id.* (citing *Brown*, 436 F. App'x at 726).

Taken in the context of the Eighth Circuit's prior decisions, *Adams* is something of an aberration. Charged under Section 922(g)(1), the defendant in *Adams* moved to dismiss the indictment as unconstitutional as applied to him, arguing that the Second Amendment prohibits a permanent, categorical ban on firearm possession by felons. *United States v. Adams*, No. 15-00153-01-CR-W-GAF, 2015 WL 5970548 at *2 (W.D. Mo. 2015). Applying intermediate scrutiny, the district court rejected this challenge, reasoning that Section 922(g)(1) served an important government objective and that defendant's prior felony conviction placed him within the suitably narrow ambit of the

law.[1] *Id.* Thus, on its face, the district court appears to have implemented some form of the two-step approach utilized in other circuits.

On appeal, the Eighth Circuit took a different approach, asserting that "to succeed on an as-applied challenge, [the defendant] must establish (1) that the Second Amendment protects his particular conduct, and (2) that his prior felony conviction is insufficient to justify the challenged regulation of Second Amendment rights. 914 F.3d at 605. The court introduced this previously unused standard without citation, departing from the rationale of other circuits and placing the burden on the defendant at all stages of the analysis. *Id.* at 608 (Kelly, J., concurring in the judgment). The court found that because the defendant failed to argue the first prong of this new test, he forfeited his claim on appeal. *Id.* Accordingly, the court conducted a limited review under the standard for obtaining relief on a forfeited claim, inquiring not into the merits of the defendant's constitutional argument, but whether the "district court made an obvious error that affected substantial rights and seriously affected the fairness, integrity, or reputation of the judicial proceedings." *Id.* at 606. Focusing exclusively on the fact that the defendant was arrested with a concealed weapon, the court found that it was not plain or obvious that the Second Amendment protected such conduct. *Id.*

Having explored the state of the law in the Eighth Circuit, the Court now turns to the case at bar. Defendant's objection proceeds in two parts. First, defendant argues that Judge Roberts improperly distinguished *Adams* from *Woolsey* in deciding which standard to apply. (Doc. 40-1, at 10). Second, defendant argues that the *Woolsey* standard is in fact a unique two-part test which, if applied here, would necessitate a finding in his favor. (*Id.* at 10–11).

[1] In *Adams*, defendant's Motion to Dismiss was originally heard by a United States Magistrate Judge whose Report and Recommendation was subsequently adopted by the District Court without modification.

1. Which Case Controls

The government argued that this case is controlled by *United States v. Adams*, 914 F.3d 602 (8th Cir. 2019), whereas defendant argued that *Woolsey* controls. (Docs 16-1, 22-1, & 40-1). Judge Roberts correctly noted that unless the cases are distinguishable, the prior decision—*Woolsey*—would override whatever contradictions were introduced by *Adams*. (Doc. 37, at 36) (citing *Free the Nipple – Springfield Residents Promoting Equal. V. Springfield*, 923 F.3d 508, 511 (8th Cir. 2019)). Judge Roberts found that *Adams* is distinguishable from *Woolsey* and that *Adams* is controlling of the factual circumstances here. (Doc. 37, at 41).

Applying the *Adams* standard, Judge Roberts found that defendant has not distinguished his circumstances from others who have been historically barred from carrying firearms and that the Second Amendment does not inhibit application of Section 922(g)(1) to defendant here. (*Id.*, 41–48). Defendant now objects to this finding, arguing that the standard described in *Adams* is inappropriate because it effectively contradicts the prior test established by *Woolsey* without the required authority of an *en banc* panel. (Doc. 40-1, at 10-11). Defendant asserts that the *Woolsey* standard demands a different result than the *Adams* standard and, naturally, defendant urges the Court to apply the former. (*Id.*).

The Court finds that *Adams* is not distinguishable from *Woolsey*. Judge Roberts placed great weight on the fact that defendant here possessed a concealed weapon as did the defendant in *Adams*, whereas the defendant in *Woolsey* possessed the firearm in his home. These factual distinctions justified considering this case within the analytical ambit of *Adams*. Such distinctions may be important to determining the constitutionality of a right to carry law or a concealed carry prohibition, but they are not material to the question of the constitutionality of the blanket prohibition on *all* forms of possession by felons at issue here, however. *See Adams*, 914 F.3d at 608 (Kelly, J., concurring in the

judgment). The "particular conduct" to be analyzed here under the test required by *Adams* is the defendant's possession of the firearm in general, because that is what Section 922(g) prohibits. Examining his conduct with any more granularity than that risks conflating conduct prohibited by the statute with conduct not contemplated by the statute and punishing the defendant for conduct for which he is not charged. "There is no precedent requiring [a defendant] to prove that every aspect of his conduct was constitutionally protected" in order to prevail on an as-applied challenge. *Id.* Thus, the only question to be asked with respect to a defendant's conduct relevant to an as-applied challenge to Section 922(g) is whether the defendant possessed the firearm for purposes of self-defense.

By introducing a previously unused test, interpreting that test to demand a detailed inquiry into minute aspects of the defendant's conduct that fall outside the scope of the statute, and then placing the burden of production entirely on the defendant, the *Adams* standard represents a significant departure from how the Eighth Circuit Court of Appeals has addressed as applied challenges to Section 922(g) post-*Heller*. With the exception of *Adams*, every as-applied challenge to Section 922(g)(1) addressed in the Eighth Circuit since *Heller* has applied the factors first introduced in *Brown* and later used in *Woolsey*. *See United States v. Hughley*, 691 F. App'x 278, (8th Cir. 2017) (per curiam) (unpublished); *United States v. Siegrist*, 595 F. App'x 666 (8th Cir. 2015) (per curiam) (unpublished); *United States v. Seay*, 620 F.3d 919 (8th Cir. 2015). In *Seay,* the court did not specifically invoke the language of *Barton* in the way the *Woolsey* court quoted that case. Instead, the court relied on the wisdom of "[o]ur sister circuits" in rejecting the defendant's as-applied challenge to Section 922(g)(3) and specifically cited cases which applied the two-step analysis utilized in most other circuits. *Seay*, 620 F.3d at 924 (citing *e.g.*, *United States v. Williams*, 616 F.3d 685, 690–94 (7th Cir. 2010); *Marzarella*, 614 F.3d at 89).

Although not explicit, *Woolsey* and its progeny rely heavily on the conceptual framework used in other circuits that the Third Circuit eventually fully described in *Binderup*. Rather than charting its own path, the language of *Woolsey* strongly indicates that the Eighth Circuit's analytical approach to as-applied challenges to Section 922(g) hews closely to the well-established two-step approach taken by other circuits. To be sure, the Eighth Circuit Court of Appeals has yet to conduct a comprehensive constitutional analysis of the statute. Instead, after determining that the defendant in each particular case cannot pass any form of scrutiny by distinguishing their circumstances "from those of persons historically barred from Second Amendment protection," the court simply declines to engage in more fulsome analysis. *Woolsey,* 759 F.3d at 909. By contrast, the placement of all burdens on the defendant in *Adams* is a sharp departure from how this circuit has handled not only Second Amendment challenges post-*Heller*, but other enumerated rights as well. Defendant's objection on this ground is **sustained.**

2. Defendant's As-Applied Challenge

Although the Court reached a different conclusion than Judge Roberts as to which case controls the outcome here, his ultimate finding remains undisturbed. As the explication of the Second Amendment standard described above makes clear, defendant's conclusion that *Woolsey* established a definitive test comprised of two independent prongs is unfounded. Indeed, the plain language of *Woolsey* itself forecloses defendant's argument. After disposing of the defendant's facial argument, the *Woolsey* court, quoting itself in *Brown*, stated

> [The defendant] has not presented facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. He does not allege, *for example,* that his stipulated prior felony conviction was for a non violent offense or that he is no more dangerous than a typical law-abiding citizen. [The defendant's] assertion that he possessed the gun for self defense is

> insufficient to successfully challenge his conviction under the felon in possession statute.

Woolsey, 759 F.3d at 909 (emphasis added) (internal citations and quotations omitted). To be fair, the Eighth Circuit did not have the benefit of the *Binderup* decision when deciding *Brown* or *Woolsey*. The court in *Binderup* went to great lengths to clarify and harmonize its decisions in *Marzarella* and *Barton*. The most logical interpretation of *Woolsey*, therefore, is that the Eighth Circuit elected to proceed with only as much analysis as was necessary to decide the issue before it. In adopting and applying the widely used analytical framework above, the court appears to have simply never been presented with a case that has made it past the first stage of analysis.

What *Woolsey* plainly did *not* do, however, was establish a completely new, two-prong "or" test that defendant now argues controls the outcome here. The portions of *Woolsey* he relies upon are not prongs of a test, as defendant theorizes. Rather, they are specific examples of the broader category of persons who may not have been historically barred from Second Amendment protections. This conclusion is clearly evident from the plain language of the quotation, namely, the words "for example" which precede the two categories that defendant contends are prongs of a test. Although there may be some room to argue over whether and to what extent defendant's conduct is protected or whether and how Section 922(g) violates the Second Amendment, there is no doubt that the test proposed by defendant is unsupported by either the text of *Woolsey* itself or any related caselaw.

Admittedly, defendant's arguments raise interesting questions of Second Amendment jurisprudence. Courts still wrestle with and disagree over significant aspects of this area of the law. *Compare New York State Rifle and Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d. Cir. 2018) (applying unique form of heightened scrutiny and finding city licensing scheme constitutional), *with New York State Rifle and Pistol Ass'n*

v. City of New York, 140 S.Ct. 1525, (2020) (Alito, J., dissenting) (applying heightened scrutiny and finding challenged law unconstitutional). *But see Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (arguing that categorical dispossession of all felons—violent and nonviolent—is not narrowly tailored and thus unconstitutional). The Court notes the significant disagreements in various courts over the precise reach of Section 922(g) and even over the appropriate degree of scrutiny to be applied. Those questions are ultimately foreclosed—to this Court, in any event—by precedent in this circuit.

For the time being, the Eighth Circuit Court of Appeals has elected to test as-applied challenges to Section 922(g) against the first prong of the widely adopted two-step test described above and, if the challenge fails at that stage, the court's inquiry proceeds no further. Applying that same standard, this Court finds that defendant has not met his burden of showing that his circumstances are distinguished from those of persons historically barred from firearm possession. Defendant is a felon. His past felonies—convictions for a third driving under the influence offense and for possessing a firearm as a felon—are undoubtedly dangerous offenses, if not violent in and of themselves. Defendant is therefore squarely in the category of persons historically barred from Second Amendment protections. Defendant's objection on this ground is **overruled.** Defendant's motion to dismiss is **denied**.

V. CONCLUSION

For the reasons stated above, defendant's objections are **sustained in part and overruled in part**. (Doc. 40). The Court **adopts with modification** Judge Roberts' Report and Recommendation (Doc. 37) and **denies** defendant's Motion to Suppress (Doc. 15) and Motion to Dismiss (Doc. 16).

IT IS SO ORDERED this 24th day of June, 2021.

C.J. Williams
United States District Judge
Northern District of Iowa

United States Court of Appeals
For the Eighth Circuit

No. 22-1080

United States of America,

Plaintiff - Appellee,

v.

Sylvester Cunningham,

Defendant - Appellant.

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: September 22, 2022
Filed: June 13, 2023

Before COLLOTON, WOLLMAN, and STRAS, Circuit Judges.

COLLOTON, Circuit Judge.

Sylvester Cunningham appeals convictions for unlawful possession of a firearm as a convicted felon, possession with intent to distribute cocaine, and possession of a firearm in furtherance of a drug trafficking offense. *See* 18 U.S.C. § 922(g)(1); 21 U.S.C. § 841(a)(1); 18 U.S.C. § 924(c)(1)(A). He argues that evidence should have been excluded from trial due to an unlawful search and seizure,

that he had a constitutional right under the Second Amendment to possess a firearm as a convicted felon, and that there was insufficient evidence to support the convictions. We conclude that none of the contentions has merit, and therefore affirm the judgment of the district court.[1]

I.

Cunningham, a twice-convicted felon serving a federal term of supervised release, was arrested for possessing a firearm and cocaine at a Walmart store in Cedar Rapids in August 2020. At the time of the incident, Cunningham had been convicted of two prior felonies: driving under the influence of alcohol in 2005 in Illinois, and possession of a firearm as a convicted felon in federal court in 2012.

Cunningham arrived at the Walmart in a vehicle, traveled from the vehicle to the entrance in his own wheelchair, and then transferred to a motorized cart owned by Walmart for use while shopping. When Cunningham first transferred from his wheelchair to a motorized cart, the cart did not work. A Walmart employee helped Cunningham move to a second motorized cart, which also did not work, and then to a third motorized cart, which functioned properly. Cunningham's personal wheelchair remained near the front of the store, pushed against a wall.

Cunningham moved into the store on the motorized cart, but soon returned to the entrance looking for his cellular phone. He seemed to have misplaced the phone when switching motorized carts. When he could not find the phone in or around the carts, Cunningham received permission from the Walmart employee to drive the motorized cart to the parking lot so that he could check for the phone in his vehicle.

[1]The Honorable C.J. Williams, United States District Judge for the Northern District of Iowa.

While Cunningham returned to his vehicle, the Walmart employee suspected that the phone could have slid under the seat cushion in Cunningham's personal wheelchair. She lifted the seat cushion and did not find a phone, but observed a firearm. She notified a Walmart manager, who approached the wheelchair and also saw the gun.

The first Walmart employee notified police officer Matthes who was outside the store and about to begin a shift working in uniform to provide security. The Walmart employee told Matthes that she needed immediate assistance because someone in the store had left a gun in a wheelchair. The employee explained that she found the gun under the seat cushion while helping a customer look for a lost cell phone. The Walmart manager stayed near the wheelchair, presumably to ensure that no patron in the vestibule would encounter the firearm. When Matthes entered the store, the manager pointed down at the wheelchair.

By then, Cunningham had returned to the store and was seated in a motorized shopping cart near the entrance. When Matthes questioned him about a gun, Cunningham admitted the wheelchair was his, but denied having a weapon or placing a weapon in the wheelchair. He also admitted that he did not have a permit to carry a firearm, and that he was on federal "probation" (*i.e.*, supervised release) for a prior firearms offense. Cunningham claimed that when he entered the store, there was no gun in or on the wheelchair. Matthes then lifted the seat cushion in the wheelchair and seized a revolver from the seat area.

Cunningham was allowed to transfer from the motorized cart back to his personal wheelchair, and he then moved to a security office in the store. Officers placed Cunningham under arrest and searched his person incident to arrest. In Cunningham's undergarment, officers found a blue latex glove containing thirteen individually-wrapped bags of cocaine, six containing cocaine base and seven containing powder cocaine.

Cunningham moved to suppress the firearm seized from the wheelchair. He also sought to exclude the drugs seized from his person, and any statements that he made after the discovery of the firearm, on the ground that the additional evidence was the fruit of an earlier unlawful search.

The district court ruled that Officer Matthes did not violate Cunningham's rights under the Fourth Amendment by searching the wheelchair and seizing the firearm. The court thus denied the motion to suppress the firearm and rejected Cunningham's claim that later evidence-gathering was the fruit of an unlawful search and seizure.

Cunningham also moved to dismiss the charge in the indictment that he unlawfully possessed a firearm as a convicted felon. He argued that the statutory prohibition of 18 U.S.C. § 922(g)(1) infringed on his right to keep and bear arms under the Second Amendment. The district court rejected Cunningham's argument because his circumstances did not distinguish him from those of persons who were historically barred from possessing firearms.

The case proceeded to trial, and a jury convicted Cunningham on all counts. The district court denied Cunningham's motion for judgment of acquittal, and sentenced him to a total term of eighty-seven months' imprisonment, followed by five years of supervised release.

II.

Cunningham first argues that the district court erred in denying his motion to suppress evidence. He contends Officer Matthes's lifting of the seat cushion on his wheelchair, one of his "effects," constituted "a physical intrusion on a constitutionally protected area." *See United States v. Jones*, 565 U.S. 400, 406 n.3 (2012).

We conclude, however, that the officer's action was permissible under the Fourth Amendment on at least two bases: as an investigative search based on reasonable suspicion of crime and danger, *see Terry v. Ohio*, 392 U.S. 1, 22-24 (1968), and as a search for evidence based on probable cause under exigent circumstances, *see United States v. Antwine*, 873 F.2d 1144, 1147 (8th Cir. 1989). Matthes received reliable information from Walmart employees that a firearm was located in the seat of the wheelchair belonging to Cunningham. Although Cunningham denied that he placed a gun in the wheelchair, Matthes had substantial reason under the circumstances to disbelieve the denial and to conclude that Cunningham was responsible for effects within the wheelchair that he brought into the store. Cunningham's statements established probable cause that he was not permitted to possess a firearm. Matthes also confronted an exigency with a reported firearm in a public location that was readily accessible to customers moving through the Walmart store. The district court properly denied Cunningham's motion to suppress.

Cunningham next challenges the district court's denial of his motion to dismiss the charge that he unlawfully possessed a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Cunningham asserts that the Second Amendment guaranteed his right to possess a firearm, despite his status as a twice-convicted felon, because neither of his prior offenses qualified as a "violent" offense based on the elements of the crime. This contention is foreclosed by *United States v. Jackson*, No. 22-2870, 2023 WL 3769242, at *4 (8th Cir. June 2, 2023), where we concluded that there is no need for felony-by-felony determinations regarding the constitutionality of § 922(g)(1) as applied to a particular defendant. The longstanding prohibition on possession of firearms by felons is constitutional, and the district court properly denied the motion to dismiss. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022); *id*. at 2157

(Alito, J., concurring); *id*. at 2162 (Kavanaugh, J., concurring, joined by Roberts, C.J.); *id*. at 2189 (Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.).

Cunningham also contends that there was insufficient evidence to support his convictions. We consider the evidence in the light most favorable to the verdict, and uphold a conviction if any rational jury could have found the elements beyond a reasonable doubt. *United States v. Two Hearts*, 32 F.4th 659, 662 (8th Cir. 2022).

On the conviction for unlawful possession of a firearm, Cunningham argues that the evidence was insufficient to prove that he knew about the gun in the wheelchair or that he knowingly possessed it. He posits that another person could have placed the firearm under the seat cushion of his wheelchair while it was left unattended near the entrance of the Walmart store.

We agree with the district court that a rational jury could have found that Cunningham acted with the requisite knowledge. Cunningham admitted that the wheelchair belonged to him, and that he was the only person to use it. Cunningham parked the wheelchair near the entrance of the store, and a Walmart employee testified that she did not see anyone else near the wheelchair. Only a short amount of time passed between Cunningham's transfer out of the wheelchair and discovery of the firearm in the wheelchair. There was no evidence suggesting why a patron of the store would wish to place a firearm in Cunningham's wheelchair. Cunningham, by contrast, was found in possession of a quantity of drugs suitable for distribution, and had a motive to possess a gun to protect his supply of cocaine. There was ample evidence to support the jury's finding that Cunningham knowingly possessed the firearm.

On the conviction for possession with intent to distribute cocaine, Cunningham argues that he was merely a drug user, and that there was insufficient evidence to show that he intended to distribute. The combination of circumstantial evidence and

expert testimony, however, was sufficient to support a finding of intent to distribute. Cunningham was found with thirteen separate packages of drugs, totaling 3.44 grams of cocaine base and 4.46 grams of powder cocaine. The government's expert testified that the packaging and quantity were consistent with intent to distribute, because drug users rarely can afford more than one or two bags of drugs at a time, and will seldom possess more than a gram of cocaine or cocaine base. She also explained that drug users typically possess only their drug of choice, so the fact that Cunningham possessed two different types of cocaine indicated an intent to distribute. Cunningham's possession of a firearm, a tool of the drug trade, also suggested that he was a distributor. Despite Cunningham's contention that he was a drug user, police found no drug paraphernalia to facilitate drug use on his person or in his wheelchair. Although the government did not present even more evidence of drug trafficking, such as a large quantity of cash or communications with drug customers, a rational jury could have found that the evidence of record established that Cunningham intended to distribute the drugs found in his undergarment.

Finally, Cunningham briefly argues that there was insufficient evidence that he possessed the firearm in furtherance of a drug trafficking offense, because the firearm was under a seat cushion and "not particularly accessible" to him. To the contrary, a rational jury could have found that the firearm was placed strategically in a location where it was hidden from view but readily accessible to one who was seated in the wheelchair and carrying drugs in his undergarment.

The judgment of the district court is affirmed.

STRAS, Circuit Judge, dissenting.

I dissent. More to come. *See United States v. Jackson*, — F.4th — , 2023 WL 3769242 (8th Cir. 2023).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1080

United States of America

Plaintiff - Appellee

v.

Sylvester Cunningham

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:20-cr-00104-CJW-1)

JUDGMENT

Before COLLOTON, WOLLMAN and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 13, 2023

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1080

United States of America

Appellee

v.

Sylvester Cunningham

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:20-cr-00104-CJW-1)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judges Erickson, Grasz, Stras and Kobes would grant the petition for rehearing en banc.

August 30, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans