No. _____

In the Supreme Court of the United States

AUSTIN LODGE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Fourth Amendment doctrine of "abandonment," a person has no Fourth Amendment rights in property he has abandoned. Courts are divided over two basic aspects of that doctrine.

The questions presented are:

1. Whether a court should consider all facts, or only those known to police, to decide whether a person has abandoned property and thereby lost Fourth Amendment rights in it.

2. Whether an appellate court should review the ultimate determination of abandonment *de novo* or only for clear error.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Austin Lodge, the defendant-appellant below.

Respondent is the United States of America, the plaintiff-appellee below.

RELATED PROCEEDINGS

United States v. *Lodge*, No. 23-4665 (4th Cir.) (Apr. 30, 2026)

United States v. *Lodge*, No. 21-cr-00030 (N.D. W. Va.) (Oct. 19, 2023)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Austin Lodge respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-35a) is reported at 174 F.4th 434. The opinion of the district court denying petitioner's motion to suppress (App. 36a-45a) is unreported but available at 2022 WL 16849056. The report and recommendation of the magistrate judge recommending denial of petitioner's motion to suppress (App. 46a-77a) is unreported but available at 2022 WL 17548605.

JURISDICTION

The court of appeals entered judgment on April 30, 2026. It denied a petition for rehearing en banc on May 27, 2026. On August 17, 2026, the Chief Justice extended the time to file a petition for a writ of certiorari until September 24, 2026. On September 18, 2026, the Chief Justice further extended the time to file a petition for a writ of certiorari until October 24, 2026. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

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

INTRODUCTION

Under the doctrine of abandonment, a person lacks Fourth Amendment rights in property he has abandoned. But courts cannot agree on how to apply that doctrine in two basic respects.

Courts first disagree over which facts count. To determine whether a person abandoned or retained his protected property interest, some courts consider all facts and circumstances. Others consider only facts known to police at the time of the search or seizure. Under the first approach, if police find an unattended package, it matters how and why it was left there. Under the second, those circumstances are erased if unknown to police. A person who puts a bag in his own family's backyard is treated the same as one who hurls it into a stranger's.

That conflict alone merits this Court's review. In addition, this case allows the Court to resolve a second conflict over another foundational issue: the appellate standard of review. In some parts of the country, abandonment is ultimately a legal determination reviewed *de novo*. In others, abandonment is a factual finding reviewed only for clear error. Under that deferential standard, trial judges can reach opposite

Fourth Amendment conclusions on identical facts. Yet this Court has required *de novo* review of Fourth Amendment reasonableness determinations precisely to avoid those "varied results." See *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996).

This case presents both questions in sharp relief. Petitioner left a backpack in the backyard of a family home—where, unbeknownst to police, he was welcome and at times resided. The court of appeals nevertheless held that petitioner had abandoned the backpack because it took the restrictive views of both questions. *First*, the court of appeals refused to consider material facts solely because officers did not know them: It acknowledged that petitioner had permission to be on the property where he put the backpack, but it excluded that fact from the abandonment analysis. *Second*, it acknowledged that reasonable minds could differ, but it deferred to the abandonment determination below rather than decide the question *de novo*.

Those holdings are at odds with the law not only in other jurisdictions but also in other Fourth Amendment settings. Like other inquiries into whether a person has a protectable Fourth Amendment interest, abandonment turns on all facts, not an artificially limited version of events. Property law makes that answer especially clear: Abandonment turns on the true facts, not what someone else happens to learn. Indeed, the federal government often advances—and benefits from—an all-facts standard. And like other objective Fourth Amendment inquiries, abandonment requires *de novo* review.

The time has come for this Court's intervention. Abandonment is litigated frequently. See *infra* 24 & nn. 2-3. Yet lower courts are applying contradictory versions of the doctrine. The Fourth Amendment should not have different scope in different places. This case—where abandonment is the sole live issue, and the decision below openly recognized both questions' dispositive effect—presents an ideal opportunity to end the confusion. This Court should establish uniformity and bring abandonment in line with other Fourth Amendment doctrines. The petition should be granted.

STATEMENT OF THE CASE

A. Factual Background

On December 13, 2018, in Clarksburg, West Virginia, a police officer followed petitioner's car, observed an alleged traffic violation, and continued to follow without attempting a traffic stop. App. 4a-5a, 54a. Petitioner parked, got out, and headed toward a residence. App. 4a-5a.

The home was familiar to petitioner, who "resided there at times." App. 20a; see App. 76a. It belonged to his child's grandmother, who testified that petitioner "had permission to enter [the] home" that day, "could have gone in and just spent the night there," "ha[d] clothes there," and "had permission to leave any property at [the] home." C.A. App. 99-100. In short, "he's family." C.A. App. 101.

After petitioner exited his car, the officer directed him to stop. App. 5a. Petitioner proceeded toward the residence and onto the front porch. *Ibid.* According to the officer's later testimony, a resident opened the door briefly

and petitioner tried but failed to put a backpack inside before the door closed. App. 5a & n.2. At the time, however, bodycam footage captured the same officer saying that he did not think anyone answered the door. App. 22a, 61a n.8.

Petitioner then continued behind the home to a partially fenced backyard. App. 5a, 16a. He put the backpack next to a shed (where the home's residents kept "a lot of stuff laying around"). App. 16a; C.A. App. 101.

Officers eventually apprehended petitioner in a wooded area behind the home. App. 5a, 48a. They returned to the home to search for the backpack. App. 6a. Petitioner claimed ownership of the bag and its contents, and he told the officers that the home belonged to his child's grandmother and that his child lived there. App. 5a. The officers located the backpack, searched it without a warrant or consent, and found drugs and related items inside. App. 6a.

B. Proceedings Below

1. Based on the evidence from the warrantless search of the backpack, the government charged petitioner with two counts of possession with intent to distribute controlled substances, in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(C). App. 3a-4a. Petitioner moved to suppress the evidence from the backpack. App. 4a.

A magistrate judge issued a report and recommendation concluding that petitioner "abandoned the backpack, such that he had no reasonable expectation of privacy in it." App. 74a; see App. 46a-77a. The magistrate judge, who conducted the evidentiary hearing, found that petitioner "clearly claimed ownership of the backpack," "had

permission to be on the property," and "resid[ed] there at times." App. 72a-73a, 76a. The magistrate judge nevertheless concluded that petitioner had abandoned the property because he discarded it while fleeing from officers. App. 74a-76a.

The district court adopted the report and recommendation and denied the suppression motion. App. 36a-45a. It noted that under circuit precedent, it could "consider 'only objective information available to officers at the time they performed the warrantless search' to determine whether a defendant abandoned property." App. 41a (quoting *United States* v. *Small*, 944 F.3d 490, 502 (4th Cir. 2019)). Applying that rule, the court concluded that petitioner abandoned the backpack because he was fleeing from police and left it in "a place where someone would not normally be." App. 43a-44a.

Petitioner then entered a conditional guilty plea to one count of possession with intent to distribute methamphetamine, while preserving his right to appeal the denial of the suppression motion. App. 4a, 79a. Petitioner was sentenced to 151 months' imprisonment, to be followed by 3 years of supervised release. App. 81a, 83a.

2. A divided panel of the Fourth Circuit affirmed in a published opinion. App. 1a-35a.

a. The majority held that petitioner abandoned the backpack and therefore "lacked any reasonable expectation of privacy in [it], and the district court was correct to deny his motion to suppress on that ground." App. 25a; see App. 1a-26a.

At the outset, the majority recognized the "[c]entral" importance of "the location where the property was discarded." App. 15a; see App. 15a-17a. It therefore faulted the district court for inferring abandonment "from flight alone," instead of "meaningfully engaging with the constitutional significance of the bag's placement on private property that may have fallen within the curtilage of a home which Lodge perhaps visited." App. 16a, 18a.

The majority also acknowledged that petitioner "could have plausibly been found to possess a reasonable expectation of privacy in" the home and curtilage where he left the backpack. App. 18a, 20a. Several facts supported that conclusion, including that petitioner "had permission to be on the property" and "resided there at times." App. 20a.

But the majority set "[s]uch plausibility aside." App. 20a. Instead, it limited its analysis in two ways under circuit precedent. *First*, it "constrained" its analysis to "only consider 'objective information available to officers at the time they performed the warrantless search.'" App. 15a (quoting *United States* v. *Mayberry*, 125 F.4th 132, 145 (4th Cir. 2025), cert. denied, No. 24-6987 (2025)). "That constraint carries particular significance where, as here, details revealed only after the warrantless search further inform whether the defendant maintained a reasonable expectation of privacy in the location where he discarded the property in question." *Ibid. Second*, it reviewed whether "a defendant 'abandoned his privacy interest' in property" only "for clear error." App. 13a (quoting *Mayberry*, 125 F.4th at 145).

Applying those limits, the majority upheld the district court's abandonment determination. App. 20a-24a. *First*,

it excluded the facts that petitioner "had permission from [the homeowner] to come and go without restriction," and that he "had free rei[n] of the Property" because those facts were discovered only after the search. App. 21a & n.10. Rather, it constrained its analysis to the "information [officers] possessed" at the time: Petitioner stated that "his children lived there and that it was their grandmother's home," the homeowner said she did not "know[ ] who was in her backyard," and an officer assertedly saw petitioner get turned away at the door. App. 21a. On those limited facts, the majority concluded, it was "reasonable" for officers to "infer[ ]" (contrary to the later-adduced facts) that petitioner was "not" "truthful about his relationship to the homeowner" and lacked "permission to be on the property." App. 21a-22a.

Second, the majority held that the abandonment determination was not clearly erroneous. Even on the limited facts known to officers, it acknowledged that "reasonable minds might differ in weighing Lodge's asserted connection to the property against his denied entry." App. 23a. But it found no "clear error" because the determination "rested on objective evidence." *Ibid.*

The majority thus viewed the case as "decided by simple application of the standard of review on appeal": "[T]he district court did not clearly err in finding abandonment based on the objective information available to officers at the time." App. 3a. And it did not even "reach[ ]" the "question of whether a defendant retains a reasonable expectation of privacy in property discarded within a home familiar to the defendant (or within its curtilage)." *Ibid.* Instead, it treated the home as *not* "familiar to the

defendant," *ibid.*, based on the facts known to officers. App. 21a, 23a.

b. Judge Gregory dissented. App. 26a-35a. Like the majority, he faulted the district court for failing "to meaningfully engage with" the "location where [petitioner] stowed the property." App. 26a. He would have vacated and remanded for the district court to undertake that analysis. App. 28a-33a.

Judge Gregory then disagreed with the majority's abandonment analysis. In his view, the majority erred by "permitt[ing] the entire abandonment analysis to turn only on the objective circumstances known to the officers at the time of the search." App. 32a (internal quotation marks omitted); see App. 34a ("Abandonment cannot turn only on whether it was reasonable for officers to infer abandonment."). Instead, the court should have asked at the outset "whether [petitioner] intended to abandon his property." *Ibid.* Judge Gregory therefore would have remanded for the district court to consider additional evidence as to petitioner's intent and account for the "private, curtilage-based setting." App. 34a-35a.

c. Petitioner unsuccessfully sought rehearing en banc. App. 78a.

REASONS FOR GRANTING THE PETITION

I. There are intractable splits on both questions presented.

A. Courts disagree over the scope of the abandonment inquiry.

Courts disagree over which facts determine whether a defendant has abandoned property and thereby lost Fourth Amendment protection. At least five circuits and three state high courts consider all facts. At least five circuits and five state high courts—including the court below—constrain the inquiry to the facts known to police at the time of the search or seizure. Under that constrained approach, a court must blind itself to relevant facts that concededly "inform whether the defendant maintained a reasonable expectation of privacy." App. 15a.

Recurring fact patterns now produce inconsistent results. When a person puts a bag on another person's property, can a court consider the person's ties to the property if unknown to police? Compare *United States* v. *Kyle*, 268 A.3d 1256, 1263-64 (D.C. 2022) (yes), with App. 21a (no). Can a court consider whether a person tries to recover lost property, unobserved by police? Compare *United States* v. *Hunt*, 153 F.4th 858, 868 (9th Cir. 2025) (yes), with *United States* v. *Pitts*, 322 F.3d 449, 456 (7th Cir. 2003) (no); see also *infra* 12-13, 15, 17-19 (collecting additional cases).

This inconsistency is untenable. Fourth Amendment rights should not turn on geography and the sovereign behind the charges. The Court's review is warranted.

1. At least five circuits and three state high courts consider all facts.

The First, Second, Ninth, Eleventh, and D.C. Circuits, along with the courts of last resort in the District of Columbia, Kansas, and Georgia, require consideration of all the facts—including facts police did not know at the time.

The **First Circuit** exemplifies this approach. It holds that "[w]hen abandonment is argued to show lack of a Fourth Amendment interest," a court must "inquire[ ] into all facts, including those not known to the police at the time of their search." *United States* v. *Paradis*, 351 F.3d 21, 32 (1st Cir. 2003). "After all, the question is not what the police knew but whether the defendant had a reasonable expectation of privacy in the seized object." *Ibid.* "[T]hat interest does not depend on the state of mind of the police at the time of the seizure." *Ibid.*

In *Paradis*, for instance, the First Circuit deemed a container of ammunition abandoned even though "the police did not know that [the defendant] had abandoned the ammunition when they seized it." 351 F.3d at 31-32. At the time of the seizure, the officer had been told it "belong[ed] to [the defendant]," *id.* at 26—indicating ownership, not abandonment. Only later did the officer learn the defendant had left that property with a neighbor and failed to retrieve it. *Ibid.* The court relied on those latter facts—unknown to officers at the time—as dispositive and held the defendant abandoned the property. *Id.* at 32; see also, *e.g.*, *United States* v. *Procopio*, 88 F.3d 21, 26-27 (1st Cir. 1996) (considering facts unknown to officers, including why property was "left openly available in a public place").

Likewise in the **Second Circuit**, abandonment is determined "on the basis of all the relevant facts and circumstances"—"not limited to those which were known to the officers at the time of the search or seizure." *United States* v. *Levasseur*, 816 F.2d 37, 44 (2d Cir. 1987). "Rather, subsequently discovered events" are relevant. *Ibid.* They may reveal, for example, that the person "had already chosen, and manifested their decision, not to return to the property." *Ibid.* That was the case in *Levasseur*, where the court held that the defendants abandoned property inside a house, given a subsequent "discovery of evidence" that they had resettled elsewhere. *Ibid.*; see also, *e.g.*, *United States* v. *Moskowitz*, 883 F.2d 1142, 1147-48 (2d Cir. 1989) ("[T]he facts and circumstances pertinent to the court's abandonment inquiry are not limited to those which were known to the officers at the time of the search.").

The **Ninth Circuit**, too, holds that determining abandonment requires "examining all the relevant facts." *Hunt*, 153 F.4th at 868. Thus, where the defendant had dropped a cell phone after being shot, the Ninth Circuit deemed it "an important fact" whether the defendant "tr[ied] to retrieve the phone from the police" *after* police seized it. *Id.* at 867. The court also considered that the defendant claimed (again, after the fact) "to not remember the shooting." *Ibid.* Those subsequent facts—unknown to police at the time of the seizure—shed light on whether the defendant had abandoned the phone. *Id.* at 867-68; see also, *e.g.*, *United States* v. *Baker*, 58 F.4th 1109, 1118 (9th Cir. 2023) ("[W]e must consider the totality of the circumstances to determine whether an individual" abandoned property); *United States* v. *Fisher*, 56 F.4th 673, 686 (9th Cir. 2022) (considering facts not known to officers at time

of search, including that "no efforts were made to retrieve the items").

The **Eleventh Circuit** also holds—relying expressly on the Second Circuit's *Levasseur* decision—that "events that occurred *after* the abandonment may be considered" in deciding whether a defendant had "a reasonable expectation of privacy with regard to [the property] at the time of the search." *United States* v. *Winchester*, 916 F.2d 601, 603-04 (11th Cir. 1990) (emphasis altered) (citing *Levasseur*, 816 F.2d at 44); see also *Pineda* v. *Warden, Calhoun State Prison*, 802 F.3d 1198, 1205 (11th Cir. 2015) (deeming it "error" to examine only "what a reasonable officer would have known at the time of the search" when assessing abandonment's effect on Fourth Amendment "standing"). Thus, in *Winchester*, the court examined events from "the day *after* the search"—unknown at the time of the search—to hold that the defendant had abandoned the searched property. 916 F.2d at 604 (emphasis added); see also, *e.g.*, *United States* v. *Ramos*, 12 F.3d 1019, 1025-26 (11th Cir. 1994) (relying on event "the next day" after the search); *United States* v. *Sparks*, 806 F.3d 1323, 1343-44, 1349 (11th Cir. 2015) (relying on defendants' conduct after losing a cell phone—unknown to police, who did not even know defendants' identity at time of search), overruled on other grounds by *United States* v. *Ross*, 963 F.3d 1056, 1066 (11th Cir. 2020) (en banc); *United States* v. *Green*, 981 F.3d 945, 956 (11th Cir. 2020) (similar).

The **D.C. Circuit** similarly considers all facts, even if unknown to officers, when assessing abandonment. In *United States* v. *Most*, 876 F.2d 191 (D.C. Cir. 1989), the court held the defendant did not abandon a bag he left

with store clerks. *Id.* at 196-97. It relied on later-adduced testimony from one of the clerks that no member of the public "could have picked up the bag," as the clerk "was 'watching the bag' at all times." *Id.* at 197 & n.12. Such "details revealed only after the warrantless search"—like "testimony adduced at the suppression hearing" about permission to access property—are off-limits under the decision below. App. 15a, 21a n.10 (emphasis and citation omitted). Yet those facts matter in the D.C. Circuit. *Most*, 876 F.2d at 197 & n.12.

Numerous state high courts agree. The **D.C. Court of Appeals** holds that Fourth Amendment abandonment "must be determined based on all of the circumstances, not only those circumstances known by the police at the time of the search or seizure." *Kyle*, 268 A.3d at 1263-64; see *id.* at 1258 (applying federal constitutional law). In adopting that rule, the court expressly sided with the First Circuit. *Id.* at 1263-64 (citing *Paradis*, 351 F.3d at 32).[1]

The court applied that rule to the very situation here, to opposite effect. As here, the defendant in *Kyle* left a backpack in another person's backyard. *Id.* at 1259-60. As here, abandonment hinged on the defendant's relationship with the homeowner. *Id.* at 1260. Yet in *Kyle*, it did not matter "that the police officers would have been unaware at the time of the incident" who owned the home. *Id.*

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[1] A later decision, without acknowledging *Kyle*'s all-facts holding, recited an officer-knowledge standard. *United States* v. *Pope*, 313 A.3d 565, 574 (D.C. 2024). Nonetheless, *Kyle* remains binding as "the earlier decision." See *Thomas* v. *United States*, 731 A.2d 415, 420 n.6 (D.C. 1999).

at 1263-64. Instead, relying on "all of the circumstances" (which showed that it was "the yard of a stranger"), the court reversed a lower-court decision that had limited the analysis to the officers' perspective. *Ibid.*; see *id.* at 1258, 1261.

The **Kansas Supreme Court** similarly considers subsequent events unknown to the officers at the time. Adopting the Eleventh Circuit's view, it has held under the Fourth Amendment that "[e]vents that occurred after the abandonment may be considered by the court as evidence of the defendant's intent to abandon the property at the previous time." *State* v. *Grissom*, 840 P.2d 1142, 1177 (Kan. 1992) (quoting *Winchester*, 916 F.2d at 604); see *ibid.* (applying federal constitutional law). Applying that rule in *Grissom*, the court held that the defendant abandoned a car based on facts unknown to officers at the time of the search: After the search, the defendant did not "claim the car," and "[t]he next morning[,]" he obtained a different car. *Id.* at 1179.

So too with the **Georgia Supreme Court**. In *Franklin* v. *State*, 925 S.E.2d 575 (Ga. 2026), the court assessed "abandonment for Fourth Amendment purposes" based on the "record as a whole," including subsequent facts unknown to officers at the time. *Id.* at 579. The police found a cell phone that the defendant dropped at a crime scene, and the court deemed it abandoned based on later events: The defendant "obtained a different phone" rather than try to retrieve the old one. *Ibid.*

2. At least five circuits and five state high courts consider only facts known to police at the time of the search or seizure.

In contrast, the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, along with the courts of last resort in Illinois, Maryland, Nebraska, North Dakota, and Utah, limit the abandonment inquiry to the facts known to police at the time of the search or seizure.

As the decision below reinforces, the **Fourth Circuit** imposes a "constraint" on the abandonment analysis: Courts may "only consider 'objective information available to officers at the time they performed the warrantless search.'" App. 15a (quoting *Mayberry*, 125 F.4th at 145); see also *United States* v. *Frazer*, 98 F.4th 102, 114 (4th Cir. 2024); *Small*, 944 F.3d at 502. Like the courts that consider all facts, the Fourth Circuit recognizes that abandonment addresses "whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned." *Small*, 944 F.3d at 502. Yet it insists that the circumstances "must be viewed from the perspective of the officers involved." *Frazer*, 98 F.4th at 115.

The **Fifth Circuit** has applied the same constraint: If "the police officer could not have known of [a] fact," it "is irrelevant." *United States* v. *Barlow*, 17 F.3d 85, 88 (5th Cir. 1994). In *Barlow*, a defendant parked his car, unlocked and with the key inside, during flight from a crime scene. *Id.* at 87. The court excluded "[t]he fact that the defendant had fled from the vehicle" as "irrelevant" because it was unknown to the officer who found the car. *Id.*

at 88-89. Instead, the court held that "it was reasonable to assume that the car had been abandoned," rather than that "the owner" was "likely to return." *Ibid.*

Likewise, the **Seventh Circuit** examines only the "knowledge available to the government agents involved in the search." *United States* v. *Edwards*, 34 F.4th 570, 583 (7th Cir. 2022) (quoting *Pitts*, 322 F.3d at 456). Under that rule, the Seventh Circuit treats as "irrelevant" whether the owner seeks "to later reclaim an item" after the search. *Pitts*, 322 F.3d at 456. Yet that same fact is often material to courts on the other side of the split, as explained above. See, *e.g.*, *Hunt*, 153 F.4th at 867 (whether the defendant "tr[ied] to retrieve the phone" afterwards was "an important fact"); *Sparks*, 806 F.3d at 1342-44 (assessing "efforts to reclaim" the property); *Grissom*, 840 P.2d at 1179 (relying on whether the defendant tried to "claim the car" after police seized it); *Franklin*, 925 S.E.2d at 579 (assessing "efforts to retrieve" the property); *supra* 12-13, 15.

The **Eighth Circuit**, too, "consider[s] only the information available to the officers at the time of the search." *United States* v. *Tugwell*, 125 F.3d 600, 602 (8th Cir. 1997); see also, *e.g.*, *United States* v. *Crumble*, 878 F.3d 656, 659 (8th Cir. 2018) (requiring that "[c]ourts consider only 'the objective facts available to the investigating officers' " when determining whether a person "abandoned" property and thus "forfeited his expectation of privacy" (quoting *United States* v. *Nowak*, 825 F.3d 946, 948 (8th Cir. 2016))). As in the Seventh Circuit (and again, contrary to courts on the other side of the split), a "desire to later reclaim an item" is irrelevant. *Nowak*, 825 F.3d

at 948 (quoting *United States* v. *Basinski*, 226 F.3d 829, 836-37 (7th Cir. 2000)).

The **Tenth Circuit** similarly views "[w]hether abandonment has occurred" through "the eyes of a reasonable officer." *United States* v. *Porter*, 66 F.4th 1223, 1226 (10th Cir. 2023), cert. denied, No. 23-5784 (2023); see also *United States* v. *Easley*, 911 F.3d 1074, 1083 (10th Cir. 2018) (asking "whether a reasonable officer in [the same] position would have believed" the property was abandoned (citing *Pitts*, 322 F.3d at 456)).

The **Utah Supreme Court** agrees. While it recognizes that Fourth Amendment abandonment addresses a defendant's "expectation of privacy in the [property]," it rejects the notion that "abandonment is measured from the vantage point of the defendant, and not the police." *State* v. *Rynhart*, 125 P.3d 938, 944 (Utah 2005) (citations and internal quotation marks omitted). Instead, it holds abandonment must be determined based only "on the facts available to the searching officer." *Ibid.*

Finally, other state high courts have expressly followed federal precedent adopting the officer-knowledge rule. **Illinois**, **Maryland**, and **Nebraska** have followed the Seventh Circuit, limiting the Fourth Amendment abandonment analysis to "knowledge available to the government agents" and treating "desire to later reclaim an item" as irrelevant. *People* v. *Pitman*, 813 N.E.2d 93, 105 (Ill. 2004) (quoting *Basinski*, 226 F.3d at 836-37); *Richardson* v. *State*, 282 A.3d 98, 111 (Md. 2022) (same); see *State* v. *Dixon*, 947 N.W.2d 563, 572 (Neb. 2020) (adopting "test for determining abandonment" limited to "the information available to the officer," where "intent to later

reclaim the item is irrelevant" (citing *Basinski*, 226 F.3d 829; *Nowak*, 825 F.3d 946)). Likewise, **North Dakota** has followed the Eighth Circuit, holding that Fourth Amendment abandonment must be determined "solely from the objective facts known to the officers at the time of the search." *State* v. *Valles*, 925 N.W.2d 404, 408 (N.D. 2019) (citing *Tugwell*, 125 F.3d at 602).

B. Courts disagree over the appellate standard of review for abandonment.

This case also presents the opportunity to settle a second disputed aspect of abandonment: the standard of review. The Sixth Circuit reviews a district court's ultimate determination of abandonment *de novo*. Jurists elsewhere have agreed—including entire panels on the Tenth and Eleventh Circuits and a dissenting judge on the Fourth Circuit. But circuit precedent in those latter courts, along with the Second, Seventh, Eighth, Ninth, and D.C. Circuits, requires clear-error review.

Disagreement over this question is stark and acknowledged. See *United States* v. *Ferebee*, 957 F.3d 406, 421 n.1 (4th Cir. 2020) (Floyd, J., dissenting) ("This is a point of division among our sister circuits."). Courts have taken both sides over decades, and the conflict will persist until this Court provides a clear answer. Review of this question is independently warranted.

1. The **Sixth Circuit** holds the "question of abandonment" is a "mixed question of law and fact," with only the "factual aspect"—not the "legal determination"—entitled to "deference" on appeal. *United States* v. *Oswald*, 783 F.2d 663, 665-66 (6th Cir. 1986). In other words, the "legal

determination of abandonment is reviewed *de novo*." *United States* v. *Eden*, 190 F. App'x 416, 421 (6th Cir. 2006) (citing *Oswald*, 783 F.2d at 666); see also, *e.g.*, *United States* v. *Cunningham*, No. 93-3795, 1994 WL 242375, at *2 (6th Cir. 1994) (same).

After all, "the question" in the abandonment inquiry is ultimately "whether the person claiming the protection of the Fourth Amendment 'has a legitimate expectation of privacy in the invaded place.'" *Oswald*, 783 F.2d at 666 (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978)). And that "legitimate expectation of privacy" question—sometimes referred to as Fourth Amendment "standing"—is a "legal determination" to be "reviewed *de novo*." *United States* v. *Pollard*, 215 F.3d 643, 646 (6th Cir. 2000).

2. In two other circuits, panels have repeatedly agreed that abandonment should be reviewed *de novo*, only for those courts to later deem themselves bound by older circuit precedent applying clear-error review.

The **Tenth Circuit** has frequently applied *de novo* review. Recognizing that "abandonment subsumes both a subjective and an objective component," the court has repeatedly held that "whether the defendant retained an objectively reasonable expectation of privacy in the property" is "a question of law that we review *de novo*." *United States* v. *Garzon*, 119 F.3d 1446, 1449 (10th Cir. 1997); see also, *e.g.*, *United States* v. *Fernandez*, 24 F.4th 1321, 1330 (10th Cir. 2022); *United States* v. *Juszczyk*, 844 F.3d 1213, 1214 (10th Cir. 2017); *United States* v. *Austin*, 66 F.3d 1115, 1118-19 (10th Cir. 1995); *United States* v. *Benitez-Arreguin*, 973 F.2d 823, 827 (10th Cir. 1992).

More recently, however, the Tenth Circuit has identified older circuit precedent applying clear-error review and designated that "earliest pronouncement" as controlling. *Porter*, 66 F.4th at 1226 & n.2 (citing *United States* v. *Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983)).

Likewise, the **Eleventh Circuit** reviewed abandonment *de novo*, then deemed older, contrary precedent to be binding. It had recognized that the ultimate question was legal: While sometimes "abandonment involves the resolution of factual disputes" (reviewed for clear error), whether the settled facts amount to abandonment is a "legal determination" reviewed "*de novo*." *United States* v. *Cofield*, 272 F.3d 1303, 1306 (11th Cir. 2001). And that standard made a difference: In *Cofield*, for example, *de novo* review led the court to vacate an abandonment decision rather than defer to it. *Id.* at 1307. Subsequently, however, the court has followed earlier precedent treating abandonment as a "finding[ ] of fact" reviewable "only for clear error." *Ross*, 963 F.3d at 1066 (citing *Ramos*, 12 F.3d at 1022-23).

3. Other circuits, too, review abandonment only for clear error. The **Fourth Circuit**'s decision below held that abandonment is "a finding of fact reviewed for clear error." App. 13a. It took that view despite recognizing (like the Sixth Circuit) that "abandonment necessarily answers the ultimate *legal* question of whether a defendant retains a reasonable expectation of privacy in the property at issue." *Ibid.* (quoting *Mayberry*, 125 F.4th at 145) (emphasis added); see *Oswald*, 783 F.2d at 665-66. So, despite reviewing the exact same question—whether the defendant lacked a reasonable expectation of privacy because he

abandoned the property—the Fourth and Sixth Circuits apply a different standard.

A member of the Fourth Circuit has pointed out the inconsistency between clear-error review for abandonment and the "general approach" of *de novo* review of "Fourth Amendment questions involving a reasonable expectation of privacy." *Ferebee*, 957 F.3d at 421 (Floyd, J., dissenting). Instead, Judge Floyd explained, although clear-error review applies to "findings of fact underlying" an abandonment conclusion, courts should "review de novo whether those findings amount to abandonment as a matter of law." *Ibid.* But the Fourth Circuit reaffirmed its clear-error standard over that dissenting view. *Id.* at 416 (maj. op.).

Likewise, the **Second**, **Seventh**, **Eighth**, **Ninth**, and **D.C. Circuits** apply clear-error review to the ultimate abandonment determination. See *United States* v. *Lee*, 916 F.2d 814, 818 (2d Cir. 1990) ("[W]e will uphold the district court's [abandonment] finding unless clearly erroneous."); *United States* v. *Rem*, 984 F.2d 806, 810 (7th Cir. 1993) ("[T]he district court's factual findings regarding abandonment will be reversed only if clearly erroneous."); *Crumble*, 878 F.3d at 659 (8th Cir.) ("We review this factual finding [abandonment] for clear error[.]"); *Baker*, 58 F.4th at 1116 (9th Cir.) ("We review . . . the district court's underlying factual findings for clear error, including the finding that property has been abandoned."); *United States* v. *Brady*, 842 F.2d 1313, 1315-16 (D.C. Cir. 1988) ("A determination of abandonment is a factual finding, which we review for clear error.").

4. Disuniformity will persist until this Court intervenes. Courts have long been unable to agree on the standard of review, and the split will not heal on its own. There is no realistic prospect that the Sixth Circuit jettisons *de novo* review, when that is the only rule consistent with other circuit precedent: Abandonment addresses whether the person has "a legitimate expectation of privacy," *Oswald*, 783 F.2d at 666 (citation omitted), and that is a "legal determination" to be "reviewed *de novo*," *Pollard*, 215 F.3d at 646. Nor is it realistic to expect every clear-error court to reverse course en banc. Only this Court can end the conflict on this basic question—it should settle the standard of review once and for all.

II. The questions presented are exceptionally important.

This Court has regularly granted review to establish uniform Fourth Amendment standards. See, *e.g.*, *Case* v. *Montana*, 607 U.S. 107 (2026); *Chatrie* v. *United States*, 609 U.S. 605 (2026); *Barnes* v. *Felix*, 605 U.S. 73 (2025); *Lange* v. *California*, 594 U.S. 295 (2021); *Torres* v. *Madrid*, 592 U.S. 306 (2021); *Kansas* v. *Glover*, 589 U.S. 376 (2020); *Byrd* v. *United States*, 584 U.S. 395 (2018). The Court likewise has intervened to identify appellate standards of review—including in the Fourth Amendment context. See *Ornelas*, 517 U.S. at 695 & n.4 (standard of review for probable cause and reasonable suspicion); see also, *e.g.*, *Urias-Orellana* v. *Bondi*, 607 U.S. 537 (2026); *Bufkin* v. *Collins*, 604 U.S. 369 (2025); *Monasky* v. *Taglieri*, 589 U.S. 68 (2020); *U.S. Bank N.A.* v. *Village at Lakeridge, LLC*, 583 U.S. 387 (2018); *McLane Co.* v. *EEOC*, 581 U.S. 72 (2017). The questions here equally warrant this Court's resolution.

The questions arise frequently. Lower courts confront abandonment regularly—and apply inconsistent approaches.[2] In the past five years, at least five federal courts of appeals have issued ten published opinions applying conflicting standards on the officer-knowledge issue alone.[3] Every abandonment case requires deciding which facts to consider. And every abandonment appeal requires identifying the standard of review.

Both questions are crucial. The "Fourth Amendment inquiry turns on the perspective from which we view the physical separation of defendant and his [property]." *Rem*, 984 F.2d at 810. And the standard of review is "the

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[2] Among just recent federal trial-court decisions, compare, *e.g.*, *United States* v. *Mayhew*, No. 1:25-CR-156, 2026 WL 3043746, at *9-10 (N.D. Ga. 2026); *United States* v. *Lewis*, No. 25-CR-20595, 2026 WL 2519413, at *3 (E.D. Mich. 2026); *United States* v. *Smith*, No. 25-CR-342, 2026 WL 1192076, at *4-5 (D.D.C. 2026); *United States* v. *Hill*, No. 24-CR-20521, 2025 WL 1684233, at *9 (E.D. Mich. 2025); and *United States* v. *Beasley*, No. 23-CR-179, 2024 WL 4542050, at *6-7 (W.D. Pa. 2024) (considering facts unknown to officers), with *United States* v. *Marion*, No. 4:24-CR-112, 2026 WL 477544, at *3 (E.D. Mo. 2026); *United States* v. *Hatfield*, No. 6:25-CR-83, 2026 WL 18885, at *3-4 (E.D. Ky. 2026); *United States* v. *Del Toro*, No. 23-CR-113-2, 2024 WL 4416747, at *6 (N.D. Ill. 2024); *United States* v. *Johnson-Emory*, No. 24-CR-40010, 2024 WL 4275989, at *2 (C.D. Ill. 2024); and *United States* v. *Young*, No. 2:22-CR-20, 2024 WL 2764527, at *3-4 (N.D. Ind. 2024) (limiting abandonment inquiry to officer's knowledge).

[3] Compare *Hunt*, 153 F.4th at 866-68; *United States* v. *Morgan*, 143 F.4th 1264, 1272 (11th Cir. 2025), cert. denied, No. 25-6520 (2026); *Baker*, 58 F.4th at 1118-19; and *Fisher*, 56 F.4th at 686 (all relevant facts), with App. 15a; *Mayberry*, 125 F.4th at 145; *Neita* v. *City of Chicago*, 148 F.4th 916, 934, 937 (7th Cir. 2025); *Frazer*, 98 F.4th at 114; *Porter*, 66 F.4th at 1226; and *Edwards*, 34 F.4th at 583 (officer knowledge only).

starting point for" Fourth Amendment analysis on appeal. 6 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* §11.7(c) (6th ed. 2026, Supp.).

Those foundational questions need uniform answers. "Fourth Amendment protections" should not "vary from place to place." *Virginia* v. *Moore*, 553 U.S. 164, 172 (2008) (quoting *Whren* v. *United States*, 517 U.S. 806, 815 (1996)). Yet that is how abandonment currently stands.

Consider a fleeing suspect who runs from D.C. into Virginia, tossing his backpack along the way. Cf. 1 LaFave, *supra*, §2.6(b) ("great majority" of abandonment decisions concern "pursuit by the police"). Which test governs whether the backpack was abandoned: the D.C. Circuit's all-facts inquiry, *Most*, 876 F.2d at 196-97, or the Fourth Circuit's "constrain[ed]" inquiry, App. 15a? The answer currently depends on which side of the border the prosecution is brought.

The disparity does not end at trial. Suppose a federal district court in Virginia concludes the backpack was abandoned. Applying clear-error review, the Fourth Circuit defers to the trial court's abandonment determination and affirms. Across Virginia's western border, however, the Sixth Circuit would review the exact same finding *de novo*.

Under this patchwork, the same facts yield different results—identical property can be abandoned in one jurisdiction yet protected in another. Where only the officers' knowledge counts, a court must ignore facts even if they definitively establish or negate abandonment. If officers find an unattended item, it does not matter whether,

before they arrived, the defendant left it with a friend or stowed it in a familiar place. And under deferential appellate review, the Fourth Amendment's scope turns on "varied results" by "different trial judges" even absent "any significant difference in the facts"—precisely why this Court requires *de novo* review for other objective Fourth Amendment questions. *Ornelas*, 517 U.S. at 697.

And resolving these issues does not systematically favor one side. Considering facts unknown to the officers can help the government establish that property was abandoned, or help the defense establish that it was not. Compare, *e.g.*, *Levasseur*, 816 F.2d at 44 (all-facts rule favoring government), and *Paradis*, 351 F.3d at 31-32 (same), with *Hunt*, 153 F.4th at 867-68 (all-facts rule favoring defendant); App. 21a-22a (officer-knowledge rule disfavoring defendant). Indeed, the federal government sometimes invokes the "all of the facts" approach to establish abandonment using circumstances unknown to officers. *E.g.*, U.S. Br. in Opp. 15, *Sparks* v. *United States*, No. 15-7733 (Apr. 8, 2016) (relying on defendants' conduct that was unknown to police, who did not even know defendants' identity at the time, see *Sparks*, 806 F.3d at 1349). Likewise, the standard of review cuts both ways, depending on who won below. Prosecutors, defendants, officers, and courts all share an interest in clear, uniform standards.

The Court's guidance is much needed and long overdue. Decades have passed since the Court last addressed abandonment. See *California* v. *Hodari D.*, 499 U.S. 621, 629 (1991); *Smith* v. *Ohio*, 494 U.S. 541, 543-44 (1990) (per curiam). In the interim, courts and commentators alike have called for guidance. See, *e.g.*, *United States* v.

Ramirez, No. 22-50042, 2023 WL 5925902, at *4 (5th Cir. 2023) (noting the absence of authority on "the interplay between abandonment" and the "property-rights rubric" applied in more recent cases); Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 955 (2016) (identifying "desperate need for some guidance as to the interaction of privacy and personal property in the Fourth Amendment calculus"). And the Court last addressed the appellate standard of review for Fourth Amendment issues in 1996. See *Ornelas*, 517 U.S. at 695. Meanwhile, courts have staked out conflicting positions on both questions presented, and abandonment now applies differently in different places. It is time for this Court's intervention.

III. This is an ideal vehicle.

This case presents an ideal opportunity to resolve both questions. Abandonment is the sole live issue. Neither the government nor the courts below raised any other ground for denying suppression of the backpack. See App. 26a, 44a; C.A. App. 36; Gov't C.A. Br. 7-10. Both questions presented are purely legal. And the court of appeals made clear that the judgment hinged on both.

First, the court "constrained" its analysis to "only" the "information available to officers." App. 15a (citation omitted). And the court openly recognized that this limit was material: "That constraint carries particular significance" because "here, details revealed only after the warrantless search further inform whether the defendant maintained a reasonable expectation of privacy." *Ibid.*

Excluding those details changed the outcome. The court of appeals held petitioner abandoned the backpack because facts known to officers suggested he "lacked permission to be" at the home where he left the backpack. App. 23a; see also App. 21a-22a (upholding inference that petitioner lacked "permission to be on the property"). But facts unknown to the officers showed the opposite: As the court acknowledged, petitioner actually "had permission to be on the property." App. 20a. Excluding that fact led the court to decide the case on a false premise.

Second, the court also expressly rested its result on clear-error deference: The outcome was "decided by simple application of the standard of review on appeal." App. 3a. The court held that it "may not reverse" so long as the district court's determination "is plausible." App. 13a.

The court recognized two such plausible outcomes. It was "plausibl[e]" that petitioner "possess[ed] a reasonable expectation of privacy," App. 18a, 20a—but also "plausible" that he "possessed [the] intent" to abandon the property, App. 24a; see also App. 25a ("plausibl[e]" that "any expectation of privacy he might otherwise have enjoyed was revoked"). "[R]easonable minds might differ," even on the facts known to the officers, over whether petitioner lacked permission to be at the home and therefore abandoned the backpack. App. 23a.

Yet rather than decide which of those reasonable conclusions was correct, the court simply deferred. It upheld "the district court's abandonment finding" because it "rested on objective evidence" and so was not "clear

error." App. 23a. It therefore refused to conduct the analysis that *de novo* review requires.

Thus, each question was essential to the decision below. Reversal on either would require vacatur of the Fourth Circuit's judgment. And reversal on both would make suppression even more straightforward: On *de novo* review with all facts—including that petitioner was welcome at the home—he would easily show that he did not abandon his backpack by leaving it there.

IV. The decision below is wrong.

A. Abandonment turns on all facts, not just those known to an officer at the time of the search.

1. Whether a person lacks a Fourth Amendment interest in property because he abandoned it turns on all the facts and circumstances. A person's interest in property does not depend on what a police officer happens to know.

Abandonment addresses whether a person has a Fourth Amendment interest. The Fourth Amendment protects the people's right to be secure in "their . . . effects." U.S. Const. Amend. IV. Abandoned property is no longer among a person's effects, so the person lacks Fourth Amendment rights in it. Searches or seizures of abandoned property therefore do not violate the Fourth Amendment. See *Hester* v. *United States*, 265 U.S. 57, 58 (1924) ("[T]here was no seizure in the sense of the law when the officers examined the contents of each [item] after it had been abandoned.").

a. The court of appeals recognized that abandonment determines "whether a defendant retains a reasonable expectation of privacy in the property at issue." App. 13a (quoting *Mayberry*, 125 F.4th at 145). That turns on all circumstances, not just facts known to police. The two prongs of the reasonable-expectation-of-privacy inquiry are whether the individual has a "subjective expectation of privacy" and whether it is "one that society is prepared to recognize as 'reasonable.'" *Minnesota* v. *Olson*, 495 U.S. 91, 95-96 (1990) (quoting *Rakas*, 439 U.S. at 143-44 n.12). Neither prong views the circumstances from the police officer's perspective. Instead, courts must determine what the *individual* expects, and whether *society* would regard that as reasonable. *Ibid.*

This Court therefore routinely looks to all facts, even if unknown to officers, in determining whether a reasonable expectation of privacy exists. For example, in *Minnesota* v. *Carter*, 525 U.S. 83 (1998), the Court addressed whether the defendants had "a legitimate expectation of privacy in [an] apartment" such that they could "claim the protection of the Fourth Amendment in th[at] home." *Id.* at 91. The dispositive facts in the Court's analysis were unknown to the officers at the time of the search. The Court relied on details of the defendants' history with the apartment's primary resident, *ibid.*—details "[t]he police *later* learned" after the search, *id.* at 86 (emphasis added).

Similarly, in *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), the Court addressed whether the defendant "had a legitimate expectation of privacy in [a] purse" belonging to someone else, in which he had left illegal drugs. *Id.* at 104-05. Again, the Court relied on facts adduced after

the search. *E.g.*, *id.* at 105 (relying on testimony that "petitioner had never sought or received access to [the] purse prior to" that day, and that the purse's owner had allowed someone else to "rummage[ ] through its contents in search of a hairbrush"). The Court gave no weight to whether the police knew any of these details. The reasonableness of the person's expectation of privacy turned on the true facts, not the officer's impression.

As those cases show, facts unknown to officers often illuminate whether an expectation of privacy is reasonable. That is especially so for abandonment, where police usually do not observe the most salient facts: who owned the property before officers found it, how and why the person left it before they arrived, and whether the person tried to retrieve it. Excluding material facts yields wrong answers. That has no place in the reasonable-expectation-of-privacy analysis.

b. Property-law principles direct the same result. "[I]t is not enough that the owner's acts give reasonable cause to others to believe that the property has been abandoned"—abandonment "is to be determined from *all* the surrounding facts and circumstances." *Botkin* v. *Kickapoo, Inc.*, 505 P.2d 749, 752 (Kan. 1973) (emphasis added). That is because abandonment requires "an actual intent to abandon." *Baglin* v. *Cusenier Co.*, 221 U.S. 580, 598 (1911); see also *Ramirez*, 2023 WL 5925902, at *5 ("Courts through [the Fourth and Fourteenth Amendments'] ratification periods treated an owner's intent as the central question in claims of abandonment."). So the true facts matter, not just third-party perceptions: "Acts which, unexplained, would be sufficient to establish an abandonment, may be answered by showing that there

never was an intention to" abandon. *Baglin*, 221 U.S. at 598.

Accordingly, a third party who takes seemingly abandoned property is still liable for conversion if the full facts show it was not. "[A]t common law," if "actual abandonment was not proven," then a defendant is civilly liable for conversion—his "knowledge," "good faith," or "mistake" "are generally irrelevant." *Morissette* v. *United States*, 342 U.S. 246, 270 & n.31 (1952). "If one takes property which turns out to belong to another, his innocent intent will not shield him from making restitution or indemnity, for his well-meaning may not be allowed to deprive another of his own." *Ibid.*

2. Courts that limit the abandonment inquiry to the police's perspective reason that the test must be "objective," or else the individual could use "any hindsight excuse" to claim "subjective 'intent'" not to abandon the property. *Rem*, 984 F.2d at 810; see also, *e.g.*, *Mayberry*, 125 F.4th at 145 ("a reviewing court must perform 'an objective analysis'" (citation omitted)). But it does not follow that the inquiry must focus on the "objective facts *as the [government] agents encountered them*." *Rem*, 984 F.2d at 810 (emphasis added).

Rather, abandonment can be "decided in objective terms," based on "all the relevant facts and circumstances," "not limited to those which were known to the officers at the time." *Levasseur*, 816 F.2d at 44. That resolves the hindsight concern: A subjectively asserted privacy interest is insufficient; it must also be outwardly manifested and objectively reasonable. But

again, that assesses the reasonableness of the *individual's* expectation—not the officer's. *Supra* 30-31.

B. The ultimate determination of abandonment is subject to *de novo* review.

1. As explained, abandonment addresses the extent of a person's Fourth Amendment rights, including "whether a defendant retains a reasonable expectation of privacy." App. 13a (quoting *Mayberry*, 125 F.4th at 145); see *supra* 29-30. That is a matter reviewed *de novo*.

In *Ornelas*, this Court held that *de novo* review applies to the objective Fourth Amendment inquiries into reasonable suspicion and probable cause. 517 U.S. at 697. Although the underlying "determination of historical facts" is purely factual, the "ultimate determination[ ]"—"whether the facts satisfy the relevant . . . constitutional standard"—is a "mixed question" warranting "independent appellate review." *Ibid.* (citation and alterations omitted). That is so, the Court recently explained, because probable cause and reasonable suspicion turn on what "was 'reasonable,'" "an objective, legally grounded inquiry as to what a hypothetical person could have found." *Bufkin*, 604 U.S. at 384-85 (citation omitted). "The answer to how a hypothetical person would act is, by its nature, one that courts refine over time," so "*[d]e novo* review" is "essential so that courts can ensure 'uniform precedent'" and "a defined set of rules." *Ibid.* (quoting *Ornelas*, 517 U.S. at 697) (alterations omitted). Moreover, "because probable cause is a constitutional standard," this Court applies "a strong presumption that determinations under that standard are subject to *de novo*

review, even if they require courts to 'plunge into a factual record.'" *Id.* at 384 (citation and alterations omitted).

Those principles likewise subject abandonment to *de novo* review. Abandonment—whether the person has a cognizable Fourth Amendment interest in the property—is an inquiry into "whether the facts satisfy the relevant . . . constitutional standard." *Ornelas*, 517 U.S. at 697 (citation and alterations omitted). In particular, "whether a defendant retains a reasonable expectation of privacy in the property," App. 13a (quoting *Mayberry*, 125 F.4th at 145), is the sort of Fourth Amendment reasonableness inquiry this Court holds must be reviewed *de novo*. See *Bufkin*, 604 U.S. at 384-85.

This Court has thus reviewed abandonment and similar issues without deference to lower-court determinations. In *Rios* v. *United States*, the Court rejected a trial court's determination that the defendant had abandoned a package of drugs, adopting the opposite conclusion on independent review. 364 U.S. 253, 260, 262 n.6 (1960). Likewise, in *Byrd*, the Court examined whether the defendant "had a 'legitimate expectation of privacy'"—including by reference to "property concepts" informing "the presence or absence of" a Fourth Amendment interest—independently, not by deferring to trial-court determinations. 584 U.S. at 403 (citation omitted); see also, *e.g.*, *Rakas*, 439 U.S. at 148-49 (similar). Nowhere in those cases did the Court hold (as did the court of appeals here) that it "may not reverse" so long as the lower court's determination "is plausible." App. 13a.

2. Courts applying clear-error review mistakenly view the abandonment determination as a "finding of fact."

App. 13a (citing *Mayberry*, 125 F.4th at 145); see also, *e.g.*, *Crumble*, 878 F.3d at 659. That is irreconcilable with other aspects of the abandonment inquiry.

First, those courts treat abandonment as addressing "whether a defendant retains a reasonable expectation of privacy in the property at issue." App. 13a (quoting *Mayberry*, 125 F.4th at 145); see also, *e.g.*, *Crumble*, 878 F.3d at 659. Yet they also recognize that question is a legal one reviewable *de novo*. *Mayberry*, 125 F.4th at 144; *United States* v. *Williams*, 521 F.3d 902, 906 (8th Cir. 2008).

Second, the same courts expressly apply a Fourth Amendment lens to the abandonment inquiry. Their inquiry rests not on "the owner's subjective intent" or even "strict property right[s]," but on whether the owner "has relinquished [his] reasonable expectation of privacy." *Crumble*, 878 F.3d at 659; see also, *e.g.*, *Small*, 944 F.3d at 502. That is a question of Fourth Amendment law, not historical fact.

Third, treating abandonment as factual is especially incompatible with assessing abandonment from the officer's perspective, as the court of appeals did. That becomes a pure inquiry into whether the "officer's understanding . . . was 'reasonable'"—precisely what *Ornelas* makes reviewable *de novo*. *Bufkin*, 604 U.S. at 384-85.

The abandonment standards adopted by the court of appeals are thus internally inconsistent and incongruous with this Court's precedents—and with the standards

applied by other courts. Only this Court can supply a coherent, uniform rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 23, 2026

APPENDICES

APPENDICES

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4665

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

AUSTIN LODGE,

Defendant – Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Thomas S. Kleeh, Chief District Judge. (1:21-cr-00030-TSK-MJA-1)

Argued: September 10, 2025 Decided: April 30, 2026

Amended: April 30, 2026

Before GREGORY, AGEE, Circuit Judges, and Roderick C. YOUNG, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Young wrote the opinion, in which Judge Agee joined. Judge Gregory wrote a dissenting opinion.

ARGUED: Hilary Lynn Godwin, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Clarksburg, West Virginia, for Appellant. Zelda Elizabeth Wesley, OFFICE OF THE UNITED STATES ATTORNEY, Clarksburg, West Virginia, for Appellee. **ON BRIEF:** William Ihlenfeld, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

YOUNG, District Judge:

This appeal requires us to decide whether a defendant abandoned his backpack—and thus forfeited any reasonable expectation of privacy in its contents—after fleeing from law enforcement and discarding the bag during the pursuit. The question turns not on abstract privacy interests, but on whether, viewing the objective circumstances known to officers at the time, the defendant's conduct amounted to abandonment under the Fourth Amendment.

Appellant Austin Lodge challenges the district court's denial of his motion to suppress evidence obtained from a warrantless search of his backpack. During a foot pursuit following a traffic stop, Lodge ran onto the porch of a nearby residence and attempted to place the backpack inside the home. A resident briefly opened the door and then closed it, rejecting Lodge's attempt. Lodge continued fleeing and was apprehended without the backpack. During questioning, but before officers recovered the bag, Lodge acknowledged that it belonged to him and stated that his

children lived at the residence, which belonged to his children's grandmother. Officers later located the backpack in the backyard of the residence next to a shed and searched it without a warrant.

A magistrate judge recommended denying the motion to suppress on the grounds that Lodge had abandoned the backpack, and the district court adopted that recommendation in full. On appeal, Lodge contends that he merely concealed—rather than abandoned—the backpack by leaving it within the curtilage of a family residence. This is an argument some of our sister circuits have accepted in other contexts, but which this Court has not yet addressed—and we need not reach it here.

Rather, this case can be decided by simple application of the standard of review on appeal. And applying that standard, we conclude that the district court did not clearly err in finding abandonment based on the objective information available to officers at the time, including Lodge's rejection at the door immediately before the backpack was discarded. Because that factual finding resolves the Fourth Amendment inquiry, the unresolved question of whether a defendant retains a reasonable expectation of privacy in property discarded within a home familiar to the defendant (or within its curtilage) during flight from law enforcement is not before us. The district court's denial of the motion to suppress is therefore affirmed without reaching that question.

I.

A federal grand jury charged Austin Lodge with two counts of possession with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and

(b)(1)(C), based on evidence recovered from a backpack seized and searched following his flight from a traffic stop.

Lodge moved to suppress the evidence obtained from the warrantless search of the backpack, arguing that the search violated the Fourth Amendment. The Government opposed the motion, asserting that Lodge lacked standing to challenge the search because he had abandoned the backpack during flight. The district court referred the motion to a magistrate judge, who conducted an evidentiary hearing, received witness testimony and exhibits, and issued a report and recommendation concluding that Lodge had abandoned the backpack and therefore lacked a reasonable expectation of privacy in its contents.

Lodge objected to the report and recommendation. After conducting *de novo* review, the district court overruled Lodge's objection, adopted the report and recommendation in full, and denied the motion to suppress. Lodge thereafter entered a conditional guilty plea preserving his right to appeal the suppression ruling. The district court entered judgment, and this appeal followed.

A.[1]

In the early morning hours of December 13, 2018, Officer Jon Flanagan of the Harrison County Sheriff's Office was patrolling the East View area of Clarksburg, West Virginia. At approximately 3:00 a.m., Officer Flanagan observed a silver Nissan sedan with Pennsylvania license plates parked near a trailer. After the vehicle departed, Officer Flanagan followed it and observed a traffic violation. The driver—later identified as Austin Lodge—

[1] This recitation of facts is gleaned from the district court's opinion adopting the report and recommendation. JA 184–86.

parked the vehicle, exited, and ran toward the nearest trailer. Officer Flanagan identified himself as a police officer and ordered Lodge to stop.

Lodge proceeded onto the front porch of the trailer (hereinafter "Property") and knocked on the door. A resident briefly cracked the door open, and during that interaction Lodge attempted to place a camouflage backpack inside the Property. The resident quickly shut the door, preventing Lodge from storing the bag inside the Property.[2] Lodge thereafter fled toward the rear of the Property near a shed, carrying the backpack. Officer Flanagan pursued Lodge on foot and repeatedly directed him to stop.

After additional officers arrived, Lodge was apprehended and handcuffed. By then, Lodge no longer had the backpack in his possession. Officer Flanagan questioned Lodge about the Property and the whereabouts of the backpack, to which Lodge responded that his children lived at the Property, which belonged to their grandmother,[3] and that "nothing bad" was in the bag—therefore claiming ownership of the bag and its contents.

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[2] This finding of fact was based on Officer Flannagan's testimony at the suppression hearing. Defendant challenged Officer Flannagan's testimony by introducing into evidence Exhibit 3, which, in Lodge's view, sufficiently rebutted Officer Flannagan's testimony insofar as Officer Flannagan is overheard in the Exhibit stating he "did not know" if the homeowner opened the door. Although the district court did not expressly state so, it is obvious from the statement of facts that it found Officer Flannagan's testimony credible, notwithstanding Exhibit 3. This factual finding is discussed in further detail in Section IV(C), *infra*.

[3] *See* JA 133.

Officers then searched the area around the Property and located the camouflage backpack on the ground next to a shed, among other outdoor items. Lodge was not near the backpack when it was recovered. The officers did not have a warrant and did not obtain Lodge's consent to search the backpack. Upon searching it, officers discovered a large quantity of crystal methamphetamine, marijuana, Suboxone strips, and related items. These contents formed the basis for Lodge's instant charges.

B.

Lodge filed a motion to suppress the warrantless search of his backpack, principally arguing that the traffic stop lacked reasonable suspicion and that all resulting evidence was therefore the product of an unlawful stop. JA 19. In its response in opposition, the Government argued that both the stop and the subsequent search were lawful. JA 36. Relevant here, the Government also contended that Lodge lacked standing to challenge the search of the backpack because he had abandoned it. *Id.* (citing *United States v. Small*, 944 F.3d 490, 501–04 (4th Cir. 2019)).

By Order dated July 5, 2022, Chief District Judge Thomas Kleeh referred Lodge's motion to suppress to Magistrate Judge John Aloi for a hearing and the preparation of a report and recommendation. On July 13, 2022, the parties appeared before Magistrate Judge Aloi for a suppression hearing. The court heard argument, received exhibits, and considered sworn testimony from three witnesses: Officer Flanagan, Lori Barker (the homeowner of the Property), and Lodge.

Three days later, Lodge filed a supplemental brief in further support of his motion, seeking admission of body-

camera footage recorded by another officer at the Property ("Exhibit 3"). The footage includes (1) Officer Flanagan's conversation with a colleague regarding Lodge's attempt to enter Ms. Barker's home through the front door; (2) Lodge's statements to law-enforcement officers concerning ownership of the backpack; and (3) Ms. Barker's conversation with an officer. JA 132–33. The video also captures Officer Flanagan stating that Lodge "knocked on th[e] door, but I don't think [Ms. Barker] answered, though." Ex. 3 at T08:23:38. Lodge argued that this footage conflicted with Officer Flanagan's suppression-hearing testimony and undermined the Government's abandonment theory.

The Government opposed admission of Exhibit 3, arguing primarily that the request was untimely and that the footage failed to "capture pertinent discussions that occurred between the witnesses." JA 136. The magistrate judge granted Lodge's motion to admit Exhibit 3 over the Government's objection. JA 142.

C.

After considering the parties' arguments, exhibits, and witness testimony presented at the suppression hearing, the magistrate judge found that Lodge had abandoned the backpack and recommended that the motion to suppress be denied. JA 145. Five factual findings were "critical" to the magistrate judge's finding:

> (1) Defendant clearly claimed ownership of the backpack, (2) Defendant clearly stated that he threw the backpack in the place where LEOs[4] recovered it, (3) Defendant threw the backpack in the

[4] Law Enforcement Officers.

> course of fleeing from LEOs, and Defendant acknowledged that he was fleeing in the moment when he threw it in that location where LEOs recovered it, (4) Defendant had permission to be on the property where he was fleeing and where he threw the backpack, and (5) LEOs did not have a search warrant for the backpack.

JA 166.[5] After establishing these facts, the magistrate judge held that Lodge abandoned his backpack by stashing it next to the shed—relying solely on this Court's opinion in *United States v. Small*, 944 F.3d 490 (4th Cir. 2019). JA 167.

In *Small*, the Fourth Circuit upheld the district court's denial of the defendant's motion to suppress. There, the defendant challenged the government's seizure and warrantless search of his cellphone pursuant to the Fourth Amendment. Small fled from police in his vehicle until he crashed into a gate, at which point he abandoned his car and continued fleeing on foot. *Id.* at 503. As officers searched for him, they recovered several items he had discarded during the pursuit. *Id.* One such item was Small's cellphone, which was uncovered in a public "grassy area, not on a sidewalk or a place where someone normally might be." *Id.* (citation modified). "Based on these circum-

[5] The magistrate judge also acknowledged that "(1) Defendant claimed that he did not know that he was being pursued by actual LEOs during the pursuit, but thought they could have been imposters, and (2) Defendant claimed that he intended to retrieve the backpack or have someone retrieve it for him." JA 167. However, the magistrate judge found these statements lacked credibility. *Id.*

stances, the district court's inference that Small abandoned his phone seem[ed] sensible." *Id.* (emphasis added).[6]

Accordingly, relying only on the reasoning articulated in *Small*, the report and recommendation concluded that Lodge likewise abandoned his backpack, analogous to the cellphone discarded in *Small*. JA 167. The report and recommendation also made three additional observations relevant here. *First*, it noted that Lodge "had every reason to abandon the backpack in the face of [the officers'] pursuit[, g]iven the backpack's incriminating contents . . . ." JA 167. *Second*, it reasoned that "the fact that Defendant had permission to be on the property at Moonlight Drive is of no moment"—because the circumstances of his flight from law enforcement negated any reasonable expectation of privacy he might otherwise have had under "normal circumstances." JA 169. *Third*, with respect to Exhibit 3, the report and recommendation explained that the body camera footage "did not change the substance of the review and analysis of the record." JA 157, n.8.

D.

Lodge objected to the report and recommendation, principally arguing that the abandonment finding was erroneous because he (1) acknowledged ownership of the bag

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[6] *Small* is not a unique decision; the Fourth Circuit routinely finds abandonment when a defendant discards property in a public space. *See e.g., United States* v. *Frazer*, 98 F.4th 102, 114 (4th Cir. 2024) (finding abandonment when "Frazer threw his black bag over the stairwell into a public place more than 40 feet away"); *United States v. Mayberry*, 125 F.4th 132, 145–46 (4th Cir. 2025) (finding abandonment when "Mayberry voluntarily left his backpack in the hotel's common stairwell").

and (2) placed the bag on familiar property within its curtilage and away from the public. These factors, in Lodge's view, rendered his case distinguishable from *Small*. JA 175–81. In support of his position, Lodge cited *United States v. Most*, 876 F.2d 191 (D.C. Cir. 1989), and argued that, like the instant matter, it concerned a case of "temporary relinquishment, rather than abandonment." JA 178.

In *Most*, the defendant entered a grocery store that required customers to check their bags while shopping. 876 F.2d at 192, 199. The defendant complied by turning in his bag to a store clerk and asking her to watch it for him. *Id.* at 192–93, 198. The clerk placed the bag beneath the checkout counter. *Id.* at 192. Shortly thereafter, the defendant left the store, but only after requesting that the clerk continue watching the bag. *Id.* Law-enforcement officers entered the store moments later and searched the bag. *Id.* at 192–93.

At the suppression hearing, a cashier testified that it was common for customers to leave their bags with clerks after finishing their shopping, particularly because many customers lacked immediate transportation. *Id.* at 199. Another cashier testified that no other customer could have accessed the defendant's bag because she "was watching the bag" at all times. *Id.* at 197 n.12. On these facts, the court held that the defendant reasonably retained an expectation of privacy in the bag's contents, as he had "entrusted [the bag] to the professional supervision of the cashiers with the clear understanding that they would protect [it] from intrusion by the public." *Id.* at 197, 199. Accordingly, in Lodge's view, "*Most* is an important case inasmuch as it demonstrates that a defendant can put a bag in a location and leave the immediate area, without

giving up a reasonable expectation of privacy, so long as the bag is not exposed to the public and the defendant does not disclaim ownership." JA 179.[7] The Government did not respond to Lodge's objection.

The district court overruled Lodge's objection and adopted the report and recommendation, thereby denying Lodge's motion to suppress. The district court's decision to adopt the report and recommendation was also guided by *Small*. JA 190–92. The district court also made an additional factual finding that further strengthened its abandonment holding: it expressly found that the door was "crack[ed] open" and "shut quickly"—meaning it resolved this contested fact in favor of the Government, finding Officer Flannagan's suppression-hearing testimony credible, notwithstanding Exhibit 3. JA 185. Relatedly, and particularly important in resolving the instant appeal, the district court found this factual finding "**meaningful**" to its analysis, along with the fact that the bag was stored in a "place where someone would not normally be in the early morning hours during the month of December." JA 191 (emphasis added).

II.

Lodge's arguments on appeal largely mirror those raised in his objection to the report and recommendation. He again contends that abandonment must be distinguished from concealment, arguing that the latter applies where, as here, property is discarded in a nonpublic location—even if done while fleeing from law enforcement. Appellant Br. 5. Lodge also again relies on *Most* and distinguishes his case from a recent decision in this Circuit in

[7] Lodge again relies on *Most* in the instant appeal.

which a defendant was found to abandon property after discarding it in a public space, *United States v. Frazer*, 98 F.4th 102, 114–15 (4th Cir. 2024). *Id.* at 8–9. Notably, Lodge posits that "[t]he testimony adduced at the suppression hearing showed that Mr. Lodge had permission from Ms. Barker to come and go without restriction"—therefore supporting his argument that his case is distinguishable from the many others in this circuit involving public discarding. *Id.* at 11.

The Government, on the other hand, argues that the district court properly concluded that Lodge abandoned his backpack because the facts reveal that his intent was to discard the bag to avoid being caught with its contents. Appellee Br. 7–11. *First*, Lodge fled from Officer Flanagan while traveling at speeds over 100 miles per hour. *Id.* at 8. *Second*, he then exited his vehicle with the backpack and attempted to pass it off to the person inside the trailer to distance himself from it. *Id. Third*, when the person inside refused to accept the bag, Lodge tried to shove the backpack inside the trailer. *Id. Fourth*, when that did not work either, Lodge fled with the backpack around the side of the trailer and discarded it on the ground near a shed before absconding into the woods. *Id.* The Government avers that this course of conduct reveals that Lodge intended to voluntarily abandon the bag so that its contents would not be associated with him if he was apprehended by law enforcement.

Lodge responded by broadly rebutting the Government's arguments and reiterating that his case is distinguishable from abandonment, instead constituting permissible concealment. Appellant Reply 1–3 (citing *United States v. Ramirez*, 2023 U.S. App. LEXIS 24122, at *6 (5th

Cir. Sept. 14, 2023) (finding no abandonment when defendant placed his jacket "on the private side of his **mother's** fence-ed in property line"—but not his own home—as such action constituted only an intent to "conceal his jacket and its contents" but not "discard, leave behind, or otherwise disavow ownership or privacy interest in the jacket")) (emphasis added).

III.

In reviewing a district court's ruling on a motion to suppress, this Court reviews findings of fact for clear error and conclusions of law de novo. *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996); *United States* v. *Burgess*, 684 F.3d 445, 452 (4th Cir. 2012). Where, as here, the district court has denied a motion to suppress, we view the evidence in the light most favorable to the Government. *United States* v. *McBride*, 676 F.3d 385, 391 (4th Cir. 2012).

Particularly relevant here, a district court's determination that a defendant "abandoned his privacy interest" in property is a finding of fact reviewed for clear error. *United States v. Mayberry*, 125 F.4th 132, 145 (4th Cir. 2025) (quoting *United States* v. *Ferebee*, 957 F.3d 406, 416 (4th Cir. 2020)). "This is true even though a well-supported factual finding of abandonment necessarily answers the ultimate legal question [of] whether a defendant retains a reasonable expectation of privacy in the property at issue." *Id.* Because abandonment is a factual determination, reversal is warranted only if the finding is "against the clear weight of the evidence considered as a whole." *United States* v. *Martinez-Melgar*, 591 F.3d 733, 738 (4th Cir. 2010). And where the district court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse—even if it

would have weighed the evidence differently. *Anderson* v. *City of Bessemer*, 470 U.S. 564, 573–74 (1985).

IV.

Lodge raises a single issue on appeal: whether the district court erred in denying his motion to suppress on the ground that he abandoned his backpack and therefore lacked a reasonable expectation of privacy in its contents.

A.

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. Generally, warrantless searches and seizures are considered per se unreasonable—and thus unconstitutional—under the Fourth Amendment. *Small*, 944 F.3d at 501 (citation omitted). However, "[i]n order to secure relief from an unconstitutional search, 'a person must have a cognizable Fourth Amendment interest in the place searched.'" *Frazer*, 98 F.4th at 113 (quoting *Byrd v. United States*, 584 U.S. 395, 410 (2018)). That is, "'the person must have 'a legitimate expectation of privacy in the invaded place.'" *Id.* (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). "To establish a legitimate expectation of privacy, the person 'must have a subjective expectation of privacy, and that subjective expectation must be reasonable.'" *Id.* (internal citations omitted). Should a legitimate expectation of privacy exist, one generally enjoys the protections of the Fourth Amendment.

This generality is subject, however, "to a few specifically established and well-delineated exceptions." *United States v. Curry*, 965 F.3d 313, 321 (4th Cir. 2020) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). One such exception is abandonment. *Small*, 944 F.3d at 502. This

Court has cautioned that "[a]bandonment shall not be casually inferred." *Mayberry*, 125 F.4th at 145 (quoting *Small*, 944 F.3d at 502).

To determine whether a defendant has abandoned property, courts conduct an objective inquiry into "whether the defendant intended to abandon the item and also decide whether that intention can be inferred from words spoken, acts done, and other objective facts." *Id.* (cleaned up). Central to that inquiry is the location where the property was discarded, as "[o]ne of the most crucial facts of an abandonment case is the **location** of the object in question." *United States v. Dillard*, 78 F. App'x 505, 510 (6th Cir. 2003) (emphasis added); *cf. United States v. Nowak*, 825 F.3d 946, 949 (8th Cir. 2016) ("Whether property is discarded in a public, private, or semi-private place is a factor in considering whether the property has been abandoned, but it is not dispositive.").

Consistent with that focus, courts assess the circumstances of the defendant's alleged disassociation from the property—most notably his physical actions and any denial or disclaimer of ownership—as those actions bear on whether the location of the discard objectively signals abandonment. *See Mayberry*, 125 F.4th at 145 (collecting cases). The analysis is temporally constrained, however, as courts may only consider "'objective information available to officers at the time they performed the warrantless search.'" *Id.* (quoting *Small*, 944 F.3d at 502). That constraint carries particular significance where, as here, details revealed only after the warrantless search further inform whether the defendant maintained a reasonable expectation of privacy in the location where he discarded the property in question.

The district court's analysis reflects a transposition of *Small*'s public-place logic onto a private, curtilage-based setting. Although the court acknowledged that Lodge placed his bag next to a shed in the backyard of the Property, which was at least partially fenced but accessible to a passerby, it treated that placement as evidence of abandonment because the area was "a place where someone would not normally be" at that hour. JA 192. In doing so, the court emphasized the perceived remoteness of the location without meaningfully engaging with the constitutional significance of the bag's placement on private property that may have fallen within the curtilage of a home which Lodge perhaps visited—an interest bearing directly on whether Lodge retained a reasonable expectation of privacy.

That analytical misstep is underscored by the court's sweeping reliance on *Small* without first engaging in a meaningful privacy-interest analysis, a move that risks collapsing the doctrinal distinction between public and private discarding.[8] Yet the location of the object is among

[8] The report and recommendation appears to suggest that Lodge's reasonable expectation of privacy was extinguished by the fact that he was fleeing from law enforcement. JA 169 (stating it was "of no moment" that Lodge had an "expectation of privacy in normal circumstances" because Lodge was "engaged in criminal activity"). The distinction between "normal circumstances" on one hand and circumstances involving "criminal activity" on the other is problematic. *Id.* Read broadly, it suggests that Fourth Amendment protection—particularly of the home—depends on the absence of unlawful conduct. That proposition conflicts with the well-established principle that "the Fourth Amendment's protection of the home does not turn on whether illegal activity takes place therein." *United States v. Green*, 106 F.4th 368,377–78 (4th Cir. 2024) (citing *United States v. Gray*, 491 F.3d 138, 144 (4th Cir. 2007)).

the most consequential facts in any abandonment inquiry, particularly where the property is placed on private land rather than discarded in a public space during flight.

To be sure, some of our sister circuits have expressly considered whether the Fourth Amendment extends to property discarded during flight within the confines of a home in which a defendant maintains a reasonable expectation of privacy. *See e.g., Dillard*, 78 F. App'x at 510–12. But we have not. And contrary to Lodge's argument on appeal, this case does not present that unresolved question because the district court's abandonment finding necessarily precedes—and thus precludes—any analysis of whether the Fourth Amendment independently protects the bag's placement within the home or its curtilage. We address that sequencing issue further in subsection C, *infra*.

That said, it is appropriate to clarify the limits of *Small* before affirming the district court's judgment. While our precedent generally supports the conclusion that a defendant who flees and discards property in a public place has abandoned it, that precedent does not compel the same conclusion where property is discarded on private property in which the defendant maintains a reasonable expectation of privacy. Affirming the district court's decision without this clarification risks suggesting a categorical rule under which flight coupled with any act of discarding property constitutes abandonment—a rule this Court has never adopted.

Where property is discarded on private property, or within the curtilage of a home in which the defendant maintains a reasonable expectation of privacy, the analysis is necessarily more nuanced. In such circumstances, the facts may support either abandonment or constitutionally

protected concealment, depending on the objective circumstances known to officers at the time of the search.

Accordingly, although the district court reached the correct result here, we emphasize that abandonment is not inferred from flight alone, but from flight viewed in context—including where and how the property was discarded.

B.

Based on the facts of this case, Lodge could have plausibly been found to possess a reasonable expectation of privacy in the Property. This Court's decision in *United States v. Green* informs that analysis. 106 F.4th 368 (4th Cir. 2024).

In *Green*, officers approached the defendant pursuant to an arrest warrant while he was socializing with his cousin at the cousin's home. *Id.* at 371. Green and his cousin were sitting in the backyard under a gazebo. *Id.* When officers arrived, Green removed a firearm from his shorts, held it in a non-threatening manner, and placed it on a shelf attached to one of the gazebo's poles. *Id.* Green then backed away toward the rear of the yard, and officers observed that he appeared to be "trying to figure out an avenue of escape." *Id.* Green was eventually apprehended against the back fence, approximately twenty-five feet from the gazebo where the firearm remained. *Id.* at 371–72. After detaining Green, officers seized the firearm from the gazebo. *Id.* at 372.

Despite Green's flight and his decision to discard the firearm, this Court held that Green retained a reasonable expectation of privacy in his cousin's home and its curtilage. *Id.* at 376. In reaching this end, the Court emphasized

that Green was not merely a casual social guest—expressly finding three factors dispositive:

> To be clear, we need not and do not decide today that all social guests have a reasonable expectation of privacy. But on the facts found by the district court, *see Green*, 2018 U.S. Dist. LEXIS 129550, 2018 WL 3655914, at *2, Green is not just any social guest. **First, he has a deep and familial relationship with the homeowner in question.** *Id.* Those are factors we have emphasized in holding that a social (but non-overnight) visitor has a reasonable expectation of privacy, *see Bonner*, 81 F.3d at 475; *Gray*, 491 F.3d at 153 (describing *Bonner*), because that kind of social connection can give rise to the requisite 'mutual trust' between visitor and host, *see Gray*, 491 F.3d at 146, 153. **Second, Green was a regular visitor to the Auth Road property over a long period of time, and his visits were exclusively social in nature**. *See Bonner*, 81 F.3d at 475; *cf. Gray*, 491 F.3d at 153 (finding no reasonable expectation of privacy where guest's commercial purpose outweighed any social relationship). **And while Green never spent the night at Yates's home, he had "free rein of the house,"** *Green*, 2018 U.S. Dist. LEXIS 129550, 2018 WL 3655914, at *2, **with the ability to enter all portions of the property and to bring friends with him when he visited**. Taken together, these factors indicate precisely the 'degree of acceptance into the household,' *Carter*, 525 U.S. at 90, that generates a reasonable expectation of privacy for a social guest. Under *Carter* and our own court's precedent, Green had a reasonable ex-

> pectation that the Auth Road property and its curtilage was a 'place where he and his possessions [would] not be disturbed' by anyone but Yates and those Yates admitted. *See Olson*, 495 U.S. at 99.

Id. (emphasis added).

Comparable considerations are present here. Lodge has a familial relationship with the homeowner, as the Property belongs to his children's grandmother, and Lodge and his children sometimes sleep there. Lodge also had permission to be on the property, and—as the district court noted—he "resided there at times," reflecting his ability to routinely access the home. JA 169.

Notably *absent* from the Court's calculus in *Green* was any suggestion that Green's reasonable expectation of privacy was diminished by the atypical circumstances at play—namely, (1) law enforcement's presence; (2) Green drawing his weapon in plain view of law enforcement; and (3) Green's subsequent capture 25 feet away from the gazebo, where law enforcement caught him by the fence. Put differently, even though Green was engaged in criminal activity, the Court held that he maintained a reasonable expectation of privacy at his cousin's home.

Accordingly, considered in light of *Green* and the factors emphasized there, Lodge plausibly could have been found to possess a reasonable expectation that the Property and its curtilage were places where he and his possessions would not be disturbed.

C.

Such plausibility aside, the inquiry does not end there—this case is not so straightforward. The question

now shifts to whether Lodge abandoned his backpack, notwithstanding the fact that he discarded it within the curtilage of a home in which he may otherwise have had a reasonable expectation of privacy.[9] The district court concluded that he did, and that finding was not clearly erroneous—even though the court did not undertake a detailed privacy-interest analysis or expound on the precise location where the property was discarded. Those omissions do not undermine the abandonment determination because the relevant inquiry turns on "the objective information available to officers at the time of the warrantless search." *Small*, 944 F.3d at 502 (collecting cases).

At the time of the search, the Officers' knowledge was relatively limited. Viewing the record in light most favorable to the Government, as we must, the only information they possessed suggesting Lodge had permission to be on the Property was his own statement that his children lived there and that it was their grandmother's home.[10] The homeowner, however, denied knowing who was in her backyard when questioned by law enforcement, and—most significantly—turned Lodge away at the door after he attempted to place his backpack inside the home. Based on those facts, officers were faced with two competing inferences: either Lodge was truthful about his relationship

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[9] The Court assumes, for purposes of this analysis, that the shed in the Property's backyard was curtilage, as it was inside a fenced-in portion of the backyard.

[10] Indeed, as noted *supra*, Section II, Lodge acknowledges in his appellate brief that "[t]he testimony adduced **at the suppression hearing** showed that Mr. Lodge had permission from Ms. Barker to come and go without restriction." App. Br. at 11 (emphasis added). Specifically, Ms. Barker testified that Lodge had free reign of the Property. JA 99–101, 107.

to the homeowner and had permission to be on the property, or he was not. The officers inferred the latter, and the district court concluded that this inference was reasonable, particularly in light of Lodge's rejection at the door—a fact the court found "meaningful" to its analysis. In short, the district court found that the door being shut in Lodge's face so too shut the door on his Fourth Amendment claim. This Court agrees.

That said, the district court's factual finding that the door opened and then closed warrants further discussion in light of Exhibit 3. At the suppression hearing, Officer Flannagan testified that the door was opened and shut; however, during the earlier on-scene questioning reflected in Exhibit 3, he stated that he did not know whether it had. Notwithstanding Officer Flannagan's earlier indecision, the district court credited Officer Flanagan's suppression-hearing testimony and found that the door opened and then closed.

Generally, "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not **contradicted** by extrinsic evidence, that finding, if not internally inconsistent, **can virtually never be clear error**." *United States v. Hall*, 664 F.3d 456, 462 (4th Cir. 2012) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)) (emphasis added). This remains true even if the reviewing court "would have weighed the evidence differently." *Anderson*, 470 U.S. at 574. By contrast, other courts have held that "[f]indings that are in plain contradiction of the videotape evidence constitute clear error." *United States v. Wallen*, 388 F.3d 161, 164 (5th Cir. 2004).

Exhibit 3 undoubtedly raises questions about the credibility of Officer Flanagan's suppression-hearing testimony concerning whether the door opened and closed. But it does not conclusively establish that the door never opened. The footage does not offer a definitive account—such as a conclusive showing that the door remained closed or other video evidence demonstrating that it did not open. Instead, it reflects Officer Flannagan's initial uncertainty as to whether the door was opened. Although this Court, sitting as the trier of fact, might have weighed Officer Flannagan's credibility differently in light of that indecision, it cannot be said that the district court's factual finding was implausible, because Exhibit 3 does not plainly contradict his testimony. The district court was also better positioned to make this credibility determination, as it was most familiar with the record and best suited to view the facts in context.

Thus, while Exhibit 3 may weaken the evidentiary basis for the district court's finding, the assessment of its weight—and whether it undermines Officer Flanagan's later testimony—falls within the district court's province. The district court credited Officer Flanagan's testimony that the door opened and then closed, a credibility conclusion that, although not stated expressly, is evident from its factual findings. Because that determination is not plainly contradicted by Exhibit 3, it is not clearly erroneous.

In sum, while reasonable minds might differ in weighing Lodge's asserted connection to the property against his denied entry, the district court's abandonment finding rested on objective evidence suggesting that Lodge lacked permission to be there. That conclusion falls far short of clear error. This result does not change merely because the district court conducted a limited privacy-interest

analysis and relied primarily on *Small*: even under a more detailed privacy analysis, the information available to the officers at the time—coupled with Lodge's rejection at the door—would still support the abandonment finding.

D.

Lodge resists this outcome by advancing several arguments, primarily relying on the fact that he claimed ownership of the bag. To be sure, Lodge's acknowledgment that the bag was his cuts against a finding of abandonment. But that fact, while relevant, is not dispositive. *See Mayberry*, 125 F.4th at 145–46. The touchstone of the inquiry is whether "the defendant intended to abandon the item," as inferred from objective facts. *Id.* at 145 (quoting *Frazer*, 98 F.4th at 114). For the reasons outlined above, the district court's conclusion that Lodge possessed such intent was plausible in light of the record viewed in its entirety.

Lodge's attempt to analogize his case to *Most* is unpersuasive, because, unlike in *Most*—and unlike similar cases within this Circuit, *see e.g., United States v. Whiteside*, 2022 U.S. Dist. LEXIS 202335, at *9 (W.D.N.C. July 8, 2022) (report and recommendation), *adopted*, 2022 U.S. Dist. LEXIS 201024 (W.D.N.C. Nov. 4, 2022)—no third party was entrusted with safeguarding the backpack. There was no individual securing the bag on Lodge's behalf, nor any indication that the bag was placed under another's supervision for safekeeping. That absence renders this case fundamentally different from the line of cases in which a defendant relinquishes possession of property to another person for the purpose of maintaining privacy, rather than abandoning it.

Lodge further resists this conclusion by emphasizing that he (1) had permission to be on the property and (2)

intended to retrieve the backpack. Both arguments are unavailing. *First*, the abandonment inquiry is objective, not subjective; Lodge's asserted intent is therefore not controlling. *See Mayberry*, 125 F.4th at 145. The focus instead is on what the officers reasonably could infer from Lodge's words and actions at the scene. *See id.*; *Frazer*, 98 F.4th at 114 (quoting *Small*, 944 F.3d at 502).

Second, Lodge's purported permission to be on the property is "of no moment." J.A. 169. As the report and recommendation acknowledged, Lodge "being permitted . . . on the property, residing there at times, and having familiarity with the environs, evinces some expectation of privacy in normal circumstances." *Id.* But these were not normal circumstances (albeit not for the criminal reasons asserted by the magistrate judge). Lodge was turned away at the door. That rejection not only supported the inference that Lodge lacked permission to be on the property, but also plausibly indicated that any expectation of privacy he might otherwise have enjoyed was revoked at that moment.

This conclusion effectively resolves the appeal. As this Court has explained, "a well-supported factual finding of abandonment necessarily answers the ultimate legal question of whether a defendant retains a reasonable expectation of privacy in the property at issue." *Mayberry*, 125 F.4th at 145. Consequently, Lodge lacked any reasonable expectation of privacy in the backpack, and the district court was correct to deny his motion to suppress on that ground. *Id.*; *see also United States v. Leshuk*, 65 F.3d 1105, 1111 (4th Cir. 1995) ("[A] person who voluntarily abandons property loses any reasonable expectation of privacy in the property and is [thus] precluded from seeking to suppress evidence seized from the property.").

V.

After a careful review of the record in full, we hold that the district court's factual finding of abandonment was not clearly erroneous. Accordingly, the district court's finding is

AFFIRMED.

GREGORY, Circuit Judge, dissenting:

I agree with much of the majority's reasoning. Judge Young ably articulates the governing Fourth Amendment principles and this Court's two-pronged abandonment analysis with care. I also share the majority's dissatisfaction with the district court's legal analysis, particularly its failure to meaningfully engage with how the location of stowed property impacts abandonment. I even agree with the majority that this case can be decided by a simple application of the clear error standard of review.

Where I part ways is the remedy. Clear error review is deferential, but it is not a rubber stamp for decisions reached through an incorrect legal analysis. The majority opinion correctly underscores that the district court failed to address a central element of the privacy-interest prong of the abandonment inquiry: the location where defendant stowed the property. Notwithstanding this analytical misstep, the majority affirms the judgment. I cannot. When a district court applies an incorrect legal framework to reach a conclusion of fact, the appropriate response is not to affirm, but to remand for proper analysis in the first instance. Nor is it proper under clear error review for an appellate court to step into the role of factfinder, supplant the district court's erroneous analysis with its own, and decide

issues of fact de novo. I would vacate the judgment and remand for a proper abandonment analysis.

I.

The facts on which this dissent rests are simple. On December 13, 2018, at approximately 3:00 a.m., Defendant Austin Lodge was fleeing from law enforcement with a camouflaged backpack. Lodge first tried to stow his backpack inside a trailer home. When that failed, he fled toward the rear of the property and stowed his backpack on the ground, next to a shed, within the partially fenced-in back yard of the trailer home. Shortly thereafter, Lodge was apprehended by police. In response to police questions about the trailer home and the backpack, Lodge answered that his children lived at the trailer home, that the trailer home belonged to his children's grandmother, and that there was "nothing bad" in the backpack. Officers proceeded to search the backpack without a warrant or Lodge's permission.

Lodge filed a motion to suppress the warrantless search of his backpack. The district court denied Lodge's motion, finding that he had abandoned his backpack. The issue before us is whether it was clear error for the district court to conclude that Lodge abandoned his backpack. I find that it was.

II.

A district court's abandonment determination is a finding of fact, which we review for clear error. *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996); *United States v. Ferebee*, 957 F.3d 406, 417 (4th Cir. 2020); *United States* v. *Burgess*, 684 F.3d 445, 452 (4th Cir. 2012). Clear error includes findings that go "against the clear weight of the

evidence considered as a whole." *United States v. Mayberry*, 125 F.4th 132, 145 (4th Cir. 2025) (citing *United States v. Martinez-Melgar*, 591 F.3d 733, 738 (4th Cir. 2010)). But that is not where the analysis ends.[1] Factual findings should also be vacated when "they were derived under an incorrect legal standard." *Heyer v. United States Bureau of Prisons*, 984 F.3d 347, 355 (4th Cir. 2021). This is because, as the Supreme Court has recognized, "there is a special danger that a misunderstanding of what the law requires may infect what is labeled a finding of fact." *Alexander v. South Carolina State Conf. of the NAACP*, 602 U.S. 1, 18 (2024). A factual finding should be set aside where it is "induced by an erroneous view of the controlling legal standard." *Brice v. Va. Beach Corr. Ctr.*, 58 F.3d 101, 106 (4th Cir. 1995); *Alexander*, 602 U.S. at 18 (finding clear error where "a trial court bases its findings upon a mistaken impression of applicable legal principles.").

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[1] The majority's articulation of clear error tracks language repeated in some recent Fourth Circuit cases, but that phrasing is often quoted only in part. Most recently, *Mayberry* adopted its formulation from *United States v. Martinez-Melgar*, 591 F.3d 733, 738 (4th Cir. 2010), which quoted *Brice v. Va. Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995), in turn quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). *Gypsum* and *Brice* recognize that clear error exists not only when a finding is against the clear weight of the evidence, but also when it is "induced by an erroneous view of the controlling legal standard." *U.S. Gypsum Co.*, 333 U.S. at 395; *Brice*, 58 F.3d at 106. *Martinez-Melgar*, which the majority cites for its clear error rule, quoted the evidentiary portion of the *Gypsum*/*Brice* rule as relevant to the issue presented in *Martinez-Melgar*. Subsequent cases have repeated that partial quote, which has mistakenly been read to suggest that clear error review turns solely on evidentiary weight. Properly understood, however, the clear error doctrine also encompasses findings reached under an incorrect governing legal framework.

III.

Here, the district court's analytical misstep regarding Lodge's privacy-interest and whether he intended to discard his backpack reflects an erroneous view of the legal standard for finding abandonment. Our abandonment analysis requires courts to conduct an objective inquiry into "whether the defendant intended to abandon the item **and** also decide whether that intention can be inferred from words spoken, acts done, and other objective facts." *Mayberry*, 125 F.4th at 145 (emphasis added, internal citation omitted); *United States v. Frazer*, 98 F.4th 102, 114 (4th Cir. 2024); *United States v. Bynum*, 604 F.3d 161, 164 (4th Cir. 2010) (this Court must consider a defendant's subjective expectation of privacy and whether that subjective expectation is reasonable). Central to the first part of the abandonment inquiry is the location where property is discarded. Maj. Op. 14, 16. This is a subjective prong evaluated from the point of view *of the defendant*. As the majority pointed out, the district court reached a conclusion regarding the defendant's intent through an improper transposition of logic that all but ignored location. Maj. Op. 15.

Once we recognize that the district court's factual findings "were clearly erroneous under the appropriate legal standard," we must "reverse . . . and remand for further proceedings." *Alexander*, 602 U.S. at 7. Appellate review "can be undertaken only if a district court first makes the findings necessitated by the relevant legal standard." *United States v. Evans*, 90 F.4th 257, 262 (4th Cir. 2024). Having concluded that the district court failed to properly determine whether Lodge intended to abandon his property, Maj. Op. 15, we cannot summarily move on to the second part of the abandonment analysis and assess whether

officers could objectively determine Lodge's intent at the time of the search. No, under clear error review, we are limited to vacating and remanding with instructions for the district court to apply the proper legal standard.

A.

This dissent rests on a narrow but consequential point: findings of fact premised on an analytical misstep cannot be insulated by clear error review. Central to the abandonment analysis is whether Lodge "intended to abandon an item." *Mayberry*, 125 F.4th at 145. A conclusion on that issue can only be reached after "the location where the property was discarded" is scrutinized. Maj. Op. 14. *See also, Mayberry*, 125 F. 4th at 145 (discussing the location where a backpack was left and concluding that "Mayberry's abandonment of the backpack in a place open to the public relinquished his reasonable expectation of privacy in the bag"); *United States v. Frazer*, 98 F.4th 102, 114 (4th Cir. 2024) (finding that defendant relinquished any reasonable expectation of privacy after throwing his bag "into a public place more than 40 feet away"); *United States v. Small*, 944 F.3d 490, 503 (4th Cir. 2019) (holding that defendant abandoned a cell phone while "fleeing from the police [and] crash[ing] through a gate in a place where he is not supposed to be").

Despite the critical importance that location plays in the abandonment analysis, the entirety of the district court's location analysis amounts to one of two things: either that the bag was stowed in "a place where someone would not normally be," J.A. 12, or that the location of the stowed bag was "of no moment" because defendant was fleeing. J.A. 169. Neither approach attempts to wrestle with how the location of the stowed bag—near a shed in a "private, curtilage-based setting"—bears "on whether

Lodge retained a reasonable expectation of privacy." Maj. Op. 15. At best, the district court arrived at its conclusion(s) "without meaningfully engaging with the constitutional significance of the bag's placement on private property that may have fallen within the curtilage of a home Lodge frequented." *Id.* And at worst, the district court completely "collaps[ed] the doctrinal distinction between public and private discarding." *Id.* Either way, the district court's error amounts to application of an erroneous legal standard.

As the majority astutely noted, instead of engaging in any type of location-based analysis to determine whether Lodge maintained a privacy-interest in his backpack, the district court conflated location with defendant's flight. "[A]bandonment is not inferred from flight alone, but from flight viewed in context—including where and how the property was discarded." *Id.* at 17.[2] *Frazer*, 98 F.4th at 114 ("the combination of flight and the locations of the abandoned items made it objectively reasonable for the officer to conclude that the abandonment was intentional"). "While our precedent generally supports the conclusion that a defendant who flees and discards property in a public place has abandoned it, that precedent does not compel the same conclusion where property is discarded on private property in which the defendant maintains a reasonable expectation of privacy." Maj. Op. at 16. The majority opinion goes to great lengths to "clarify the limits of *Small*," the sole case on which the district court relied, and to reject "a categorical rule under which flight coupled

[2] The majority correctly explains that Fourth Amendment protection does not depend on the absence of unlawful conduct. Maj. Op. 15, n. 9.

with any act of discarding property constitutes abandonment—a rule this Court has never adopted." Maj. Op. 16, 17. But, by affirming the district court's abandonment finding, the majority provides future defendants with the exact remedy they are denying Lodge: application of the appropriate legal standard in the first instance.

Declaring the location of Lodge's backpack to be "of no moment," because he was fleeing when he placed it near a shed on private property ignores the *sine qua non* of our abandonment analysis and amounts to a textbook example of misapplication of a legal standard. The majority too ignores this Court's precedent and permits the entire abandonment analysis to turn only on "the objective circumstances known to officers at the time of the search." Maj. Op. at 17. As discussed below,[3] we should not sanction an analysis that permits one prong of the test to swallow the other. Instead, "[r]eversal is required when a district court has applied an incorrect legal standard that may have influenced its ultimate conclusion." *Tatum v. RJR Pension Inv. Committee*, 761 F.3d 346 (4th Cir. 2014).

The district court's—and now the majority's—error is exacerbated by the fact that the government bore the burden of proving the admissibility of evidence obtained pursuant to a warrantless search[4] in the first instance. *Small*, 944 F.3d at 502. Adhering to proscribed legal standards and burden of proof requirements is critical for upholding the rule of law. Even under clear error review the issue

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[3] *Infra*, Part IIIB.

[4] "In assessing whether a finding is clearly erroneous, it is important to keep in mind the standard of proof that the district court was required to apply." *Alexander*, 602 U.S. at 33, n. 11.

remains "whether the rule of law as applied to the established facts is or is not violated." *Heien v. North Carolina*, 574 U.S. 54, 72 (J. Sotomayor, dissenting). Our review—and this dissent—is not about reweighing the evidence presented to the district court. It is about confirming that the district court used the correct legal analysis when it applied law to fact. It is about ensuring that the government satisfied its burden under the proper legal framework. It is about preserving the rule of law for all who come before us.

Clear error review does not "protect findings which have been made on the basis of the application of incorrect legal standards or made in disregard of applicable legal standards." *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526 (4th Cir. 1984). Instead of affirming the district court's clear error, we must vacate and remand for proper application of this court's abandonment analysis. *Alexander*, 602 U.S. at 7 ("findings of fact, which were clearly erroneous under the appropriate legal standard" warrant vacatur and "remand for further proceedings").

B.

Despite emphasizing the importance of location when determining whether a defendant intended to abandon his property, the majority claims that the district court's abandonment determination can prevail "because the relevant inquiry turns on the objective information available to officers at the time of the warrantless search." Maj. Op. 20. The majority misreads and misapplies the very case law on which it relies. "'In assessing whether a defendant' abandoned certain property, 'a reviewing court must perform "an objective analysis" and decide whether the defendant intended to abandon the item and also decide whether his intention can be inferred from "words spoken,

acts done, and other objective facts."'" *Mayberry*, 125 F.4th at 145 (citing *Frazer*, 98 F.4th at 114 (quoting *Small*, 944 F.3d at 502)) (emphasis added). This analysis is not multifactorial; it is conjunctive. Limiting the "relevant inquiry" to "the objective information available to officers at the time of the warrantless search," Maj. Op. 20, vitiates our abandonment framework. Instead of curing the district court's failure to address the location-based subjective prong of the abandonment analysis, the majority opinion seems to eliminate consideration of that prong in its entirety.

Abandonment cannot turn only on whether it was reasonable for officers to infer abandonment. *See Mayberry*, 125 F.4th at 145 ("[a]bandonment should not be casually inferred"). To do so would turn our abandonment analysis on its head and give no consideration to "whether **a defendant** retains a reasonable expectation of privacy in the property at issue." *Id.* (emphasis added). Thus, even if the district court's abandonment finding rested on objective evidence that Lodge lacked permission to be on the property where he stowed his bag,[5] Maj. Op. 22, that does not obviate the requirement that the abandonment finding also assess whether Lodge intended to abandon his property, a finding that can only be completed by grappling with the nature of the location where the property was left. "[T]here is a special danger that a misunderstanding of

[5] I do not agree with the majority's conclusion regarding the objective information available to officers at the time of the warrantless search, Maj. Op. Part IV.C., but I refrain from addressing this prong of the abandonment analysis because clear error review requires vacatur and remand once we discover that the district court's factual findings were predicated on an erroneous legal analysis. *Alexander*, 602 U.S. at 7.

what the law requires may infect what is labeled a finding of fact." *Alexander*, 602 U.S. at 18. The district court's factual findings were so infected. Having concluded—along with the majority—that the district court's privacy-interest analysis was incorrect, all that remains is for us to vacate and remand for further proceedings consistent with this Court's two-pronged abandonment analysis.

IV.

I close by reiterating my respect for Judge Young's careful articulation of the legal analysis underpinning factual findings of abandonment. Addressing clear error review cannot stop at identifying the correct framework. Nor does it permit an appellate court to complete its own de novo fact finding analysis to shore up a district court's misapplication of law. For that reason, I would vacate the judgment and remand with instructions that the district court assess how the private, curtilage-based setting bears on whether Lodge abandoned his backpack.

Thus, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CLARKSBURG

UNITED STATES OF AMERICA,

Plaintiff,

v.

AUSTIN LODGE,

Defendant.

Crim. Action No. 1:21-CR-30
(Kleeh)

MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION [ECF NO. 47], DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE [ECF NO. 28], AND OVERRULING DEFENDANT'S OBJECTION [ECF NO. 50]

Pending before the Court is Defendant Austin Lodge's *Motion to Suppress Physical Evidence* [ECF No. 28]. Upon referral [ECF No. 29], the Magistrate Judge conducted a hearing on Defendant's Motion on July 13, 2022, at which time the Court heard witness testimony, accepted exhibits into evidence, and heard arguments of counsel for both Defendant and the Government. On July 29, 2022, the Magistrate Judge issued a thorough Report and Recommendation ("R&R") [ECF No. 47], recommending that

Defendant's Motion [ECF No. 28], be denied. Defendant filed one objection to the R&R. [ECF No. 50].

For the reasons discussed herein, the Court **ADOPTS** the R&R [ECF No. 47], **DENIES** the Motion to Suppress [ECF No. 28], and **OVERRULES** Defendant's objection [ECF No. 50].

I. Facts

Defendant Austin Lodge ("Lodge" or "Defendant") objects to one recommendation of the R&R: that the warrantless search of Lodge's backpack was permissible "to the extent which the backpack simply may be considered to be part of his person and that Mr. Lodge abandoned the backpack, such that he had no reasonable expectation of privacy in it." ECF No. 50 at 3. Because this finding and recommendation is reviewed de novo, 28 U.S.C. § 636(b)(1), the Court focuses its findings of fact on the warrantless search of the backpack.

On December 13, 2018, at approximately 3:00 a.m., Jon Flanagan, road patrolman and K9 handler for the Harrison County Sheriff's Office, was patrolling the East View, Clarksburg, West Virginia, area due to frequent complaints of drug activity and presence of suspicious persons. ECF No. 59, Suppress Hr'g Tr., 5:21-6:7. During patrol, Officer Flanagan viewed a silver Nissan sedan with Pennsylvania tags parked at a trailer in the East View area. Id. 6:20-7:5. At some point thereafter, the driver of the vehicle drove away from the trailer, and Officer Flanagan followed. Id. 7:5-11:12.

After witnessing the driver violate speed limitation laws, Officer Flanagan observed the driver, a white male,

park and exit the vehicle and run to the nearest trailer and attempt to enter. Id. 11:1-12:4. Officer Flanagan later learns the driver is the defendant. Id. 18:14-23. Officer Flanagan identifies that he is the police and directed the defendant to stop. Id. 11:21-22. While on the front porch of the trailer, a resident cracks open the front door and shuts it quickly. Id. 12:10-16. During that interaction on the front porch, Defendant attempted to place a camouflage backpack inside the trailer but failed. Id. Defendant looks back at Officer Flanagan and runs toward the back of the house near a shed, with the backpack in hand. Id. 12:17-13:11. As Officer Flanagan follows the defendant, he flashes his flashlight and continues to direct Defendant to stop. Id. 13:3-19. When Officer Flanagan caught up to Defendant, Defendant did not have the backpack. Id.

Officer Flanagan's backup, Sergeant Dean, arrived. Id. 14:12-25. After multiple commands for the defendant to stop, both officers chased the defendant and handcuffed him. Id. 14:12-17:5. Throughout the police chase on foot, the officers observed Defendant reaching for his waist band and feared he was reaching for a firearm or other weapon. See Ex. 3; ECF No. 59, Suppress Hr'g Tr. Video surveillance depicts the officers asking Defendant who lives in the trailer and what is in the camouflage bag, notifying him that they were going to locate the bag. Ex. 3, 4:40-5:10. Defendant responded that his daughters lived there and that "nothing bad" is the backpack. Id.

Officer Flanagan searched the area around the trailer for the camouflage backpack and found it "abandoned behind the . . . shed." Id. 20:6-11. Lodge was no where near the backpack when Officer Flanagan located it next to the shed. Id. 55:19-25. In the area around the shed, there were

various pieces of equipment and outdoor items present on the ground, including a ladder, bench, two white bags, and something with a wheel attached. Id. 52:17-54:2. The officers began unloading the backpack and found "a large amount of crystal meth, . . . some marijuana, [and] suboxone strips." Id. 21:5-9. Officer Flanagan believes plastic bags and digital scales were also present. Id. When the officers located the backpack, it was abandoned next to the shed, near the trailer, on top of grass and rusty metal. Id. 54:1-55:11. The officers had no search warrant for the bag nor did they have consent from the defendant to search it. Id. 55:12-24.

II. Legal Standard and Applicable Law

Pursuant to 28 U.S.C. 636(b)(1)(B), a magistrate judge may be designated by a district court to consider motions to suppress evidence and statements as unconstitutionally obtained. After the magistrate judge has considered such motion, he must submit "'proposed findings of fact and recommendations for the disposition.'" Camry v. Davis, 718 F.2d 198, 199 (4th Cir. 1983). Parties are entitled to file written objections to the findings and recommendations of the magistrate judge, and if a party chooses to object within the allotted 14-day period, the district court shall make a de novo review of the findings and recommendations objected to. Id. and 28 U.S.C. 636(b)(1)(C). Any findings to which no party objects are upheld by the district court unless "clearly erroneous or contrary to law." 28 U.S.C. 636(b)(1)(C). Defendant filed one objection to the magistrate judge's R&R concerning the motion to suppress. ECF No. 50. Lodge argues that the magistrate judge erroneously concluded that the warrantless search

of the backpack was lawful. ECF No. 50. All findings challenged by this objection will be reviewed de novo. 28 U.S.C. § 636(b)(1).

The magistrate judge noted the well-stablished principle that the Fourth Amendment provides "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. Under the exclusionary rule, a court should exclude evidence obtained by law enforcement's unlawful arrest or search. See Mapp v. Ohio, 367 U.S. 643 (1961). The Supreme Court of the United States has further held that warrantless seizures are "per se unreasonable under the Fourth Amendment, subject to only a few specifically established and well delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967).

One delineated exception is the abandonment exception. A person who abandons property does not enjoy Fourth Amendment protection over that property. United States v. Small, 944 F.3d 490, 502 (4th Cir. 2019) (internal citation omitted); see also United States v. Stevenson, 396 F.2d 538 (4th Cir. 2005) (finding that a defendant had no privacy interest in abandoned property). "The law is well established that a person who voluntarily abandons property loses any reasonable expectation of privacy in the property and is consequently precluded from seeking to suppress evidence seized from the property." United States v. Leshuk, 65 F.3d 1105, 1111 (4th Cir. 1995). To determine whether property has been abandoned, Courts ask "whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be aban-

doned." Small, 944 F.3d at 502 (internal quotations omitted). "To determine whether the defendant maintains a reasonable expectation of privacy in an item, the court performs 'an objective analysis' which considers the defendant's actions and intentions." Id. (quoting United States v. Davis, 657 F. Supp. 630, 647-48 (D. Md. 2009)). The Court should consider "only objective information available to officers at the time they performed the warrantless search" to determine whether a defendant abandoned property. Id. "Intent [to abandon] may be inferred from words spoken, acts done, and other objective facts." Davis, 657 F. Supp. at 648. "The government bears the burden of proving the admissibility of evidence obtained pursuant to a warrantless search by a preponderance of the evidence." Small, 944 F.3d at 502 (internal citations omitted).

The appellant in United States v. Small contended that his cell phone was not abandoned, contrary to the district court's finding. 944 F.3d at 502. Small fled from officers in a vehicle and tossed away personal items as he traveled. Id. at 503. Small then exited his vehicle, abandoning it and its contents, and fled on foot. Id. Among the items thrown during his flight was a cell phone, "only fifty yards from the shirt and hat" which were also discarded along the way. Id. "The phone was found in a grassy area, not on a sidewalk or 'a place where [someone] normally might be.'" Id. (internal citation omitted). "[U]sing only objective information available to officers at the time they performed the warrantless search," the Small Court held "there clearly was" a voluntary intention to abandon the cell phone, and the warrantless search of the cell phone was lawful. Id. at 502-03.

III. Analysis

Lodge objects to the magistrate judge's finding that the warrantless search of the backpack was lawful because the backpack was abandoned. ECF No. 50. Lodge contends that the search of the backpack was a violation of the Fourth Amendment, and all evidence flowing from that warrantless search must be suppressed at trial. Lodge spends the entirety of the objection arguing against the doctrine of abandonment, and does not analyze the Magistrate Judge's finding that the backpack was considered to be part of Defendant's person "only because his bag was not on his person when it was searched . . . ." ECF No. 50 at 3. In its response to the motion to suppress, the Government argued that the backpack was abandoned pursuant to United States v. Small, 944 F.3d 490 (4th Cir. 2019). ECF No. 38. The Government did not respond to Lodge's objection.

The Court finds, after reviewing the testimony and exhibits, the Government proved its burden, by a preponderance of the evidence, that the backpack was abandoned; therefore, the officers' warrantless search of the backpack was lawful and the evidence retrieved therefrom is admissible at trial. Small, 944 F.3d at 502. Here, Officer Flanagan and Sgt. Dean used the objective information available to them in determining the camouflage backpack had been abandoned. First, after fleeing from Officer Flanagan in his vehicle, Lodge exited his vehicle and fled on foot, with the backpack in hand. ECF No. 59, Suppress Hr'g Tr., 11:1-12:4. After failing to shove the backpack inside the trailer, Lodge takes off again on foot with the backpack, and runs to the back of the trailer. Id. 12:17-13:11. The next time Officer Flanagan sees the defendant during the

foot chase, the backpack is not on the defendant's person. Id. 13:3-19. After Lodge was handcuffed and questioned about the backpack, he responded that "nothing bad" was inside of it. Ex. 3, 4:40-5:10. Next, the officers located the backpack next to the shed, near the trailer, and on top of grass and rusty metal. ECF No. 59, Suppress Hr'g Tr., 54:1-55:11.

Lodge's actions and intentions lead the Court to believe he voluntarily abandoned the backpack. Small, 944 F.3d at 502. Lodge's first attempt at stashing the backpack inside the trailer, and ultimately failing to deposit it and making the decision to flee on foot instead, is meaningful to the Court. The next time the officers see Lodge, he is without the backpack, having abandoned it outside, in the cold December weather, next to the shed. Between Lodge's brief time on the front porch to his flight behind the trailer, he made a calculated decision to abandon the backpack and continue to run from Officer Flanagan. Indeed, "the only reasonable conclusion [the Court] can draw is that Defendant abandoned the backpack rather than be caught with it." ECF No. 47 at 25.

The location of the abandoned backpack is also telling here: the Court certainly considers this location – a grassy area with rusty metal - a place where someone would not normally be in the early morning hours during the month of December. Small, 944 F.3d at 503. The evidence showed that neither Lodge nor any other person was near the backpack when the officers located it by the shed. The backpack was found among various equipment and other outdoor items, none of which appeared to be Lodge's personal items, other than the backpack itself. Lodge volun-

tarily abandoned the backpack and lost any reasonable expectation of privacy over it. United States v. Leshuk, 65 F.3d 1105, 1111 (4th Cir. 1995).

Therefore, the Court **UPHOLDS** the magistrate judge's finding and recommendation that Lodge abandoned the backpack. Therefore, the warrantless search was reasonable. Accordingly, the Court **ADOPTS** the Report and Recommendation in its entirety [ECF No. 47] and **DENIES** Defendant's Motion to Suppress [ECF No. 28]. The Court **OVERRULES** Defendant's Objection [ECF No. 50].

IV. Conclusion

For the reasons stated herein, the Court:

- **ADOPTS** the magistrate judge's Report and Recommendation in its entirety [ECF No. 47];

- **DENIES** Defendant's Motion to Suppress Evidence [ECF No. 28];

  and

- **OVERRULES** Defendant's Objection [ECF No. 50] to the Report and Recommendation.

It is so **ORDERED**.

The Court directs the Clerk to transmit copies of this Memorandum Opinion and Order to counsel of record and all appropriate agencies.

DATED: November 10, 2022

[signature]
THOMAS S. KLEEH, CHIEF JUDGE
NORTHERN DISTRICT OF WEST VIRGINIA

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CLARKSBURG

UNITED STATES OF AMERICA,

Plaintiff,

v.

AUSTIN LODGE,

Defendant.

Criminal Case No.: 1:21-CR-30
(JUDGE KLEEH)

REPORT AND RECOMMENDATION RECOMMENDING THAT DEFENDANT'S MOTION TO SUPPRESS [ECF NO. 28] BE DENIED

Pending before the undersigned Magistrate Judge is Defendant Austin Lodge's ("Defendant") Motion to Suppress Physical Evidence [ECF No. 28], filed on July 1, 2022. By Order dated July 5, 2022 [ECF No. 29], the presiding United States District Judge, Hon. Thomas S. Kleeh, referred the motion to the undersigned for conducting a hearing and entering a report and recommendation as to disposition of the motion.

The Court also is in receipt of the Government's response to Defendant's motion, filed on July 11, 2022. [ECF No. 38]. The undersigned conducted a hearing on Defendant's motion on July 13, 2022, at which the Court heard

witness testimony and accepted exhibits into evidence. At the hearing on July 13, 2022, the undersigned invited counsel for the parties to submit any additional briefing on the issues arising herein, should they choose to submit any, by July 20, 2022.

On July 15, 2022, Defendant filed a supplement [ECF No. 43] to his motion to suppress, which included a motion to submit an additional exhibit. By the included motion, Defendant sought to admit into evidence an additional body camera video generated by a law enforcement officer ["LEO"] at the time of the pursuit and arrest of Defendant. By Order dated July 18, 2022, the undersigned ordered Defendant's counsel to provide a copy of the proposed exhibit to the undersigned for review, and also ordered the Government to file any response to the same. The Government timely filed such a response on July 27, 2022, objecting to submission of the additional exhibit as untimely and without context which could have been gleaned from examination of witnesses at the suppression hearing. By Order of event date herewith, the undersigned granted Defendant's motion and received the additional body cam footage into evidence.

Based on a detailed review of Defendant's motion [ECF No. 28], the Government's response [ECF No. 38], the exhibits introduced into evidence at the hearing on Defendant's motion, the testimony given by witnesses at said hearing, and review of Defendant's additional exhibit noted above (including Defendant's motion concerning the additional exhibit [ECF No. 43] and the Government's opposition to it [ECF No. 45]), the undersigned **RECOMMENDS** that Defendant's motion be **DENIED** as set forth herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant stands accused in a two-count indictment which a Grand Jury returned against him on May 4, 2021. [ECF No. 1]. Defendant is named in the Indictment with the offenses of (1) Possession with Intent to Distribute Methamphetamine, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C), and (2) Possession with Intent to Distribute Heroin, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

Defendant was detained by the Harrison County (West Virginia) Sheriff's Department ("Sheriff's Department") in the early morning hours of December 13, 2018. A LEO with the Sheriff's Department was on patrol of an area, about which there had been a number of complaints of drug activity. The LEO saw Defendant's vehicle parked at a residence where drug activity had been concentrated. A few minutes later, the LEO observed Defendant's vehicle traveling away from that residence. A few moments after that, the LEO observed Defendant's vehicle traveling at a high rate of speed, approximately 100 miles per hour.

LEOs eventually caught up with Defendant once he had pulled into a residence. Defendant questioned whether the LEOs actually were officers, and fled on foot into nearby woods. LEOs gave chase on foot, and ultimately caught and detained Defendant after an extended struggle. In the course of his fleeing, Defendant had tossed aside a backpack. LEOs recovered the backpack shortly after Defendant's arrest. Inside the backpack, LEOs found quantities of a number of controlled substances, including crystal methamphetamine, marijuana, and suboxone strips, as well as plastic bags and digital scales. LEO's

searched Defendant's person incident to arrest, and found a metal container with heroin inside.

Defendant was taken into custody, ultimately, on the basis of his absconding from parole.

Defendant challenges, first, the assertion that he was traveling at excessive speed, and thus challenges the propriety of the traffic stop. Secondly, Defendant challenges the propriety of the resulting searches which yielded the controlled substances resulting in the Indictment here. The Government, on the other hand, argues that its evidence credibly demonstrates that Defendant was speeding excessively. As such, the Government argues, the resulting detention, arrest, and seizure of evidence were lawful.

II. SUMMARY OF TESTIMONY AND OTHER EVIDENCE

During the aforementioned suppression hearing on July 13, 2022, the Court heard sworn testimony from three witnesses, namely, (1) Deputy Jon Flanagan ("Flanagan") of the Sheriff's Department, (2) Lori Barker ("Barker"), and (3) Defendant himself. The Court also received into evidence the following:

1. Government's Exhibit 1 [ECF No. 41], the body camera footage generated by Flanagan during his pursuit of Defendant on foot and arrest of Defendant on December 13, 2018, during which LEOs collected certain evidence which is the subject of Defendant's motion;
2. Government's Exhibit 2 [ECF No. 41], body camera footage from an unknown officer generated during LEOs' pursuit of Defendant on December

13, 2018, depicting Barker's conversation with an LEO; and,

3. Defendant's Exhibit 3[1], body camera footage from an unknown officer generated during LEOs' pursuit of Defendant on December 13, 2018, depicting Barker's conversation with an LEO, Flanagan's conversation with a colleague regarding Defendant's attempt to enter Barker's home through the front door, and Defendant's statements to LEOs about his owning the backpack at issue in this case.

The undersigned also notes receipt of Flanagan's incident report resulting from events on December 13, 2018 giving rise to the Indictment herein, provided as an attachment to Defendant's motion. [ECF No. 28-1].

A. Flanagan's Testimony

The Government called Flanagan to testify. According to his testimony,[2] Flanagan was working the midnight shift for the Sheriff's Department in the early morning hours of December 13, 2018. [12:22:16 to 1:22:30]. In his

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[1] As noted in the Order entered on even date herewith, allowing Defendant's Exhibit 3 into evidence, this exhibit is mislabeled. Defendant did not admit exhibits into evidence at the suppression hearing, thus this exhibit should be labeled "Defendant's Exhibit 1." However, in the interest of consistency, the undersigned will refer to Defendant's exhibit here as "Defendant's Exhibit 3." At the suppression hearing, the Government admitted only two exhibits into evidence, so Defendant's labeling this exhibit this way does not compete with the label of another Exhibit 3.

[2] The citations here to times in brackets correspond to the times of the Court's archived audio recording of the suppression hearing on July 14, 2022, which is located on the section of the Court's intranet site for FTR recordings.

capacity as a deputy with the Sheriff's Department, Flanagan was assigned to road patrol, which included routine surveillance. [12:21:53 to 12:22:15]. During his shift on December 13, 2018, Flanagan was in a marked police vehicle, was wearing a police uniform, and was wearing a functional body camera. [12:22:33 to 12:22:58]. Flanagan's police vehicle was not equipped with its own camera. Id.

During his above-noted shift, at around 3:00 a.m., Flanagan was patrolling the East View area of Clarksburg. [12:23:10 to 12:23:21]. Flanagan was concentrated on this area because the Sheriff's Department had been handling a number of calls about drug activity and suspicious persons there. [12:23:22 to 12:23:46]. A particular residence giving rise to a number of such calls was a house trailer occupied by Mark Cole ("Cole"). [12:23:47 to 12:24:09]. Flanagan was patrolling the vicinity of Cole's trailer. [12:24:10 to 12:24:28].

Flanagan noticed a silver Nissan sedan ("Nissan") with Pennsylvania plates parked at Cole's trailer. [12:24:29 to 12:24:50]. Flanagan also noticed that, inside a portion of Cole's trailer, the lights were on, while lights in the surrounding structures in the area were off. [12:24:51 to 12:25:01]. Flanagan continued his patrol of the area. [12:25:30 to 12:25:37]. Flanagan's practice was to drive in a repeated loop of the area he patrolled, to see if anything had changed from his prior view, and he did so at this time. [12:25:48 to 12:25:59].

Flanagan proceeded up a nearby street, which at the time was called Green Avenue (and which currently has a different name which Flanagan could not recall). [12:26:01 to 12:26:16]. On Green Avenue, Flanagan passed the Nissan coming from the opposite direction. [12:26:17 to 12:26:31]. Flanagan knew that this Nissan was the same

vehicle he saw earlier at Cole's trailer because it had the same plates. [12:27:07 to 12:27:10]. On cross-examination, Flanagan stated that when he encountered the Nissan at this time, the Nissan was in working order and there was nothing about it, standing alone, which was suspicious. [1:16:03 to 1:16:56]. The driver had committed no traffic infractions at that time. Id. Rather, Flanagan was interested in the Nissan only because it had been at Cole's trailer. Id.

Green Avenue intersects with Philippi Pike, and there is a stop sign at that intersection at which traffic proceeding from Green Avenue to Philippi Pike must stop. [12:27:21 to 12:27:33]. Once Flanagan passed the Nissan, he immediately turned around in a nearby driveway so as to be traveling in the same direction as the Nissan. [12:27:03 to 12:27:20]. By the time Flanagan had turned his vehicle around, the Nissan was out of sight. Id.

Flanagan stated that the area is residential, and as such there is a speed limit of 25 miles per hour unless it is posted differently. [12:27:35 to 12:27:52].

Flanagan explained that, in the short time which elapsed for him to turn around, he would have expected to have seen the Nissan once he had turned around if it were being driven at a normal speed. [12:27:53 to 12:28:24]. On cross-examination, Flanagan acknowledged that he planned to follow the Nissan and pull it over if he could find reason to do so, and inquire of the driver about why he or she had been at Cole's trailer. [1:21:28 to 1:21:59].

Once Flanagan had his vehicle turned around on Green Avenue and stopped at the stop sign at the intersection of Green Avenue and Philippi Pike, he saw the Nissan in the distance traveling on Philippi Pike in the direction of the

community of Anmoore. Id. On cross-examination, Flanagan estimated that approximately six to eight seconds elapsed between (a) the moment when he passed the Nissan on Green Avenue and (b) the moment when he arrived at the intersection of Green Avenue and Philippi Pike and saw the Nissan again. [1:19:11 to 1:19:47]. Further, on cross-examination, Flanagan stated that the Nissan, were it traveling at a normal speed, still should have been visible once Flanagan turned his police vehicle around on Green Avenue. [1:19:53 to 1:20:24]. Flanagan stated that so little amount of time elapsed that the Nissan should have been stopped at the stop sign at the intersection of Green Avenue and Philippi Pike. Id. However, because the Nissan was not visible, Flanagan suspected that the driver had not stopped at the stop sign, although Flanagan was candid in saying that he did not witness such a traffic violation. Id.

Flanagan proceeded onto Philippi Pike to attempt to catch up with the Nissan. [12:28:26 to 12:28:28]. Flanagan accelerated his vehicle to a speed of 100 miles per hour; the Nissan was increasing its distance from Flanagan, leading Flanagan to conclude that the Nissan was traveling at approximately the same speed. [12:28:29 to 12:29:01]. Philippi Pike is a two-lane road with a number of potholes and crumbling edges. [12:29:28 to 12:30:01]. Much of the segment of Philippi Pike in question is fairly straight and fairly flat. [1:18:55 to 1:19:06]. Flanagan stated that it often has chunks of pavement missing and is not well maintained. [12:30:02 to 12:30:17]. Philippi Pike is not a roadway that is conducive for traveling safely at speeds of 100 miles per hour. [12:30:18 to 12:30:27]. In any event, per Flanagan, traveling at such speeds is illegal on that roadway. Id.

Flanagan did not activate the emergency lights on his vehicle so as to effectuate a stop of the Nissan. [12:29:07 to 12:29:11]. Instead, Flanagan switched his radio to a private frequency to alert other deputies nearby that the Nissan was fleeing. [12:29:12 to 12:29:24]. Flanagan then saw the Nissan execute a left turn from Philippi Pike onto Moonlight Drive. [12:29:25 to 12:29:26]. On Moonlight Drive, the Nissan made the first left turn, to a garage. [12:30:50 to 12:30:54]. On cross-examination, Flanagan could not give a precise estimate of the distance the Nissan traveled on Philippi Pike, i.e. from Green Avenue to Moonlight Drive, although he did not think that the distance was multiple miles long, and did not outright disagree with Defendant's counsel's suggestion that the distance is approximately one mile. [1:27:00 to 1:27:45].

In pursuing the Nissan, Flanagan did not activate his vehicle's lights or sirens. [1:04:30 to 1:04:39].

Flanagan observed that the driver of the Nissan was alone in that vehicle, and that the driver was a white male. [12:31:01 to 12:31:17]. Flanagan observed the driver of the Nissan open the door and exit the vehicle. Id. Flanagan opened his own vehicle door to exit it, called out "police, stop" to the driver of the Nissan, and dropped the radio with which he was communicating to dispatch as to his location. [12:31:18 to 12:31:51]. The driver of the Nissan fled on foot and Flanagan pursued him. [12:31:53 to 12:31:57].

The driver of the Nissan proceeded from the area of the garage to an adjoining property on which was situated a house trailer with a porch. [12:31:58 to 12:32:08]. The driver of the Nissan ran onto the porch and attempted to enter that residence. [12:32:09 to 12:32:14]. Flanagan recalled that the door of this residence opened slightly, apparently by someone from the inside of the residence.

[12:32:32 to 12:32:43]. The driver of the Nissan attempted to shove a camouflage backpack through the door, but the door ultimately was shut in his face. [12:32:44 to 12:33:15]. The driver knocked on the door two or three more times, looked back at Flanagan, and then ran from the porch. [12:32:49 to 12:33:01].

The driver went to the left side of the trailer, around a detached shed, and then proceeded to the right. [12:33:03 to 12:33:49]. Flanagan chased the driver into the backyard area. [12:33:50 to 12:34:02]. Flanagan illuminated the area with a handheld flashlight, and shouted to the driver "police, stop." [12:34:03 to 12:34:14]. As Flanagan caught up to the driver, he saw that the driver no longer had the backpack, and that the driver was reaching into his waistband area. [12:34:15 to 12:34:28]. Flanagan feared that the driver was reaching for a weapon, so Flanagan drew his service weapon, pointed it at the driver, and again shouted "police, stop." [12:34:29 to 12:34:38].

At this same time, another LEO, Deputy Deem ("Deem")[3], arrived on the scene and had proceeded to the backyard area. [12:34:39 to 12:34:47]. The driver saw Deem arrive on the scene and so continued to flee on foot through nearby woods. [12:34:48 to 12:35:47]. Flanagan and Deem pursued the driver on foot, and announced that they were police and commanded the driver to stop. [12:35:49 to 12:36:05]. The driver exclaimed that he could not see the officers' badges, and yelled for help and expressed distress about being robbed. [12:37:30 to 12:37:40]. In the course of this pursuit, Flanagan was knocked to the ground when he hit a tree limb, while Deem

[3] Flanagan explained that, since this time, Deem has been promoted to the rank of sergeant.

continued to pursue the driver. [12:36:08 to 12:36:38]. Flanagan remained still as Deem seemed to be chasing the driver back into the area where Flanagan was waiting. [12:36:30 to 12:36:55]. Flanagan was waiting in anticipation of being able to apprehend the driver, but Deem eventually caught the driver just before the driver made his way to Flanagan. Id.

Flanagan went to assist Deem, and the driver resisted being arrested. [12:36:56 to 12:37:05]. As Flanagan and Deem attempted to handcuff the driver and commanded him to stop resisting, again stating that they were police, the driver continued to resist. [12:37:06 to 12:37:21]. The LEOs were unable to handcuff the driver, so Flanagan used "hammer strikes" with his fists as well as "knee strikes" to attempt to subdue the driver. [12:37:22 to 12:38:36]. At some point in the struggle, Deem used "OC spray" or "pepper spray" to incapacitate the driver. [12:39:05 to 12:39:16]. Flanagan also was hit with the spray, inadvertently, and was thus adversely impacted by it. [12:39:17 to 12:39:22]. Eventually, Flanagan was able to handcuff the driver's right wrist. [12:38:37 to 12:39:04]. Deem was able to handcuff the driver's left wrist. [12:39:22 to 12:39:27]. Because the driver was resisting the LEOs so much, the LEOs had to employ the uncommon technique of latching their two sets of handcuffs, one to the other, from the driver's left and right wrists, rather than the driver being handcuffed with a single pair of cuffs. [12:39:28 to 12:40:05]. Effecting even this handcuffing was a strenuous effort for the two LEOs. Id. Flanagan also sustained a lower back injury in the course of the arrest and had difficulty standing afterwards because of shooting back pain. [12:40:10 to 12:41:43]. Combined with the effects

of the spray, Flanagan was nauseated to the point of vomiting, as reflected in the end of the body cam video. [1:01:26 to 1:02:00].

Flanagan ultimately identified the driver as Defendant. [12:42:00 to 12:42:07].

Flanagan recovered the camouflage backpack which he had earlier observed Defendant carrying. [1:02:02 to 1:02:20].[4] Inside the backpack, LEOs found large amounts of controlled substances, including crystal methamphetamine, marijuana, and suboxone strips, as well as plastic bags and digital scales. Id. Upon a patdown of Defendant's person, incident to arrest, LEOs found a metal container with heroin inside. [1:03:40 to 1:03:47]. Flanagan considered the backpack to have been abandoned, as it was not in any person's possession when LEOs recovered it. [1:04:38 to 1:04:44]. On cross-examination, Flanagan explained that he found the backpack beside the shed that was situated close to the house trailer on Moonlight Drive which Defendant had attempted to enter. [1:48:28 to 1:49:44]. The backpack was on top of a pile of some kind of vegetative debris and/or scrap metal. Id. Flanagan stated that he did not determine who owned the shed [1:49:45 to 1:49:48]. Flanagan did not have a search warrant to search the backpack nor Defendant's consent to search it, and the backpack was not within Defendant's reach at the time Flanagan found it. [1:50:01 to 1:50:33].

Flanagan stated that Defendant's operation of the Nissan at such excessive speed was an offense for which he

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[4] The moment when Flanagan finds the backpack can be observed in the body cam footage which comprises Government's Exhibit 1, at the 8:38:22 time mark.

could have arrested Defendant. [1:02:30 to 1:02:40]. The offense amounted to reckless driving.[5] [1:02:41 to 1:02:48]. As for the circumstances of Defendant's arrest here, he actually was arrested based upon his absconding from parole. [1:02:49 to 1:03:30].

B. Barker's Testimony

The Defendant called Lori Barker to testify. Barker testified that she knows Defendant because Defendant and her daughter have a child together. [2:13:04:to 2:13:10]. Barker explained that Defendant has lived at her residence on Moonlight Drive. [2:13:40 to 2:13:50]. The incident in this matter took place in the area of her residence. [2:13:51 to 2:13:58]. Barker was present at her home at the time of events here. [2:14:00 to 2:14:26]. Defendant resided at Barker's home at the time. [2:16:55 to 2:17:00]. Defendant would have had permission to enter Barker's home at that time. [2:17:01 to 2:17:27].

At approximately 3:00 a.m. on December 13, 2018, Barker was asleep in her bedroom when she heard knocking at the front door. [2:14:27 to 2:14:43]. Ordinarily, this door was unlocked, but she had locked it at that time because of unspecified other concerns. Id. She went outside to look to see what was happening, because she heard screaming. [2:14:44 to 2:15:02]. Outside, she saw two police vehicles in front of her home, with no lights on. Id. She heard yelling behind her home, in the distance. [2:15:03 to 2:15:13]. The yelling consisted of cries for help. [2:15:30 to

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[5] Although not cited specifically in the course of these proceedings, reckless driving is criminalized in West Virginia by dint of the provisions at W. Va. Code § 17C-5-3. Further, it appears that authority for making such an arrest given these factual allegations is set forth at W. Va. Code § 62-1-5a(1).

2:15:38]. She ran to her adjacent building, and could hear someone shouting "stop, police." [2:15:14 to 2:15:25]. Barker eventually recognized once of the voices as that of Defendant. [2:16:01 to 2:16:07]. Barker returned to the inside of her home, afraid to go towards the commotion alone in the dark. [2:16:12 to 2:16:27]. Looking to the outside from within her home, Barker eventually saw that Defendant had been arrested. [2:16:28 to 2:16:41].

Barker testified that she did not speak to any LEOs or Defendant at that time. [2:16:42 to 2:16:44]. On cross-examination, however, the Government played body camera footage from the time of these events at Barker's home. This video was admitted as Government's Exhibit 2. Barker acknowledged that the video depicts her residence, and her speaking with a LEO. [2:25:41 to 2:25:50]. Barker further stated that she did not recall this interaction. Id.

C. Defendant's Testimony

Defendant testified on his own behalf. Defendant testified that he indeed was driving a vehicle in the East View area of Clarksburg on December 13, 2018. [2:48:15 to 2:48:21]. He recalled seeing two police vehicles[6] in the moments when he was approaching Philippi Pike and then turning onto Philippi Pike.

As he drove on Philippi Pike, Defendant did not notice police vehicles following him, nor did he notice any illumination by emergency lights. [2:50:00 to 2:50:10]. Defendant stated that he did not commit any traffic violations while

[6] Presumably, one of these police vehicles was Flanagan's. Flanagan did not testify that another police vehicle was in this vicinity during this portion of that night's events. There is nothing in the record otherwise about a second police vehicle at this place and at this time.

driving on Philippi Pike. [2:50:19 to 2:50:25]. Defendant stated that he did not believe he was speeding. [2:50:29 to 2:50:51]. Defendant stated that he was not in a hurry. [2:50:52 to 2:50:55]. On cross-examination, Defendant stated that he could have been speeding, yet disagreed that he was speeding excessively. [2:5529 to 2:55:34].

Defendant stated that he then turned onto Moonlight Drive. [2:50:56 to 2:51:00]. Defendant explained that he was traveling to Barker's residence. [2:51:01 to 2:52:29]. When Defendant got to his destination on Moonlight Drive, he testified, he walked to the front porch to enter through the front door. Defendant found the front door locked. [2:52:30 to 2:52:49]. Defendant knocked on the door, but got no answer. [2:52:50 to 2:52:59]. Defendant left the front porch to walk around to the back porch, and when he did, an unknown person was shining a light in his eyes and commanding him to stop. [2:53:00 to 2:53:08]. Defendant stated that he ran. [2:53:15 to 2:53:18].

Defendant acknowledged having the backpack at issue, and throwing the backpack beside the shed. [2:53:25 to 2:53:30]. Defendant stated that he intended to retrieve the backpack later. [2:53:31 to 2:53:33].

Defendant stated that the people he encountered may have stated that they were police officers, but that he did not necessarily believe them. [2:53:38 to 2:53:48]. Defendant testified that he was not in an optimal state of mind, although it is unclear what exactly Defendant meant by that. [2:54:01 to 2:54:03]. Defendant stated that he was scared, he panicked, and he tried to leave the scene. [2:54:04 to 2:54:10].

On cross-examination, Defendant reviewed the portion of Government's Exhibit 1 in which he has the first interaction with LEOs.[7] Defendant acknowledged that he was just a few feet away from the LEOs, that the LEOs were telling him that they were officers, and that the LEOs were wearing police uniforms. [2:58:20 to 2:58:31]. Further, on cross-examination, Defendant stated that he did see the police vehicles parked at the scene on Moonlight Drive, then stated that he may have seen them, and then stated that he could not recall. [2:58:32 to 2:58:46]. Further, on cross-examination, Defendant acknowledged that he ran from the LEOs, and complained that officers were not affording him an opportunity to see their badges. [2:59:09 to 2:59:37]. In reviewing the video that is Government's Exhibit 1, on cross-examination, Defendant acknowledged running away at the same time he asked to see Flanagan's badge. [2:59:50 to 3:00:14].

III. LEGAL ISSUES AND ANALYSIS[8]

Defendant contends, firstly, that the allegation about his driving at excessive speeds has not been corroborated

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[7] This moment is at the 8:24:07 time mark in Government's Exhibit 1.

[8] At the outset of the analysis here, the undersigned notes that he has reviewed Defendant's Exhibit 3. Defendant seems to present the exhibit for two reasons. First, the exhibit shows an inconsistency with Flanagan's testimony at the suppression hearing. At the suppression hearing, Flanagan stated that the front door of the Barker residence opened when Defendant was knocking, and then shut, while in the video Flanagan says he does not think anyone answered the door. Second, the exhibit shows further indicia of Defendant's ownership of the backpack (and thus further shows Defendant's purported privacy interest in it), in that the video captures Defendant admitting to LEOs that he owns the backpack. These additional factual matters do not change the substance of the undersigned's review and analysis of the record.

or sufficiently established. The evidence produced to Defendant in discovery sets forth a mere general allegation of speeding, Defendant argues. Defendant disputes that he was speeding as alleged. Secondly, Defendant thus argues, the resulting stop was improper. Defendant argues that there was no reasonable suspicion for LEOs to perform a prolonged, investigatory stop of Defendant. Thus, according to Defendant, the resulting arrest, search, and seizure of evidence here were unlawful. Relatedly, Defendant asserts that he did not abandon the backpack, and intended to retrieve it.

On the contrary, the Government argues there is sufficiently credible evidence to show that Defendant was speeding excessively on Philippi Pike. As such, per the Government, Defendant committed a severe enough traffic offense that he could have been outright arrested for it. Moreover, the Government emphasizes that Defendant would have been arrested regardless, because he had absconded from parole. (Indeed, Defendant was arrested on that basis). In any event, the Government states, Defendant was not at all compliant with LEOs, in that he fled and violently fought against arrest. The implication here is that Defendant did not doubt the LEOs' legitimacy, but rather was interested only in fleeing because he knew he was in trouble. Finally, the Government insists that Defendant's backpack was abandoned, such that Defendant had no privacy interest in it and no constitutional protections with respect to it.

There is an important factual distinction with regard to the evidence in this case. As noted in the summary of factual testimony, above, LEOs recovered controlled substances from both (a) the backpack which Defendant tossed during LEOs' pursuit of him and which he did not

possess at the time of arrest, and (b) a patdown of Defendant upon his arrest. By his motion to suppress, Defendant seeks to "suppress[] any evidence derived from the unlawful search of his person. . .". [ECF No. 28 at 7]. Based on argument received during the hearing before the undersigned on July 13, 2022, it is clear that Defendant seeks to suppress evidence recovered both from the backpack and from the patdown incident to arrest. As such, evidence recovered from the backpack requires an additional level of analysis, as more fully set forth below.

A. Legal Principles

As a foundational matter, the undersigned notes the well-established principle that the Fourth Amendment of the United States Constitution 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. Moreover, "the general rule [is] that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." Michigan v. Summers, 452 U.S. 692, 700 (1981).

A warrantless arrest and search incident to such arrest are permissible where there is probable cause[9] that crime has been, is being, or will be committed, although if it is a misdemeanor, the crime must be committed in the officer's

[9] The undersigned notes the vast body of caselaw differentiating between police stops where there is probable cause of a crime being committed versus stops governed by the lesser standard of reasonable, articulable suspicion of a crime. Based upon arguments at the hearing before the undersigned on July 13, 2022, the parties appear to agree that the facts and circumstances in this matter are governed by the probable cause standard.

presence. U.S. v. Dickey-Bey, 393 F.3d 449, 453 (4th Cir. 2004). "'[P]robable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." Id. (quoting Michigan v. DeFillippo, 443 U.S. 31, 37 (1979). "Probable cause is judged by an analysis of the totality of the circumstances . . . which are weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. Under this pragmatic, common sense approach, we defer to the expertise and experience of law enforcement officers at the scene." Id. (citations and quotations omitted).

As for automobile stops, it is clear that they are a "seizure" under the Fourth Amendment. U.S. v. Sowards, 690 F.3d 583, 587-588 (4th Cir. 2012). As for a LEO stopping a vehicle for traveling above the speed limit, there must be some "indicia of reliability" to support the LEO's conclusion that the vehicle was speeding. Id. "[W]here an officer estimates that a vehicle is traveling in only slight excess of the legal speed limit, and particularly where the alleged violation is at a speed differential difficult for the naked eye to discern, an officer's visual speed estimate requires additional indicia of reliability to support probable cause." Id. However, "where an officer estimates that a vehicle is traveling in significant excess of the legal speed limit, the speed differential—i.e., the percentage difference between the estimated speed and the legal speed limit—may" establish probable cause for the stop. Id.

Moreover, "it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval

by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). It is the Government's burden to demonstrate that one of these exceptions applies. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). Among those few exceptions to the requirement to obtain a warrant is the circumstance where the search of a person is incident to an arrest of that person. "[A] police officer who makes a lawful arrest may conduct a warrantless search of the arrestee's person and the area 'within his immediate control.' Davis v. United States, 564 U.S. 229, 232 (2011) (citation and quotation omitted). The policy behind this exception is to remove any weapons an arrestee may possess and to secure evidence. United States v. Davis, 997 F.3d 191, 195 (4th Cir. 2021).

Additionally, a warrantless search of property (either real or personal) which has been abandoned may be proper. The Fourth Circuit has articulated how to determine the propriety of such a warrantless search of abandoned property:

> A finding of abandonment is based "not [on] whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned." United States v. Haynie, 637 F.2d 227, 237 (4th Cir. 1980) (quoting United States v. Wilson, 472 F.2d 901, 902 (9th Cir. 1973)). To determine whether the defendant maintains a reasonable expectation of privacy in an item, the court performs "an objective analysis" which considers the defendant's actions and intentions.

> United States v. Davis, 657 F. Supp. 2d 630, 647-48 (D. Md. 2009), aff'd, 690 F.3d 226 (4th Cir. 2012). "Intent [to abandon] may be inferred from words spoken, acts done, and other objective facts." *Id.* at 648 (quoting United States v. Hoey, 983 F.2d 890, 892 (8th Cir. 1993)).

United States v. Small, 944 F.3d 490, 502 (4th Cir. 2019). "When a person voluntarily abandons his privacy interest in property, his subjective expectation of privacy becomes unreasonable, and he is precluded from seeking to suppress evidence seized from it." United States v. Stevenson, 396 F.3d 538, 546 (4th Cir. 2005) (citations omitted).

It is the Government's burden, by a preponderance of the evidence, to establish the admissibility of evidence seized without a search warrant. Small, 944 F.3d at 502.

Finally, a well-established principle is that of the exclusionary rule. This rule holds that a court should exclude evidence obtained by dint of law enforcement's unlawful arrest or search. See Mapp v. Ohio, 367 U.S. 643 (1961). Relatedly, however, a court should suppress evidence in a criminal matter "only … where its deterrence benefits of exclusion outweigh its substantial social costs." Hudson v. Michigan, 547 U.S. 586, 591 (2006) (citations and quotations omitted).

B. Analysis

In the case at bar, the necessary sequential analysis is as follows. The first issue is whether there is credible, reliable evidence that Defendant was speeding excessively on Philippi Pike, such that the stop of him was lawful. The second issue, then, is whether Defendant's resulting arrest and the recovery of evidence (from both the backpack

tossed during LEOs' pursuit of Defendant and from Defendant during patdown at arrest) leading to the Indictment herein were lawful. Ancillary to the second issue is whether Defendant abandoned his backpack, such that there was no privacy interest in it.

1. Allegation of Defendant Speeding Excessively

As a threshold matter, in his motion, Defendant complains of the paucity of information produced in discovery to substantiate the allegation that he was speeding excessively on Philippi Pike. Defendant notes that there are no witnesses other than Flanagan, and no video footage of him operating the Nissan. Further, by his motion, Defendant questions whether the Nissan was capable of driving at the excessive speeds alleged, especially over the relatively short distance Defendant traveled. Defendant also emphasizes, as factors which would inhibit excessive speed, the poor road conditions of Philippi Pike, the darkness that would have provided limited visibility, and the need to decelerate to make the sharp turn from Philippi Pike onto Moonlight Drive. Defendant requests that the Court require the Government to establish, to the Court's satisfaction, that a traffic violation occurred as alleged. After all, Defendant argues, without credible evidence that the traffic violation occurred in the first place, the ultimate stop and arrest of Defendant, and searches yielding incriminating evidence, were improper.

The undersigned concludes that Flanagan was credible in his testimony, and substantiated the allegation that Defendant was speeding excessively. First, and perhaps most importantly, in his testimony, Flanagan gave detail and context for his assertion that Defendant was driving at excessive speed, approximately 100 miles per hour. Flanagan explained the initial moment when he surmised that

Defendant was speeding excessively: when the Nissan was not visible at the stop sign at the intersection of Green Avenue and Philippi Pike just seconds after Flanagan turned around his patrol vehicle to tail the Nissan. Flanagan explained that, if the Nissan were being driven at a normal speed, it still would have been visible after Flanagan turned his patrol vehicle around. Secondly, Flanagan explained how he followed the Nissan, and in so doing, accelerated his patrol vehicle to a speed of 100 miles per hour. Yet, as Flanagan further explained, he was not closing the distance on the Nissan, but that the Nissan was pulling farther away from him. This of course means that the Nissan was traveling at a rate of speed of 100 miles per hour, perhaps more. What is more, Flanagan testified that he radioed to his colleagues nearby to alert them that the Nissan was fleeing, supporting his observation in the moment that the Nissan was speeding excessively.

As noted in the recitation of legal principles above, Flanagan's stop of the automobile is a "seizure" under the Fourth Amendment. Sowards, 690 F.3d at 587-588. For the stop of a vehicle for a traffic violation, the LEO must have probable cause that there was such a violation. Id. Further, per Sowards, the probable cause giving rise to a stop of a vehicle for speeding must be based on an "indicia of reliability." Id.

In the instant matter, Flanagan's stop of the Nissan certainly was based on indicia of reliability, in contrast to the scenario in Sowards. In Sowards, the LEO stopped a vehicle when he made a visual estimate that the vehicle was traveling only five miles per hour over the speed limit of 70 miles per hour. Id. at 585. The LEO's patrol vehicle had radar equipment, but the LEO had purposely parked the vehicle at an angle that prevented an accurate reading

from the radar equipment. Id. As a condition of obtaining certification for using radar equipment, the LEO in Sowards had to estimate, by sight, the speeds of twelve vehicles. As part of that test, the LEO's estimate could have been off upwards of 12 miles per hour. The LEO there did not attempt to confirm his speed estimate using some other means, such as pacing. Id. The Fourth Circuit took issue with how the LEO "used absolutely no technique or method to visually *guess* vehicle speeds." Id. at 589 (emphasis in original). The Fourth Circuit also took issue with how the LEO glossed over the need to account for the distance an object travels and the time it takes to travel that distance in order to calculate its speed. Id. The Fourth Circuit also found fault with how the LEO "exhibited a notable absence of fluency in his knowledge of distance measurements." Id. at 590.

The Sowards court did not provide a bright line rule about what the threshold is for excessive speed over the legal limit, without additional "indicia of reliability," to establish probable cause that the vehicle is speeding. However, that court did explain that "where the alleged violation is at a speed differential difficult for the naked eye to discern, an officer's visual speed estimate requires additional indicia of reliability to support probable cause." Id. at 592. In other words, and perhaps most important to the instant matter, the Sowards court concluded that an LEO's estimate that a vehicle is traveling significantly faster than the speed limit may, standing alone, establish probable cause that there is a traffic violation.

In the case at bar, Sowards legitimizes Flanagan's determination that there was probable cause that the Nissan was speeding. Flanagan testified that the speed limit where he witnessed the Nissan speeding is 25 miles per

hour unless posted differently. There was no evidence presented that the speed limit there was posted differently at the time of events at issue. Further, he testified that the Nissan was traveling at a rate of 100 miles per hour, which is four times the speed limit. That visual speed estimate, given the speed differential, is probably sufficient under Sowards. However, Flanagan's account goes a step further. He substantiated his conclusion about the Nissan's speed by explaining how he himself was traveling at 100 miles per hour behind the Nissan and not gaining on it. What is more, Flanagan explained how the Nissan was not in sight when he first turned his police vehicle around to tail it – suggesting that the Nissan was being operated at excessive speed from that moment.

Additionally, Flanagan did not overstate his conclusions about the Nissan. This actually bolsters his credibility before the undersigned. He candidly explained the ways in which the Nissan appeared to be in working order when he first encountered it, and how Defendant operated it within the bounds of the law prior to the fleeing. He also was candid about how he saw no illegal activity *per se* when he first saw the Nissan parked at Cole's trailer. Only when there was a blatant violation of the law, excessive speeding, did Flanagan affirmatively engage with Defendant.

In contrast to Flanagan's testimony, Defendant was not credible in his testimony about the speed at which he drove the Nissan. Although Defendant denied that he drove at excessive speed, he did concede that he could have been driving over the speed limit. Moreover, Defendant stated that he was not in a good frame of mind that night. This is borne out by the body camera footage of Defendant's arrest which occurred very shortly after he was driving the Nissan. It is not clear from Defendant's testimony

whether his mind was addled by use of controlled substances, consumption of some other type of substance, mental or emotional issues, some combination thereof, or something else altogether. Regardless, Defendant's testimony on this point was not credible. His version of events is questionable, given his candid admission that he was not in a good frame of mind at the time.

Thus, the undersigned **FINDS** that there is reliable, credible evidence that Defendant was speeding excessively, such that there was probable cause that that Defendant committed the crime of reckless driving. Therefore, the undersigned **FINDS** that a traffic stop of Defendant was proper.[10]

2. Warrantless Arrest of Defendant and Resulting Warrantless Search of Defendant's Person

Because of the finding, above, that the traffic stop of Defendant was proper, the undersigned **FINDS** that the warrantless arrest was proper because Flanagan credibly established how there was probable cause that Defendant had committed the crime of reckless driving. Dickey-Bey, 393 F.3d at 453. Thus, it follows that the undersigned **FINDS** the warrantless search of Defendant's person incident to arrest was permissible. Id. Relatedly, the undersigned reiterates that, per Flanagan's testimony, Defend-

[10] The evidence before the Court presents a factual nuance. The traffic stop here was not the result of an affirmative pulling over of Defendant along a public road. Rather, the stop was the result of Defendant effectively outrunning a LEO in his vehicle, parking that vehicle, and ultimately fleeing on foot. Because the reason for the LEO's pursuit of Defendant was a traffic violation, both parties herein appear to agree that the facts necessitate an analysis under the law governing traffic stops. The undersigned thus has engaged in such an analysis.

ant would have been arrested regardless because Defendant had absconded from parole. In fact, according to Flanagan, this ultimately was the reason stated for Defendant's arrest. Thus, either by reason of an arrest for reckless driving or for absconding from parole, there would have been a permissible, warrantless search of Defendant's person incident to arrest.

3. Warrantless Search of Defendant's Backpack

Because of the findings, above, that the traffic stop of Defendant and the warrantless arrest and search of his person were permissible, the undersigned **FINDS** that the search of Defendant's backpack also was permissible to the extent which the backpack simply may be considered to be part of his person.

However, the issue of the search of Defendant's backpack presents another layer of nuance, and thus a need for another level of analysis, to determine whether Defendant abandoned the backpack. If he abandoned the backpack, then he had no privacy interest in it, and thus LEOs' warrantless search of the backpack was permissible. See United States v. Ferebee, 957 F.3d 406, 412-413 (4th Cir. 2019) (explaining unreasonableness of claiming a privacy interest in abandoned property); see also United States v. Stevenson, 396 F.3d 538, 546 (4th Cir. 2005).

From the briefing of the parties and the hearing before the undersigned, the following five factors have been established, and all of them are critical to this analysis: (1) Defendant clearly claimed ownership of the backpack, (2) Defendant clearly stated that he threw the backpack in the place where LEOs recovered it, (3) Defendant threw the backpack in the course of fleeing from LEOs, and Defendant acknowledged that he was fleeing in the moment

when he threw it in that location where LEOs recovered it, (4) Defendant had permission to be on the property where he was fleeing and where he threw the backpack, and (5) LEOs did not have a search warrant for the backpack.

The undersigned also acknowledges two additional points: (1) Defendant claimed that he did not know that he was being pursued by actual LEOs during the pursuit, but thought they could have been imposters, and (2) Defendant claimed that he intended to retrieve the backpack or have someone retrieve it for him. To be clear, and as set forth in more detail here, the undersigned does not find Defendant to be credible as to either of these claims.

Seminal caselaw from the Fourth Circuit is instructive in this factual scenario. Small, 944 F.3d 490. In Small, the Fourth Circuit upheld the District Court's denial of that defendant's motion to suppress. The defendant in that matter was convicted of carjacking, conspiracy to commit carjacking, and destruction of government property. The convictions were based in part on evidence seized by a warrantless search of his mobile phone. Evidence on the phone connected Small to the stolen vehicle and helped LEOs ascertain his identity and location during events at issue. As in the instant matter, Small fled from LEOs; in the process, Small shed personal property, including a shirt, a hat, and the mobile phone. Id. at 503. Small also left a vehicle behind during the pursuit. The Fourth Circuit pointed to how a mobile phone's tracking function can aid LEOs in locating it (and the person possessing it), and how a suspect fleeing LEOs thus would be incentivized to intentionally abandon a mobile phone. Id. The Fourth Circuit looked at the discarded mobile phone in context with the other discarded items to conclude that the phone was one

of a series of items abandoned, in which that defendant had no reasonable expectation of privacy. Id.

In short, the undersigned concludes that Defendant here similarly abandoned the backpack, such that he had no reasonable expectation of privacy in it. As with the mobile phone in Small, Defendant herein had every reason to abandon the backpack in the face of LEOs' pursuit. Given the backpack's incriminating contents, abandoning it could thwart criminal trouble – just as Small abandoning the mobile phone could both stymie the pursuit of that defendant and preclude collection of evidence of criminal activity.

Defendant's self-serving argument in the instant matter – that he intended to retrieve the backpack, eventually – is not credible. Defendant cannot invoke this claim, without more, to force the conclusion that the backpack was not abandoned. It is not reasonable for a criminal defendant to toss aside an object containing incriminating evidence during flight, yet claim an absolute privacy interest in it. To this end, to determine whether a person has a reasonable expectation of privacy in such property, Small and related cases require this Court's objective analysis to examine Defendant's intentions and actions. Small, 944 F.3d at 502.

Here, all indications are that Defendant fled LEOs and sought to ditch incriminating items in the process. After all, Defendant first encountered Flanagan when the two passed each other traveling in opposite directions on Green Avenue. This is a residential street, so Defendant necessarily was in close proximity to Flanagan in his marked police vehicle. Common sense dictates that, in that moment, Defendant would have been able to identify the police vehicle as such. Defendant even testified that he saw two police vehicles at this time. Then, Defendant sped off

from the area where he first encountered Flanagan, operating the Nissan at a reckless speed of 100 miles per hour. The plain conclusion here is that Defendant wished to put distance between himself and law enforcement. Defendant reached his destination on Moonlight Drive, where he encountered Flanagan again in the police vehicle. Defendant eventually also encountered Deem there. Both LEOs were wearing police uniforms with badges, and shouted to Defendant that they were police and commanded him to stop.[11] Importantly, Defendant tossed the backpack aside while LEOs were pursuing him. In the context of all of these facts, the only reasonable conclusion the undersigned can draw is that Defendant abandoned the backpack rather than be caught with it.

To this end, Defendant's assertion that he did not know that the LEOs were legitimate is simply not credible. Defendant would have seen at least one of the LEOs, Flanagan, in a police vehicle. After all, Flanagan testified that he first shouted at Defendant to stop and announced himself as police, from his police vehicle. This was when Flanagan first arrived on the scene at Moonlight Drive. This also was the moment when Defendant began to flee on foot from the front porch of Barker's home – suggesting that he knew he had encountered law enforcement. Further, Flanagan and Deem were wearing police uniforms and shouting commands consistent with those which LEOs might issue. Defendant decried that he could not see the LEOs' badges, but a review of Flanagan's body cam footage shows Defendant fleeing rather than at all trying to affirm the presence of badges. A reasonable conclusion is that Defendant

[11] Flanagan did not activate his emergency lights during the pursuit on Philippi Pike or once he stopped at Moonlight Drive. The reason for his not doing so is unclear from the record.

was attempting to perpetuate a ruse about his disbelief that Flanagan and Deem were actual LEOs.

Finally, the fact that Defendant had permission to be on the property at Moonlight Drive is of no moment. Certainly, the undersigned appreciates that Defendant being permitted to be on the property, residing there at times, and having familiarity with the environs, evinces some expectation of privacy in normal circumstances. However, in the factual scenario here, Defendant was engaged in criminal activity – excessive speeding – moments before LEOs gave chase on the property at Moonlight Drive. Just because Defendant made it to this destination before LEOs caught up with him, and tossed the backpack aside in a location with which he was familiar, does not obviate the fact that LEOs were pursuing him and that he was fleeing from them.

In sum, then, the undersigned **FINDS** that Defendant abandoned the backpack at issue, such that LEOs warrantless search of it was lawful.

IV. CONCLUSION

Accordingly, the undersigned **FINDS** that the Government has met its burden, by a preponderance of the evidence, to show the admissibility of evidence seized without a warrant.[12] Thus, for the reasons set forth herein, the undersigned **RECOMMENDS** that Defendant's Motion to Suppress [ECF No. 28] be **DENIED**.

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[12] To be clear, in reaching this conclusion, the undersigned speaks only to the admissibility of evidence in the context of the motion to suppress. Nothing herein should be construed as a conclusion about the admissibility of evidence at trial as to grounds not raised in the context of the motion to suppress.

Any party shall have fourteen (14) days (filing of objections) from the date of the filing of this Report and Recommendation to file with the Clerk of the Court **specific written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection.** A copy of such objections should also be submitted to the presiding United States District Judge. Objections shall not exceed ten (10) typewritten pages or twenty (20) handwritten pages, including exhibits, unless accompanied by a motion for leave to exceed the page limitations, consistent with LR PL P 12.

Failure to timely file written objections to the Report and Recommendation as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

The Clerk of Court is **DIRECTED** to transmit copies of this Report and Recommendation to counsel of record as provided in the Administrative Procedures for Electronic Case Filing in the United States District Court for the Northern District of West Virginia.

Respectfully submitted July 29, 2022.

[signature]
MICHAEL JOHN ALOI
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

FILED: May 27, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4665
(1:21-cr-00030-TSK-MJA-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

AUSTIN LODGE

Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA	)	**JUDGMENT IN A CRIMINAL CASE**
v.	)	Case Number: 1:21CR30
AUSTIN LODGE	)	USM Number: 82675-509
	)	Hilary L. Godwin
	)	Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) One
□ pleaded nolo contendere to count(s) _____ which was accepted by the court.
□ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	Possession with Intent to Distribute Methamphetamine	12/13/2018	1

□ See additional count(s) on page 2

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

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

☑ Count Two is dismissed on the motion of the United States.

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

October 18, 2023
Date of Imposition of Judgment

[signature]
Signature of Judge

Honorable Thomas S. Kleeh, Chief U.S. District Judge
Name and Title of Judge

October 19, 2023
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 151 months. This term shall run consecutive to the defendant's imprisonment under any previous state or Federal sentence.

☑ The court makes the following recommendations to the Bureau of Prisons:

☑ That the defendant be incarcerated at an FCI or a facility as close to Harrison County, West Virginia as possible;

☑ and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;

☑ including the 500-Hour Residential Drug Abuse Treatment Program;

□ That the defendant be incarcerated at _____ ___ or a facility as close to his/her home in _____ ____ as possible.

□ and at a facility where the defendant can participate in substance abuse treatment, as determined by the Bureau of Prisons;

□ including the 500-Hour Residential Drug Abuse Treatment Program.

☑ The defendant be evaluated and allowed to participate in a mental health treatment program as determined appropriate by the Bureau of Prisons.

☑ That the defendant be allowed to participate in any educational or vocational opportunities while incarcerated, as determined by the Bureau of Prisons.

☑ Pursuant to 42 U.S.C. § 14135A, the defendant shall submit to DNA collection while incarcerated in the Bureau of Prisons, or at the direction of the Probation Officer.

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

□ The defendant shall surrender to the United States Marshal for this district:

□ at ___ □ a.m. □ p.m. on _____;

□ as notified by the United States Marshal.

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

□ before 12:00 pm (noon) _____

□ as notified by the United States Marshal.

□ as notified by the Probation or Pretrial Services Office.

□ on _____, as directed by the United States Marshals Service.

RETURN

I have executed this judgment as follows:

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

_____
United States Marshal

By _____
Deputy United States Marshal

SUPERVISED RELEASE

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

MANDATORY CONDITIONS

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

You must comply with the standard conditions that have been adopted by this court in its November 29, 2016, Standing Order, as well as with any other conditions on the attached page (if applicable).

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You shall not commit another federal, state or local crime.
4. You shall not unlawfully possess a controlled substance. You shall refrain from any unlawful use of a controlled substance. You shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the probation officer.

5. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

6. You must answer truthfully the questions asked by your probation officer.

7. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

9. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you

must notify the probation officer within 72 hours of becoming aware of a change or expected change.

10. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

11. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

12. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

13. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

14. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

15. You shall not purchase, possess or consume any organic or synthetic intoxicants, including bath salts, synthetic cannabinoids or other designer stimulants.

16. You shall not frequent places that sell or distribute synthetic cannabinoids or other designer stimulants.

17. Upon reasonable suspicion by the probation officer, you shall submit your person, property, house, residence, vehicle, papers, computers, or other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

18. You are prohibited from possessing a potentially vicious or dangerous animal or residing with anyone who possesses a potentially vicious or dangerous animal. The probation officer has sole authority to determine what animals are considered to be potentially vicious or dangerous.

19. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a substance abuse treatment program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).
2. You must submit to substance abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with the testing methods.
3. You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).
4. You must not use or possess any controlled substances without a valid prescription. If you do have a valid prescription, you must promptly disclose the prescription information immediately to your supervising probation officer. You must also very carefully follow all instructions that come with any prescription medication dispensed to you, including dosages or how frequently or often you are instructed to take those dosages.
5. You must not use or possess alcohol.
6. If prescribed, you must take all mental health medications as prescribed to you by your treating physician and share that prescription information with your supervising probation officer.

7. You must not go to, or remain at, any place where you know controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100.00	$0.00	$0.00	$0.00	$0.00

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

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

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

The victim's recovery is limited to the amount of their loss and the defendant's liability for restitution ceases if and when the victim receives full restitution.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
TOTALS	$	$	

□ See Statement of Reasons for Victim Information

□ Restitution amount ordered pursuant to plea agreement $

□ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

- □ the interest requirement is waived for the □ fine □ restitution
- □ the interest requirement for the □ fine □ restitution is modified as follows:

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

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

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

SCHEDULE OF PAYMENTS

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

A. ☑ Lump sum payment of $ 100 due immediately, balance due

□ not later than _____, or

☑ in accordance with □ C □ D, □ E, ☑ F, or □ G below; or

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

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

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

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

F. ☑ Special instructions regarding the payment of criminal monetary penalties:

Financial obligations ordered are to be paid while the defendant is incarcerated, and if payment is not completed during incarceration, it is to be completed by the end of the term of supervised release; or

G. □ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall immediately begin making restitution and/or fine payments of $ per month, due on the first of each month. These payments shall be made during incarceration, and if necessary, during supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to Clerk, U. S. District Court, Northern District of West Virginia, P.O. Box 1518, Elkins, WV 26241.

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

□ Joint and Several

Case Number Defendant and Co-Defendant Names (*including defendant number*)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

□ The defendant shall pay the cost of prosecution.

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

□ The defendant shall forfeit the defendant's interest in the following property to the United States:

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