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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.

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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.

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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.

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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—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

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

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 (Continued)

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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.

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.

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.

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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 Aloï for a hearing and the preparation of a report and recommendation. On July 13, 2022, the parties appeared before Magistrate Judge Aloï 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

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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 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

⁴ Law Enforcement Officers.

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.*

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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** circumstances, 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

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”).

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 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).

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

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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 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

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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]

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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

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 (Continued)

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location of the object is among 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

“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)).

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 expectation 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

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.

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 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.

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.

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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

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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

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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

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, (Continued)

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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.”).

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

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.

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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.

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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 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

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

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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 search⁴ 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 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.

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.

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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

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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 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.

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.

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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.

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

O R D E R

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

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

AUSTIN LODGE,

Defendant.

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].

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**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]**

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

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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,

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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

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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-established 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

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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 abandoned." 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.

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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

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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

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**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]**

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

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

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 voluntarily 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].

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**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]**

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



THOMAS S. KLEE, CHIEF JUDGE
NORTHERN DISTRICT OF WEST VIRGINIA

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

AUSTIN LODGE,

Defendant.

**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 3¹, 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

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.

13, 2018. [12:22:16 to 1:22:30]. In his 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 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

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

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 could have arrested Defendant. [1:02:30 to 1:02:40]. The offense amounted

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.

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 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].

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).

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 vehicles⁶ 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 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. [2:55:29 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

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.

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].

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

III. LEGAL ISSUES AND ANALYSIS⁸

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

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.

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 cause⁹ 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 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

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.

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, Defendant 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.

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.

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.

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.

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 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**.

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).

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.

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.

A handwritten signature in black ink, appearing to read 'Michael John Aloi', written over a horizontal line.

MICHAEL JOHN ALOI
UNITED STATES MAGISTRATE JUDGE