THIRTY-EIGHTH ANNUAL
DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 22 – 305

Supreme Court of the United States

THOMAS COLLINS,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

RECORD ON APPEAL

TABLE OF CONTENTS

Indictment.....1

Boerum Gambling Statute.....3

Exhibits.....4

Department of Justice Press Release.....4

FBI Report.....6

Photo of Storage Locker.....9

Obituary of Lucy Washington.....10

Material Witness Deposition (Excerpt).....11

Transcript: Undercover Conversation.....15

Transcript: Grand Jury Minutes (Excerpt).....21

Transcript: Motions to Suppress.....28

Transcript: Trial Testimony of Special Agent Sayed (Excerpt).....42

Transcript: Motion to Admit Grand Jury Testimony.....49

Circuit Court Opinion.....54

Certified Questions.....65

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM

----------X
UNITED STATES OF AMERICA,

- against -

INDICTMENT
21-CR-808
(T. 18, U.S.C. §§ 1955, 1956)

THOMAS COLLINS,

Defendant.

----------X

COUNT ONE
(Illegal Gambling)

The Grand Jury charges:

From at least on or about September 1, 2020, to at least on or about January 1, 2021, in the Eastern District of Boerum, the defendant THOMAS COLLINS did unlawfully and knowingly conduct, finance, manage, supervise, direct and own all or part of an illegal gambling business, said illegal gambling business involving sports betting conducted out of a tavern space rented by the defendant in Boerum City, in violation of the laws of the State of Boerum (Boerum Penal Code § 68.01(1)(b)), in which said business was conducted; which illegal gambling business involved during the period aforesaid, five or more persons who conducted, financed, managed, supervised, directed, or owned all or part thereof; and which gambling business remained in substantially continuous operation for a period in excess of thirty days and had a gross revenue of $2,000 in a single day.

(Title 18, United States Code, Section 1955)

COUNT TWO

(Laundering of Monetary Instruments)

The Grand Jury further charges:

From at least on or about September 1, 2020, to at least on or about January 1, 2021, in the Eastern District of Boerum, the defendant THOMAS COLLINS, knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, to wit, the illegal gambling business charged in Count One of this Indictment, conducted and attempted to conduct such a financial transaction which in fact involved the proceeds of specified unlawful activity as defined in 18 U.S.C. § 1956(c)(7), knowing that the transaction was designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of specified unlawful activity.

(Title 18, United States Code, Section 1956(a)(1)(B)(i))

DATED: February 24, 2021, at Boerum City, Boerum.

A TRUE BILL

Maria Lutz
GRAND JURY FOREPERSON

Matthew Macleod

MATTHEW MACLEOD
UNITED STATES ATTORNEY
EASTERN DISTRICT OF BOERUM

Boerum Code Annotated

Title 12. Boerum Penal Code

Chapter 6. Offenses Against Public Health, Welfare, Safety and Morals

§ 68.01 Gambling.

(1) A person is guilty of gambling if the person:

(a) participates in gambling, including any Internet or online gambling;

(b) knowingly permits gambling to be played, conducted, or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part; or

(c) knowingly allows the use of any video gaming device that is:

(i) in any business establishment or public place; and

(ii) accessible for use by any person within the establishment or public place.

(2) Gambling is a third degree felony.

Department of Justice
U.S. Attorney's Office
Eastern District of Boerum

FOR IMMEDIATE RELEASE
Wednesday, October 5, 2021

Boerum City Resident Convicted of Illegal Gambling and Money Laundering Charges Related to Underground Sports Betting Operation

Thomas Collins and His Partner, Who Fled the Country, Used Restaurant as a Front for Illegal Sports Betting Operation

Matthew Macleod, the United States Attorney for the Eastern District of Boerum, announced today that THOMAS COLLINS was found guilty by a federal jury for his role in conducting an illegal sports betting operation and laundering the monetary proceeds through a well-known Boerum City restaurant.

U.S. Attorney Matthew Macleod said: "Today, Thomas Collins was found guilty of conducting an illegal sports gambling business and knowingly laundering the funds through his restaurant. His actions contributed to the presence of illegal sports gambling operations in Boerum, which often lead to the perpetuation of harmful betting addictions and can, in turn, encourage other types of crimes. Today's conviction reflects the commitment of our office and that of our law enforcement partners to cleanse our streets of illegal gambling businesses and to prosecute those conducting these operations to the fullest extent of the law."

According to allegations in the Indictment, other documents filed in federal court, as well as statements made in public court proceedings:

Over the course of multiple months, members of the FBI Boerum City Task Force were investigating potential illegal gambling activity in the vicinity of Burrow Street in Boerum City, Boerum. During the course of their investigation, they narrowed in on a gambling operation that involved both in-person and online sports betting, occurring at a well-known neighborhood restaurant, Hoyt's Tavern, which is owned by COLLINS. After obtaining a search warrant for a storage unit connected to COLLINS, law enforcement officers recovered a thumb drive and a duffel bag containing over $2 million in cash. Evidence recovered from the thumb drive included sports gambling

records for multiple years. The gambling proceeds were funneled through Hoyt's Tavern and a shell company set up for the purpose of legitimizing the funds.

* * *

COLLINS, 42, of Boerum City, Boerum, was found guilty of one count of conducting an illegal gambling business, in violation of 18 U.S.C. § 1955, which carries a maximum sentence of five years in prison, and one count of money laundering, in violation of 18 U.S.C. § 1956, which carries a maximum sentence of twenty years in prison.

COLLINS is scheduled to be sentenced on December 15, 2021.

The statutory maximum sentences in this case are prescribed by Congress and are provided here for informational purposes only, as any sentencing of the defendant will be determined by the presiding judge.

U.S. Attorney Matthew Macleod praised the exceptional investigative work of the Federal Bureau of Investigation and the Boerum City Police Department. He also thanked the Boerum City District Attorney's Office for its assistance in the investigation.

This case is being handled by the Office's Boerum City Division. Assistant United States Attorney Twyla Twerski is in charge of the prosecution.

Topic(s):

Illegal Gambling; Money Laundering

Component(s):

USAO - Boerum, Eastern

Contact:

Genevieve Godsoe
Director of Media Relations
genevieve.godsoe@usdoj.gov
(290) 123-9876

Press Release Number:

21-312

Updated October 5, 2021

FEDERAL BUREAU OF INVESTIGATION

Date of Transcription: 01/26/2021

At approximately 6:25 PM on January 26, 2021, Special Agent (SA) Omar Sayed and SA Stephan Simonson drove to Thomas Collins' residence in Caplow Complex, located at 45 Caplow Street in Boerum City. The luxury apartment building is two blocks from the restaurant owned by Collins, Hoyt's Tavern on 48 Burrow Street.

Upon arrival, SA Sayed rang the buzzer for Penthouse 6. Collins answered and buzzed the agents into the building. The interior lobby had a reception area and four elevators, two on either side of a hallway that led to a lounge area at the back of the building. While waiting for the elevator, SA Simonson observed a tenant wheeling a large sports equipment case from a door marked "storage."

Collins answered the front door to his apartment on the fifteenth floor. SA Sayed informed him of the FBI investigation into Hoyt's Tavern's excess revenue, illicit gambling operation, and suspected funding of Brooklania's government and military.

SA Sayed asked Collins for permission to look around the apartment. Collins called his lawyer but was unable to get through. Collins then verbally consented to a cursory search of his residence. SA Sayed and SA Simonson conducted a sweep of each room of the large apartment but did not spot any contraband. On a dresser in one of the three bedrooms, SA Simonson observed a small set of keys that included an electronic key fob bearing the logo of the luxury apartment building, interlocking C's over a tall building, for "Caplow Complex." The only other key in the set was a small gold key.

SA Sayed asked Collins if the keys were for his storage unit. Collins stated that he owned a vacation home out of state in Colorado, and that the keys were for his storage unit at that location.

SA Simonson stated he was going to hold onto the keys momentarily. SA Sayed remained in the kitchen with Collins, informed him of the mounting case against him and tried to obtain his cooperation against other suspects in the case.

SA Simonson took the key and key fob, returned to the lobby and asked the man sitting behind the front desk, who identified himself as Wilfred Roberts, if the building had a storage area. Roberts directed SA Simonson to the on-site storage lockers on the ground floor. SA Simonson turned back towards the elevator banks to the area where he had earlier observed a tenant removing sporting equipment. There were two doors on either side of the hallway labeled storage.

SA Simonson tried the key fob on the door marked "Storage for Floors 7-15/PH" and it opened. Inside the large room were rows of large storage lockers with metal slats filled with sporting equipment, bicycles, luggage, boxes, and small furnishings. The last row of lockers was labeled "PH" for penthouse. SA Simonson tested the small gold key in the locks on the first and second lockers to the far left of the row, but it did not fit either one. Above the keyholes to the lockers were small metal ovals with name plates, but only one of the lockers in that row had a name plate inserted. One of the lockers in the last row was papered over with newspaper, partially concealing the contents inside. Through slim gaps in the newspaper, boxes, books, a safe, and a dusty suitcase were visible. SA Simonson tested the key in the lock on the papered unit and it matched. SA Simonson did not turn the key and did not open the door to the storage unit.

SA Sayed and SA Simonson returned the keys to Collins and left his residence without opening the door to the storage unit.

Before exiting the building, SA Simonson asked Roberts how frequently tenants access the on-premises lockers. Roberts stated that use of the lockers varies; some tenants access them a few times a week and others maybe only once a year to collect Christmas decorations.

Roberts said he did not recall how often Collins accesses the storage room. There is a ceiling camera that would catch people walking down the hallway to and from the storage rooms, but it would not show individuals entering or exiting the room.

Investigation on January 26, 2021 at Boerum City, Boerum

File # 250-JL-35712-BJW-51-THOMAS COLLINS Date dictated January 26, 2021

by SA Omar Sayed and SA Stephan Simonson

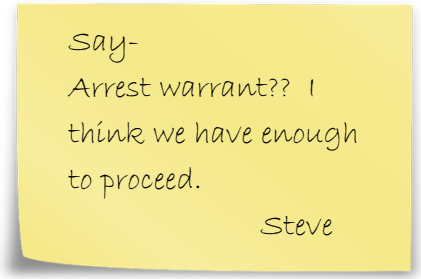
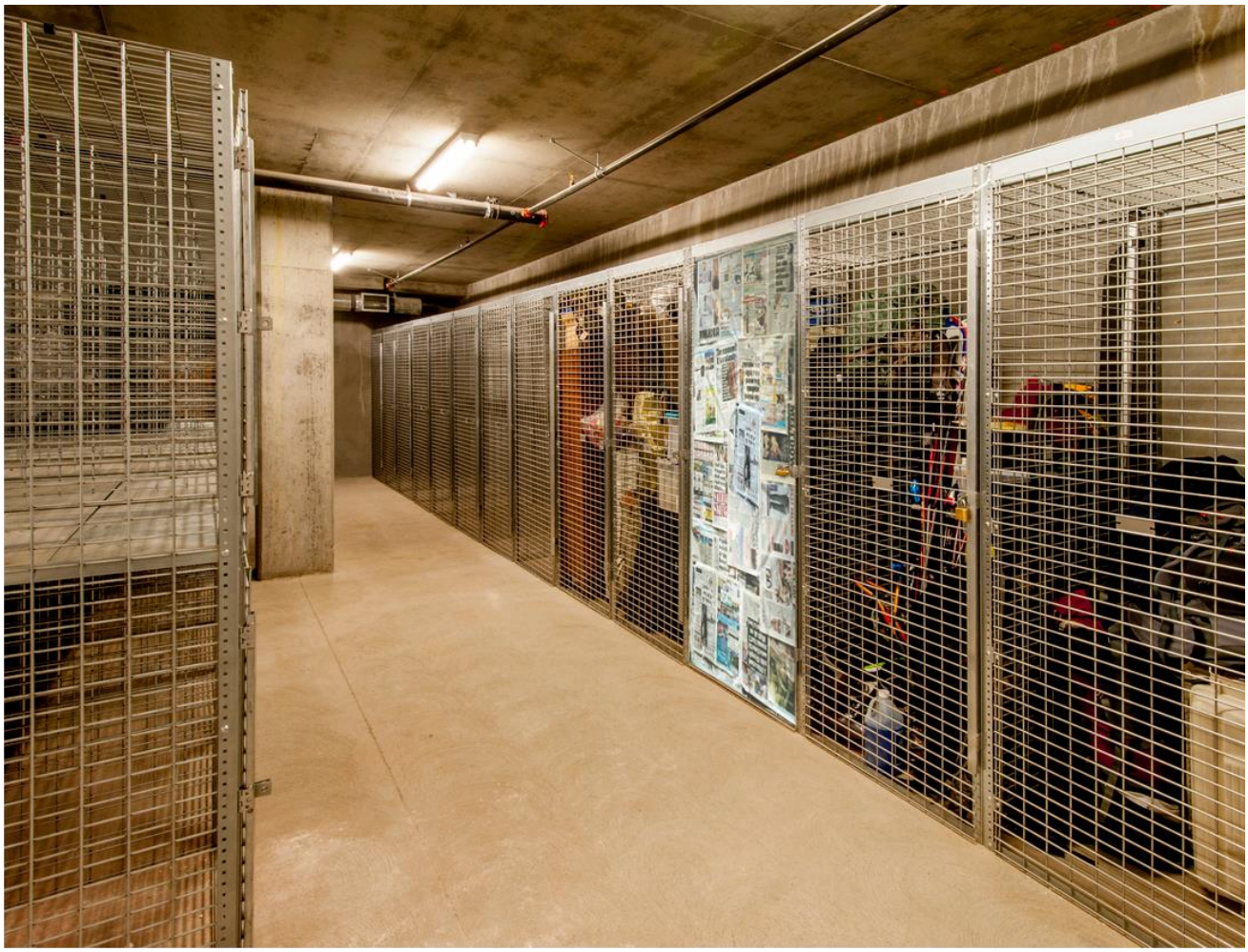


Photo of Storage Locker on the Ground Floor of Thomas Collins' Apartment Building

Source:	Caplow Complex
Description:	Photograph taken by Caplow Complex management in 2020



OBITUARY

June 24, 2021 – Boerum City, Boerum

Lucy Alexander Washington, 32, passed away on June 21, 2021, after sustaining injuries in a bicycle accident. Born in Brooklania, Mrs. Washington immigrated to Boerum City with her parents and younger brother when she was eight years old. She worked at local restaurant Hoyt's Tavern and was enrolled in undergraduate classes at Boerum State University as a part time student. Mrs. Washington dreamt of becoming a psychologist. She loved ice skating, art, and working with people.

Mrs. Washington is survived by her husband (Mark Paul Washington), mother (Alena Alexander), father (Andrei Alexander), and brother (Nicholas Alexander). Visitation services will be on June 25, 2021, from 2:00-4:00 p.m., at the Livingston Chapel, 123 Main Road, Boerum City, Boerum 34324. Funeral services will begin at 4:00 p.m.

Friends wishing to make a memorial contribution can do so to the nonprofit Bike Better Boerum, which works to improve the safety of the city's bicycle lanes.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA,

-against- 21-CR-808 (CC)

THOMAS COLLINS,

Defendant.
----------X

UNSEALED DEPOSITION OF PAVEL HOAG-FORDJOUR, a Material Witness pursuant to 18 U.S.C. § 3144, taken on behalf of the United States of America at 12:54 P.M., on January 8, 2021, at 82 Kanwar Street, Boerum City, Boerum 34322, pursuant to Notice, before Rebecca Ressler, a Court Reporter and Notary Public of the State of Boerum.

APPEARANCES:

For the United States of America: Twyla Twerski, AUSA
Office of the U.S. Attorney
Eastern District of Boerum

[Witness is sworn in.]

EXAMINATION BY AUSA TWYLA TWERSKI

Q: Can you please state your full name for the record?

A: Pavel Hoag-Fordjour.

Q: Where do you currently reside?

A: I live in Brooklania.

Q: Can you tell us what are you doing in Boerum?

A: I came here on business.

Q: When the FBI picked you up on January 5, what were you doing?

A: I was on my way to the airport to catch a flight back home to Brooklania.

*** * *[Non-relevant testimony omitted]* * ***

Q: Have you ever received wire payments from a company called Gourmet Grocers?

A: Yes, I have.

Q: More than once?

A: Yes.

Q: How often do you receive these payments from Gourmet Grocers?

A: It depends, but usually one payment every couple of months.

Q: Approximately how much money do you receive in each payment?

A: That also depends. But I'd say, on average, about ten thousand dollars each time.

Q: How long ago did these payments start?

A: A little over five years ago.

Q: When was the most recent payment?

A: I’m not sure of the exact date ... a few weeks ago.

Q: And what do you do with this money?

A: The money is combined with other donations which are then used to fund governmental efforts.

Q: Which government, specifically, does this money go towards?

A: The funds are used to support the current government and its military forces in Brooklania.

Q: Do you know Roxanne Roulette, also known as Roxy Roulette?

A: Yes.

Q: Do you know who Thomas Collins is?

A: Yes.

Q: How do you know Ms. Roulette and Mr. Collins?

A: They are associated with Gourmet Grocers.

Q: So you know Roxanne Roulette and Thomas Collins because they are associated with the company, Gourmet Grocers. You receive regular payments from Gourmet Grocers that you then use to support Brooklania’s current governmental regime. Is that all accurate?

A: Yes.

Q: Do you know if either Ms. Roulette or Mr. Collins is the individual who actually sends the payments that you have been receiving?

A: No, I don’t know the details of their operations. I just know they work together at Gourmet Grocers and someone sends me the money.

Q: Thank you.

*** * *[Non-relevant testimony omitted]* * ***

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA,

-against- 21-CR-808 (CC)

THOMAS COLLINS,

Defendant.
----------X

TRANSCRIPT OF AUDIO RECORDING OF WIRED CONVERSATION BETWEEN FBI SPECIAL AGENT RONALD RISTROPH AND THOMAS COLLINS

Audio Recording	Date:	January 27, 2021
	Time:	1:04 P.M. B.S.T.
	Location:	Hoyt's Tavern 48 Burrow Street Boerum City, Boerum 34322
Transcription By:		Kayla Porter Boerum Legal Transcription 2711 Cactus Street, Suite B Boerum City, Boerum 34328 (290)515-7590

AGENT: Hi there, could I please have a gin and soda?

COLLINS: Sure thing – was just about to pour myself another one of those actually so I'll make it two.

AGENT: I like the way you operate. How much will that be?

COLLINS: Nine dollars please.

AGENT: Great, here's ten. Keep the change.

COLLINS: Appreciate it. And here you go – cheers.

AGENT: Cheers. By the way, this is quite a cool spot.

COLLINS: Appreciate it, buddy, we've put a lot of work into it so that's always nice to hear.

AGENT: Have you been bartending here for a while? Seems like there's been a good-sized crowd around here recently.

COLLINS: I own the joint actually, so have been leading the charge since we opened a few years back. Business was pretty slow at first [unintelligible]... wasn't sure we were going to make it ... but it's been picking up.

AGENT: Oh, are you Tom? I'm one of Roxy's associates, she mentioned you two are good friends.

COLLINS: Yes sir, I'm Tom. Sorry ... I didn't catch your name?

AGENT: Brett Thompson, nice to meet you. Roxy and I go way back – have been friends since childhood back in Brooklania and now work together on a few different gigs.

COLLINS: Oh yeah ... yeah, now that you say that I have seen you around here before. Always nice to meet a friend of hers

(inaudible) ... let’s do another round on me. Gotta treat Roxy’s friends right!

AGENT: Can’t say no to that. But yeah, Roxy and I have stayed close over the years, nice to have a piece of home over here in the States. How do the two of you know each other?

COLLINS: Yeah, good to have people around that you trust. Roxy and I are old friends from around the neighborhood.

AGENT: True, Roxy has always been big on trust. I’m sure you're the same way if you two are partnered up. How did you guys get into business together anyways?

COLLINS: Right. I don’t know, man ... the business just sort of happened. A few years back we realized we could help each other out, if you know what I mean, and here we are now with everything in full swing.

AGENT: I know what you mean ... well it seems like it’s working out really well with everything you two have going on.

COLLINS: For sure ... Roxy has been great for business. At first I wasn’t really sure about it all, you know, I don’t usually approve of that kind of stuff ... but then I saw how much business it drove in. Can’t deny it really turned things around here.

AGENT: I get it, man, sometimes you just have to go with it. I imagine you are also friends with the other Brooklanian guys from the neighborhood?

COLLINS: Yup ... the whole crew. We get together every month, talk shop, you know how it goes. Though, not sure when we'll do that again since they've been trickling back to the motherland. Did you hear Piatro, Viktar and Fedor caught flights back there?

AGENT: I spoke with Fedor briefly and he mentioned getting a flight, but didn't know about other guys. What's going on with them? Our conversation the other day got cut short.

COLLINS: They got all worked up over this investigation thing. You heard about those target letters the feds sent out, right? And then yesterday... these guys, a whole crew of them, just showed up at my apartment and started poking around and asking me questions, trying to get me to turn on Roxy. They're crazy if they think that sort of thing is going to work with anyone in our circle, a waste of their time.

AGENT: Oh boy (unintelligible) ... I heard about the letters, but didn't know they checked out your place. Did everything go OK with that?

COLLINS: Yeah, I mean, was also a waste of their time ... they aren't going to find what they're looking for in my apartment.

AGENT: Right ... Roxy and I were actually supposed to meet today to talk about her other business that I've been helping with, you know the one we are your vendor for.

COLLINS: Oh, you work for Gourmet Grocers too? I didn't realize ... hard to keep up with everything these days.

AGENT: Yeah I do, and I know I'm not supposed to come around here too often, since I work there, but I haven't heard from her so thought I'd just swing by and see if I could catch her. Do you know if she'll be around today?

COLLINS: You won't find her around here, she shot me a text that she won't be available for some time. Not clear when she'll be back.

AGENT: Got it, thanks for the heads up.

COLLINS: Has there been anything new on your end with this whole investigation? I mean, I'm not concerned ... just figuring out where they've got their eyes on at this point.

AGENT: I haven't heard much. I think that's partially what Roxy wanted to talk about today, guess we'll see once I get in touch with her. How involved are you with the Gourmet Grocers side of things by the way?

COLLINS: I've been handling the finances between the two for a while now ... that reminds me — have my payments been going through OK?

AGENT: Well it's nice to put a face to the person on the other side of all those transactions. All seems good with your payments though. Do you take care of sending the extra funds back to Pavel in Brooklania too?

COLLINS: I do ... never totally sure with those overseas payments though, you know, if they go through properly or not.

AGENT: I know what you mean, but as far as I can tell everything seems to be all set. Oh, sorry I need to take this call. Great meeting you!

COLLINS: Hold up, let’s do another shot before you head out ... to Roxy!

AGENT: Oh no no, thank you. I have to drive in a bit. Appreciate the hospitality though. See you around soon.

COLLINS: Alright – more for me then. Cheers!

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA,

-against- 21-CR-808

THOMAS COLLINS,

Defendant.
----------X

TRANSCRIPT OF GRAND JURY MINUTES

DATE: February 22, 2021

For the United States of America: Twyla Twerski, AUSA
Office of the U.S. Attorney
Eastern District of Boerum

Court Reporter: Rowan McPhail
Eastern District of Boerum
Grand Jury Court Reporter

CLERK: This is United States against Thomas Collins. Case number 21-CR-808. Twyla Twerski appears for the Government.

TWERSKI: The Government calls Lucy Washington as a witness.

[Witness is sworn in.]

TWERSKI: Can you please state your name for the record.

WASHINGTON: My name is Lucy Washington.

TWERSKI: Are you testifying here with an offer of immunity?

WASHINGTON: No, I am not.

TWERSKI: What is your occupation?

WASHINGTON: I am a bartender at Hoyt's Tavern.

TWERSKI: Who employed you as a bartender?

WASHINGTON: Tom Collins is my boss, he owns the restaurant.

TWERSKI: Are you aware of any other businesses or operations that are connected to Hoyt's Tavern?

WASHINGTON: Yes, there is a sports betting operation run in the basement of the restaurant.

TWERSKI: Are you involved in the sports betting operation?

WASHINGTON: Yes, I am.

TWERSKI: What is your involvement with the sports gambling ring?

WASHINGTON: This is Roxy Roulette's business. I am Roxy's right-hand woman. Her chief of staff, you could say. I manage a lot of the finances, all of our bookies report to me and the computer and tech people too. I do my best to bring in new business.

TWERSKI: How did you get involved with Roxy Roulette in the first place?

WASHINGTON: Roxy and I go way back. We're both from Brooklania, and we grew up together here in Boerum. One day, Roxy told me her idea for the sports betting operation and how it was a way for us to make good money. She needed someone to help run her numbers. I've always been good at numbers, so she wanted to team up. I helped expand the online side of the business. She was ambitious and couldn't manage an operation of that scale on her own.

TWERSKI: It sounds like you all planned for it to be a lucrative operation. Why then did you seek a job bartending at Hoyt's Tavern?

WASHINGTON: Roxy knew Tom from the neighborhood and knew that Hoyt's would be a great spot for our operation. Hoyt's Tavern is a neighborhood spot with lots of regulars, so it wouldn't be strange to have people coming through all the time. But we were worried because Tom Collins is a talker, I mean, he runs a bar, sort of comes with the territory, right? But we wanted to keep everything on the down low, so we thought it would be smart if I became a bartender so that I could keep an eye on him.

TWERSKI: So you're a bartender by day and manager of the gambling operation by night?

WASHINGTON: I suppose you could say that.

TWERSKI: Is it fair to say that you report to Mr. Collins about your dealings with the betting operation, as well?

WASHINGTON: No, anything that had to do with the betting operation I reported to Roxy. I just tend the bar for Tom.

TWERSKI: But you mentioned the gambling was taking place in Mr. Collins' restaurant?

WASHINGTON: Yes, it was. The operations were run through the restaurant. But I only ever worked the bar for Tom. Roxy was always very explicit about not telling Tom what was going on. I don't think she trusted him to keep his mouth shut.

TWERSKI: When you managed the gambling ring at Hoyt's was Mr. Collins ever there at the restaurant?

WASHINGTON: Well, he was pretty much at the bar all the time. He practically lived there.

TWERSKI: Did you ever speak directly with Mr. Collins about your role in the gambling operation?

WASHINGTON: No, we'd mostly discuss things about the restaurant, but we'd also talk about our lives - like my husband or going back to school. I was always encouraging him to date. But we never spoke about the sports betting.

TWERSKI: Did Mr. Collins know about your second job or your close relationship with Ms. Roulette?

WASHINGTON: I never discussed it with him.

TWERSKI: What do you know about the relationship between Mr. Collins and Ms. Roulette?

WASHINGTON: They are old neighborhood friends.

TWERSKI: Do you know that they work together on dealings related to the gambling ring?

WASHINGTON: Not that I'm aware of.

TWERSKI: Did you ever speak to Mr. Collins about what was going on in the bar basement?

WASHINGTON: No, we never spoke about it. It was obvious to me that he didn't know what was happening down there. Roxy was the mastermind behind the operation, and she took advantage of an old friend in order to use the space downstairs. Mr. Collins was an honorable and fair boss. At one point, Roxy's dealings started to attract really sketchy and dangerous clientele to the restaurant. Mr. Collins kicked them out and told them never to come back to Hoyt's.

TWERSKI: Why did Mr. Collins let Ms. Roulette continue using the basement even after it was bad for his business?

WASHINGTON: They're old friends. There is a lot of loyalty there. And at the end of the day, more people were coming through the restaurant overall. But I swear, Mr. Collins never knew about the operation. I hardly saw the two of them interact when I was at Hoyt's.

TWERSKI: What do you know about the vendor Gourmet Grocers?

WASHINGTON: They supply all of Hoyt's specialty items, like the nicer wines, truffle mushrooms ... things like that.

TWERKSI: Do you know about Roxy's involvement in Gourmet Grocers?

WASHINGTON: Well ... Roxy owns Gourmet Grocers, too. Although they do supply Hoyt's with specialty items, Roxy and I also use Gourmet Grocers as a way to distribute funds made from the gambling operation to anyone we need to pay, like ourselves, Pavel in Brooklania, and even to Tom for renting out his basement.

TWERSKI: So, you are aware of how Mr. Collins launders money through Gourmet Grocers?

WASHINGTON: No, no, I wouldn't say that. Mr. Collins is an honest guy. He would never do something like that. Like I said, he is just too nice to tell his neighborhood friend to knock it off. Loyalty means a lot to him.

TWERSKI: You really never ...

WASHINGTON: I don't know what you're talking about with this laundering business. I personally never spoke with him about any of the operation finances. All he does is buy his nicer quality food items from Gourmet Grocers. Roxy and I make sure that the money gets to where it needs to go. I don't even think he realizes that his rent checks are coming from Gourmet Grocers.

TWERSKI: Ms. Washington, do you remember that you gave an oath not to lie in front of the Grand Jury?

WASHINGTON: Yes, I do.

TWERSKI: Are you aware that breaking that oath is considered perjury, which is a violation of federal law?

WASHINGTON: I didn't know that it was a crime, but if you're trying to accuse me of lying, I'm telling you that I'm not.

TWERSKI: It is important you tell us the truth about Mr. Collins' and Ms. Roulette's business dealings. So I am going to ask you again. Did Mr. Collins know about the gambling ring or willingly participate in the ring in any way?

WASHINGTON: No. Not to my knowledge.

TWERSKI: No further questions.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA,

-against- 21-CR-808 (CC)

THOMAS COLLINS,

Defendant.
----------X

TRANSCRIPT OF HEARING ON MOTIONS TO SUPPRESS

BEFORE: THE HONORABLE Cooper Cahill

DATE: September 20, 2021

APPEARANCES:

For the United States of America: Twyla Twerski, AUSA
Office of the U.S. Attorney
Eastern District of Boerum

For Defendant Thomas Collins: Margaret Henry, Esq.

Court Reporter: Maya Araiza
Eastern District of Boerum
Court Reporter Services

COURT: All right, Counselors. This is the matter of United States against Thomas Collins, case number 21-CR-808. Is everyone ready to proceed?

HENRY: Yes, Your Honor, ready for Defendant.

TWERSKI: Ready for the Government, Your Honor.

COURT: Defendant has filed two motions to suppress, raising two issues, which are whether testing a key to a storage unit constituted a search under the Fourth Amendment and whether the Sixth Amendment right to counsel attached during the defendant's conversation with the undercover agent. Ms. Henry, whenever you're ready, let's discuss the Fourth Amendment issue first.

HENRY: Your Honor, Special Agent Stephan Simonson violated Mr. Collins' Fourth Amendment rights when he inserted the key into the lock of the storage unit to confirm it belonged to Mr. Collins. The evidence obtained must be suppressed. *United States v. Bain* lays out the modern analysis of the search doctrine, and at issue today is *Bain*'s application to individual storage lockers on the premises of the apartment building where Mr. Collins lives. Since this is a novel issue in the Fourteenth Circuit, we urge this Court to follow the approach used by the First, Seventh, and Ninth Circuits and hold that testing a key is an unreasonable search under the Fourth Amendment.

COURT: Ms. Twerski, your response?

TWERSKI: Your Honor, it is the Government's position that Agent Simonson testing a key in Mr. Collins' storage unit did not constitute a search under the Fourth Amendment. We urge the Court to follow the approach employed by the Fourth and Sixth Circuits. It was not a search because Agent Simonson merely identified the storage unit as likely belonging to Mr. Collins. He did not search the unit until after getting a warrant, and inserting the key was a minimal intrusion on Mr. Collins' rights.

COURT: Ms. Henry, tell me why Mr. Collins had an actual expectation of privacy in his storage locker, and why should we find that expectation reasonable?

HENRY: Your Honor, under *Katz* and its progeny, the search violated Mr. Collins' reasonable expectation of privacy in the curtilage of his private residence. The storage locker was inside Mr. Collins' apartment building behind a locked front door, another locked door to the room with the storage units, and with an individual lock on the unit itself. Mr. Collins also made an additional effort to conceal the contents of his unit by papering over the metal slats of the storage locker. Mr. Collins' actual expectation of privacy in his storage unit is an expectation that society would consider reasonable — it is reasonable to lock up your personal belongings and expect that they remain locked up.

COURT: OK. Ms. Twerski, did Mr. Collins have a reasonable expectation of privacy here?

TWERSKI: Your Honor, it is our position that Special Agent Simonson testing the key in the storage unit did not constitute a search under the Fourth Amendment because there was no reasonable expectation of privacy in the storage room. The storage room is a common area because just about every resident in the building has access to it. Additionally, the contents of each unit is in plain view because of the metal slats. Although Mr. Collins covered his up with newspaper, this does not in any way create a reasonable expectation of privacy because newspaper can be easily torn to then reveal what is inside the storage unit.

COURT: Let's turn to the FBI agent testing the key in the lock on the Defendant's unit. Was this permissible?

HENRY: Even if the Court finds that Mr. Collins did not have a reasonable expectation of privacy in his storage unit, under the relevant case law, the insertion of the key into the lock of Mr. Collins' storage unit constituted a trespass into his home. The information obtained from that unlicensed intrusion — Mr. Collins' ownership or tenancy of the storage locker — was acquired in violation of the Fourth Amendment. Therefore, the fruits of that illegal search, the thumb drive and duffel bag of cash should be suppressed.

TWERSKI: Your Honor, the case law tells us that the storage unit must be within the curtilage of the home. To determine whether it is within the curtilage of the home, the four *Dunn* factors are

applied. Here, though the storage unit is enclosed within the apartment building, the other three factors point to it being beyond the curtilage. The storage unit is not even on the same floor as Mr. Collins' apartment, there is no evidence to show that he uses the storage unit regularly, and he made a weak attempt to further protect the unit with newspaper which can be easily removed.

COURT: Are there any precedents that are factually similar to Mr. Collins' case?

TWERSKI: Yes, the facts before us are more similar to those in *United States v. Lyons* than to *Bain.* In *Lyons*, the First Circuit found that testing a key in a storage unit was not a search because it was just a way for officers to determine whether the defendant had access to that unit. The Court further explained that the storage container padlock was considered an "effect" under the Fourth Amendment, and "effects" get much less protection than residences. Here, the lock in question also goes to a storage unit that was not directly inside the home.

HENRY: Your Honor, Mr. Collins' home is in the apartment building and so is the storage locker. It's not a separate commercial unit like it was in *Lyons.*

COURT: And what do the Fourth and Sixth Circuits have to say?

TWERSKI: The Fourth Circuit decision in *United States v. Moses* held that testing a key in the apartment door did not constitute

the beginning of a search because no search of the apartment occurred. A Sixth Circuit case held that testing a key in a car was a minimal intrusion justified by a founded suspicion and by the legitimate crime investigation and no search occurred because the officer "merely identified it as belonging to the defendant." Similarly, here Special Agent Simonson was conducting a legitimate investigation into Mr. Collins. He simply identified the storage unit to be Mr. Collins' and didn't look inside until he got a warrant.

COURT: Ms. Henry, do you have anything to add before I make my decision?

HENRY: Your Honor, this case is not similar to *Lyons.* There, the storage unit was not within the curtilage of the home because it was a separate and independent storage facility. Here, the storage unit is fully inside the apartment building, and we have already shown that it falls within the curtilage and is protected under the Fourth Amendment. Additionally, opposing counsel relies on a Sixth Circuit case, but that case concerns testing a key in a car. That has nothing to do with a home. The Court should follow *Bain* because it is the most analogous case.

COURT: Thank you. Ms. Twerski, if this Court finds that there was an unreasonable search, will you be arguing any exceptions?

TWERSKI: No, the Government will not be arguing the good faith exception to an unreasonable search.

HENRY: Your Honor, I would like to be heard briefly about the other Circuits in favor of finding that testing a key is a search.

COURT: Yes, go ahead.

HENRY: In another case, the court held that testing a key fob to enter an apartment building lobby and testing a mailbox key constituted searches based on their precedent. Similarly, here the Agents tested the fob on the storage room and then tested the storage unit key. Additionally, even if the Court were to find that Sixth Circuit case applied here, a Ninth Circuit case demonstrates that testing keys on car doors can still constitute a search. There, the Court held that testing a key in a car door was a search, even if it was for the sole purpose of figuring out who owned the car. The Court relied on the Supreme Court case *United States v. Jones,* where the Court held the outside of the car is a constitutionally protected area.

COURT: Thank you counselors, I have heard enough on this issue to make my decision. I find that Mr. Collins' privacy interest in the contents of his storage locker, or rather, the keyhole to the lock of his storage locker is outweighed by law enforcement's interest to ensure justice is served and the public is protected. I am adopting the reasoning of those Circuits that endorse the finding that testing a key in a lock is a minimal intrusion, and there is no reasonable expectation of privacy for a lock. Given the facts of the case at hand, this approach allows for reasonable

flexibility on the part of Government actors, while still allowing individuals to retain reasonable expectations of privacy. Therefore, the motion to suppress the contents of the locker is denied.

* * *

COURT: Now I would like to move on to the Sixth Amendment issue regarding the motion by Defendant to suppress certain statements made by the Defendant to the FBI undercover agent, and all evidence derived therefrom. Ms. Henry?

HENRY: On January 27, 2021, Mr. Collins was working at his bar and restaurant Hoyt's Tavern in Boerum City when a man approached him. He told my client his name was Brett Thompson, and that he was an associate of Roxanne Roulette, the individual to whom my client rented out the basement of his restaurant and bar.

Brett Thompson, who was, in fact, FBI undercover agent Ronald Ristroph, began eliciting incriminating statements from my client. He pushed my client to provide information about the alleged illegal gambling and laundering offenses charged in the indictment. Mr. Collins did, in fact, make statements that allegedly incriminated himself in the scheme.

Your Honor, the actions by the Government violated my client's Sixth Amendment right to counsel. While my client had not yet been formally charged at the time of this interrogation, the FBI and U.S. Attorney's office engaged in a course of conduct that clearly

demonstrates that adversarial proceedings, for all intents and purposes, had begun. At the time the undercover interrogation occurred, the Government had: sent target letters to my client and others; filed a material witness warrant for an individual involved in this alleged scheme; taken a material witness deposition of this individual; arrested and charged Roxanne Roulette, a key player in this alleged scheme; and searched my client's home and storage locker.

This suppression hearing is not just about what was said during the wiretapped interrogation. Rather, it is about the events leading up to the interrogation that clearly demonstrate the Government had crossed the line from factfinder to adversary. Like Roxanne Roulette, my client should have been formally charged and shielded by the Sixth Amendment right to counsel. The fact that he was not afforded counsel violates the Constitution. Any statements made during that conversation as well as any evidence derived therefrom must be suppressed.

COURT: My understanding is that the Sixth Amendment right to counsel does not go into effect until a suspect becomes an accused, that is, until charges are filed. Counselor, you admit that at the time of this undercover conversation, formal charges had not yet been filed. If that's the case, on what basis could Mr. Collins' Sixth Amendment right to counsel have attached? Can he really be considered an accused?

HENRY: Yes, my client can and should be considered an accused at the time of this undercover interrogation. In *Kirby v. Illinois*, the Supreme Court held that the right to counsel attaches at the initiation of adversary judicial proceedings, and the Court listed several examples of what that may look like, including formal charges or an indictment. The Court did not say that one of these events must occur for the adversary proceedings to officially begin. Rather, it said that the initiation of adversary proceedings occurs when the Government has committed itself to prosecute, and the adverse positions of both the defendant and prosecutor have solidified.

COURT: Counselor, you are saying that the circumstances listed in *Kirby* do not define when adversary judicial proceedings begin but are merely examples. Does the case law support this?

HENRY: Your Honor, the circuit courts do not agree on whether *Kirby* created a bright line rule regarding attachment. Several circuits have found that the Supreme Court did not create a bright line rule, and that the right to counsel may attach prior to the filing of formal charges.

For example, the First Circuit has noted the possibility that the Sixth Amendment right to counsel may attach in instances outside those identified in *Kirby* whenever the Government has crossed the line from factfinder to adversary. And decisions from the Third Circuit also support our position.

COURT: What about the courts on the other side of the split?

HENRY: Your Honor, some circuits deem *Kirby* to have established a bright line rule. But even within that camp, courts have expressed unease with the results such a rule produces. For example, in *United States v. Hayes*, the Ninth Circuit held that the right to counsel had not attached at the time of a pre-indictment taped interrogation, even though the prosecution had already taken several adversarial actions against the defendant in that case. The court applied a bright line rule but stated that it felt "queasy" about the result.

Special Agent Ristroph stepped into Mr. Collins' bar on the afternoon of January 27, 2021. By this time the cumulative actions of the Government clearly indicate it had committed itself to prosecuting my client. Yet the Government still sent an undercover agent to deliberately elicit incriminating statements from my client, something the Government cannot do after charges have been filed.

The Government was well aware that its conduct was not above board. The copy of the FBI 302 we received from AUSA Twerski included a photocopied Post-it note written by Special Agent Simonson when he drafted the report on January 26. The note indicates his belief that Mr. Collins should have been arrested at this point. This Post-it note may have been mistakenly produced to

us, but it shows that the assigned FBI agents harbored doubts as to whether their delay in arresting Mr. Collins was appropriate.

We are asking this Court to follow the circuits finding that *Kirby* did not create a bright line rule – the circuits that find in favor of fairness. A fair assessment is that at the time of this interrogation by the undercover agent, Mr. Collins was more than a target of the investigation: he was an accused who deserved the right to have counsel physically present during any interrogation. For these reasons I ask this Court to grant Defendant's motion to suppress the statements made by Mr. Collins to Special Agent Ristroph.

COURT: Thank you, Ms. Henry. I will now hear from the Government.

TWERSKI: Your Honor. In *Kirby,* the Supreme Court created a bright line rule establishing that the Sixth Amendment right to counsel does not attach prior to the initiation of formal criminal proceedings. Here, at the time of the conversation between Agent Ristroph and the Defendant, there had been no formal charge, preliminary hearing, arraignment, or indictment. Therefore, under well-established precedent, the Defendant's Sixth Amendment right to counsel had not attached, and his incriminating statements are admissible.

This position is supported by numerous circuits, and this Court should not disturb those precedents today. For example, the

D.C. Circuit has found that the right to counsel does not attach during a pre-indictment taping of a defendant's conversations. And similarly, the Fifth Circuit has held that the Government's tape recording of a conversation between the defendant and his former attorney did not violate the defendant's right to counsel where the defendant had not yet been indicted.

COURT: Counselor. In either of those cases, had the Government engaged in similar behavior as in this case? Had the Government taken material witness depositions or charged potential co-conspirators?

TWERSKI: No, Your Honor. But even in the *Hayes* case cited by defense counsel, where the Government engaged in actions very similar to this case, the Ninth Circuit did not suppress the evidence because it acknowledged the Supreme Court created a bright line rule in *Kirby*.

COURT: Notwithstanding *Hayes*, how does the Government justify its behavior in this case? Special Agent Simonson clearly seemed to believe that the FBI had enough evidence to arrest the Defendant as of January 26, before the undercover operation. Why wasn't Mr. Collins arrested and charged like Ms. Roulette?

TWERSKI: Your Honor, the fact is that Mr. Collins and Ms. Roulette each had a different involvement in this scheme, and so the evidence against each of them is distinct. Special Agent Simonson's offhand Post-it comment to his colleague should not be

given weight by the Court. Ultimately it is neither his nor Special Agent Sayed's decision whether and when to arrest and charge a suspect.

The undercover conversation with Mr. Collins was not an attempt to evade the Constitution, it was simply another step in the Government's investigation process. The Government should not be punished for its thoroughness in investigating Mr. Collins prior to filing formal charges. This Court should side with established Supreme Court and appellate court precedents and hold that the right to counsel did not attach here.

COURT: Anything further from the defense?

HENRY: No, Your Honor.

COURT: I am ready to make a decision. I find that the undercover conversation did not violate Mr. Collins' right to counsel under the Sixth Amendment. But let me be clear. This Court does not agree with nor condone the Government's behavior in this case. This ruling reflects what appears to be established precedent creating a bright line rule for attachment, but it is not delivered without discomfort. This Court is aware that a paper thin line separated this Defendant from his Sixth Amendment right to counsel. But, this Court is bound to follow *Kirby* until clearer guidance is handed down by the Supreme Court. Therefore, the motion to suppress the Defendant's statements to Special Agent Ristroph is denied.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA,

-against- 21-CR-808 (CC)

THOMAS COLLINS,

Defendant.
----------X

TRIAL TRANSCRIPT (EXCERPT)

BEFORE: THE HONORABLE Cooper Cahill

DATE: September 29, 2021

For the United States of America: Twyla Twerski, AUSA
Office of the U.S. Attorney
Eastern District of Boerum

For Defendant Thomas Collins: Margaret Henry, Esq.

Court Reporter: Maya Araiza
Eastern District of Boerum
Court Reporter Services

CLERK: This is United States against Thomas Collins, case number 21-CR-808. Twyla Twerski appears for the Government. Margaret Henry appears for the defendant, Thomas Collins.

COURT: Today, we resume the Government's case against Thomas Collins. Counselor Twerski?

TWERSKI: The Government calls our next witness, Special Agent Omar Sayed. May we proceed?

COURT: You may.

[Witness is sworn in.]

TWERSKI: Can you please state your name for the record?

SAYED: My name is Omar Sayed.

TWERSKI: What do you do for work?

SAYED: I'm a Special Agent with the FBI.

TWERSKI: How long have you worked for the FBI?

SAYED: 15 years.

TWERSKI: Why are you here today?

SAYED: I am the lead investigator in the case against the defendant, Thomas Collins.

TWERSKI: How long have you been a part of the investigation against Mr. Collins?

SAYED: I have been the lead on this investigation for about a year now.

TWERSKI: Why did you start investigating Mr. Collins?

SAYED: The IRS tipped us off around September 2020 about a potential illegal operation happening at Collins' business because its income was excessive for the type of business.

TWERSKI: What kind of business does Mr. Collins have?

SAYED: He owns a restaurant called Hoyt's Tavern. It's a local joint in the middle of the Brooklanian community in Boerum City.

TWERSKI: Once you received the tip, what did you do next?

SAYED: I spent some time observing the restaurant. First, I noticed that something was going on because a woman named Roxanne Roulette appeared to have rented out the basement of the restaurant. After further investigation I learned that an illegal sports gambling operation was being run out of the basement and that Collins and Roulette were in charge.

TWERSKI: Did you find further information about the operation?

SAYED: My team and I reviewed materials showing that Gourmet Grocers was supposedly the restaurant's largest vendor. We believed that Hoyt's Tavern and the vendor were being used to launder the money made from illegal gambling.

TWERSKI: Did you continue to look into Gourmet Grocers?

SAYED: Yes. We learned that Gourmet Grocers was a shell company set up by Ms. Roulette. We traced money that flowed to Gourmet Grocers to the sports betting operation, large payments to Collins and Roulette, and overseas wires to a man named Pavel Hoag-Fordjour in Brooklania.

TWERSKI: Can you tell us more about Pavel Hoag-Fordjour?

SAYED: Hoag-Fordjour is an influential power broker in Brooklania who was using this money to fund Brooklania's military and to help Brooklania's government, which is an authoritarian regime, stay in power. Last December, we received an alert that he was in Boerum City. While he was on his way to the Boerum airport on January 5, we stopped him and served a material witness warrant.

TWERSKI: Is Mr. Hoag-Fordjour still in the United States?

SAYED: No, he's back in Brooklania. We conducted a material witness deposition of Mr. Hoag-Fordjour. We held him as long as we could but had to let him go.

TWERSKI: How did the investigation continue?

SAYED: We noticed that some of the restaurant's employees who also worked as bookies had started to return to Brooklania, so we knew we had to move our investigation along quickly.

I sent a letter to Mr. Collins notifying him that he was the target of a federal investigation, and the Assistant U.S. Attorney and I hatched a plan for an undercover operation. At this point, I was watching the restaurant very closely.

TWERSKI: When did you send the target letters?

SAYED: Let's see . . . they are dated January 21, 2021.

TWERSKI: After you sent the target letters, what did you do?

SAYED: We actually went forward with arresting Ms. Roulette on January 25 because we thought she was a flight risk. Unfortunately, she was released on bail over the prosecutor's strong opposition and ended up fleeing the country using a fake passport.

TWERSKI: And there's no extradition agreement between the U.S. and Brooklania, correct?

SAYED: Yes, that is my understanding.

TWERSKI: What happened next with respect to Mr. Collins?

SAYED: Special Agent Simonson and I went to visit Mr. Collins in his home. He let us look around his apartment. We only did a cursory search. Mostly, we wanted to convince him to turn himself in and cooperate with the government.

TWERSKI: Did anything else happen while you were at Mr. Collins' apartment?

SAYED: Special Agent Simonson found a set of keys that looked like they belonged to a storage unit in the building. When he asked what they were, Mr. Collins said they belonged to his vacation home. SA Simonson mentioned he'd hold onto the keys for a few minutes. He tried them on a few lockers in the building's storage room and confirmed one of them was a match.

TWERSKI: What happened next?

SAYED: We got a search warrant to conduct a search of that specific storage locker and the apartment.

TWERSKI: So then you conducted the search at Mr. Collins' apartment building?

SAYED: Correct. The next morning, while Mr. Collins was at work, we went back to his apartment and searched his apartment and the storage locker. We found $2.5 million in cash in a duffel bag, and a thumb drive with the ledgers for the gambling operation in the locker. There were other personal belongings stored there too of course, things like books, clothes, furniture, and kitchenware.

TWERSKI: Did this lead you to arrest Mr. Collins?

SAYED: Well...we knew we had enough evidence at this point, but we already had the plan for our undercover investigation. We wanted to have a solid case against Mr. Collins, so we went forward with the undercover operation. We sent a Special Agent into Hoyt's Tavern. He chatted with Mr. Collins, who basically confessed to the laundering scheme with Gourmet Grocers.

TWERSKI: What happened after this, as you call it, confession?

SAYED: We promptly arrested and charged Mr. Collins.

TWERSKI: Thank you, Special Agent Sayed, no further questions.

COURT: Defense, do you wish to cross?

*** * *[Non-relevant testimony omitted]* * ***

HENRY: You know who Lucy Washington is, correct?

SAYED: Yes.

HENRY: Who is she?

SAYED: She was one of the employees at Mr. Collins' bar that works as a bartender, and she was Roxy Roulette's second in command in running the gambling ring.

HENRY: So Ms. Washington worked for Roxy Roulette, didn't she?

SAYED: She also worked for Mr. Collins.

HENRY: She was not employed by Ms. Roulette?

SAYED: Ms. Roulette and Mr. Collins were in league with each other. Ms. Washington did work for both of them. They were operating the entire scheme together as a team.

*** * *[Non-relevant testimony omitted]* * ***

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA,

-against- 21-CR-808 (CC)

THOMAS COLLINS,

Defendant.
----------X

TRANSCRIPT OF HEARING ON MOTION TO ADMIT GRAND JURY TESTIMONY

BEFORE: THE HONORABLE Cooper Cahill

DATE: September 30, 2021

For the United States of America: Twyla Twerski, AUSA
Office of the U.S. Attorney
Eastern District of Boerum

For Defendant Thomas Collins: Margaret Henry, Esq.

Court Reporter: Maya Araiza
Eastern District of Boerum
Court Reporter Services

CLERK: This is United States against Thomas Collins. Case number 21-CR-808. Twyla Twerski appears for the Government. Margaret Henry appears for the Defendant, Thomas Collins.

COURT: Today, we resume the Government's case against Thomas Collins. Defendant has moved to offer into evidence Lucy Washington's grand jury testimony in response to FBI Special Agent Sayed's testimony implicating the Defendant's direct role in the sports betting and money laundering operations. Let's hear arguments about it. Ms. Henry, are you prepared to start?

HENRY: Yes, Your Honor. Defendant wishes to offer into evidence the grand jury testimony of Lucy Washington as a hearsay exception under Rule 804(b)(1). Ms. Washington was a bartender at Mr. Collins' restaurant, and she was Ms. Roulette's second in command in running the gambling ring. Ms. Washington's testimony is both highly relevant and exculpatory. The jury needs to be aware of her side of the story.

For the record, the witness who gave the testimony at the grand jury is considered unavailable under Rule 804(a)(4). Unfortunately, Ms. Washington passed away in a tragic bike accident prior to this trial.

COURT: That does fit squarely within the hearsay exception. Please continue.

HENRY: Your Honor, the Fourteenth Circuit has yet to rule on whether exculpatory testimony given before the grand jury can be

admitted at trial against the Government under Rule 804(b)(1). This court should follow the lead of the circuit courts that allow for this testimony to be admitted at trial. The Rule allows the court to admit such grand jury testimony if the government had a similar motive when they initially questioned the witness as they now do at trial.

Similar motive does not require the same intensity of questioning. For instance, the D.C. Circuit has held that exculpatory testimony offered before the grand jury directly pertained to the guilt or innocence of the defendant, and therefore, the government had a similar motive while questioning the witness. Similarly, the Ninth Circuit adopted that reasoning and held that the government's objective during the grand jury was the same as it would have been at trial.

In this case, Ms. Washington's testimony corroborates Mr. Collins' defense that he is the fall guy, that he was unaware of the illegal gambling and only rented out the space to Ms. Roulette and nothing more.

COURT: Thank you counselor. Ms. Twerski, your response?

TWERSKI: We do not dispute that the witness is currently unavailable due to Ms. Washington's untimely death. However, these grand jury minutes should not be admitted as a hearsay exception under 804(b)(1) because the Government clearly did not have a similar motive while questioning Ms. Washington in the

grand jury as we would have if we could question her at trial today. The Government's motive is not just a matter of determining innocence or guilt, but requires a deeper factual analysis.

In *DiNapoli*, the Second Circuit held that parties do not have the same level of intensity when questioning witnesses in the grand jury and, therefore, do not have a similar motive. After a thorough fact-based analysis, the court held the Government did not question the witness with the same level of intensity as they would have at trial.

At the time of Ms. Washington's testimony, we had several leads related to Mr. Collins and the underground gambling ring. At the grand jury proceeding, we also presented testimony from FBI Special Agents Sayed and Simonson, the transcript from Hoag-Fordjour's material witness deposition, and additional evidence relating to the contents of Mr. Collins' storage unit. Given all of this material, the burden to indict at a grand jury was met. There was no incentive to try and impeach Ms. Washington or discredit the exculpatory testimony at that time. The case we were building was strong, and while we did have other witnesses who would have discredited Ms. Washington, we were not prepared to reveal our prosecutorial strategy at that time.

COURT: Thank you, counselors. After considering the arguments, I find that the Government did not have a similar motive while

questioning Ms. Washington at the grand jury proceeding as they would have here at trial. Therefore, Defendant's motion to admit Lucy Washington's grand jury testimony into evidence is hereby denied.

In the United States Court of Appeals for the Fourteenth Circuit

---

AUGUST TERM 2021

No. 22-173

THOMAS COLLINS,
Defendant-Appellant.

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
For the Eastern District of Boerum

ARGUED: APRIL 2, 2022

DECIDED: JUNE 23, 2022

Before: CODRINGTON, HERMAN, and KIM, *Circuit Judges*.

OPINION OF THE COURT

CODRINGTON, *Circuit Judge:*

Defendant-Appellant Thomas Collins ("Defendant") appeals from a judgment of conviction on October 5, 2021, and a sentence entered on December 15, 2021, by the United States District Court for the Eastern District of Boerum, in connection with conducting an illegal gambling business and laundering of monetary instruments (18 U.S.C. §§ 1955, 1956). On appeal, the Defendant raises three issues challenging his conviction and sentence. For the reasons set forth below, we affirm the rulings of the district court on all issues and hold that (1) testing the Defendant's key on a lock to a storage unit in the Defendant's apartment building did not constitute a search in violation of the Fourth Amendment, (2) the right to counsel under the Sixth Amendment had yet to attach at the time of Defendant's conversation with FBI undercover agent Ronald Ristroph, and (3) Lisa Washington's testimony before the grand jury was properly excluded as hearsay that does not fall within the exception set forth in Federal Rule of Evidence 804(b)(1).

Facts

At the time of his arrest, Defendant owned and operated the popular restaurant and bar Hoyt's Tavern in Boerum City, Boerum. In September 2020, the Internal Revenue Service (IRS) shared information with the Federal Bureau of Investigation (FBI) that Hoyt's Tavern's income was excessive for the size of the business and that they believed the restaurant was involved in illegal activity.

The FBI began an investigation, learning that Hoyt's Tavern was home to an illegal sports betting operation. Defendant and his associate Roxanne Roulette ("Roulette") appeared to manage the sports betting operation together. The FBI also learned that Roulette immigrated as a child from Brooklania, that Hoyt's Tavern is situated within the heart of the Brooklanian community in Boerum City, and that some servers and bartenders at Hoyt's Tavern doubled as bookies for the illegal enterprise.

Hoyt's Tavern's largest vendor, Gourmet Grocers, which allegedly supplied specialty items to the restaurant, was a shell company set up by Roulette. Money directed from Hoyt's Tavern to Gourmet Grocers was used to fund the sports betting operation, make generous payments to the Defendant and Roulette, and for overseas wire transfers to Pavel Hoag-Fordjour ("Hoag-Fordjour") in Brooklania. Hoag-Fordjour allegedly used the money to help support authoritarian rule in Brooklania.

In late December 2020, the FBI was alerted to the fact that Hoag-Fordjour was present in Boerum City. On January 5, 2021, Hoag-Fordjour was served with a material witness warrant under 18 U.S.C. § 3144 and detained while he was on his way to the Boerum International Airport to catch a flight back to Brooklania. Shortly thereafter, the Government conducted a

material witness deposition of Hoag-Fordjour pursuant to Federal Rule of Criminal Procedure 15.

Because some of Defendant's associates had returned to Brooklania, a country with which the United States does not have an extradition agreement, the FBI expedited the investigation. On January 21, 2021, Lead FBI Special Agent Omar Sayed sent the Defendant, as well as his associates, letters informing them that they were targets of an FBI investigation. A few days later, on January 25, 2021, the FBI arrested Roulette, believing she was about to flee. Roulette was charged and released on bail despite the Government's strong objections, and she fled to Brooklania using a false passport. Meanwhile, Special Agent Sayed and the assigned Assistant U.S. Attorney authorized an undercover operation. At the same time, the FBI planned a direct conversation with the Defendant at his apartment.

In the evening of January 26, 2021, Special Agents Sayed and Stephan Simonson went to Defendant's residence at Caplow Complex in Boerum City while he was present and asked if they could take a look around his apartment. Defendant telephoned his lawyer but was unable to get through to her. Defendant then consented to a cursory search of his apartment, and not his storage unit. On the dresser in one of the bedrooms, Special Agent Simonson found a set of keys that included a small gold key and an electronic key fob bearing the logo for Caplow Complex. Defendant claimed the keys were for a storage unit at his vacation home in Colorado.

Special Agent Sayed remained in the apartment with Defendant, informed Defendant of the growing amount of evidence against him and advised him that cooperating would be in the Defendant's best interest. While Sayed was conversing with Defendant, Special Agent Simonson took the keys to the lobby where, on his way into the building, he had seen a tenant moving sports equipment into a storage room. Simonson used the fob to open a locked room marked, "Storage for Floors 7-15/PH" within which there were rows of large metal storage lockers. Simonson inserted the smaller gold key into locks on a number of lockers until he found a unit where the key fit the lock. Although the key fit the lock to this specific storage locker, he did not unlock it, nor he did not examine the contents of the locker.

Based on this information, the Special Agents secured a search warrant for Defendant's apartment and the storage locker that presumably belonged to Defendant. On the morning of January 27, 2021, while Defendant was at work, the FBI returned to Defendant's apartment building to execute the search warrant. When they searched the storage locker, the Special Agents found a thumb drive with records of the gambling operations for the past five years and a duffel bag containing $2,500,000 in cash.

Later that day, the previously authorized undercover operation was executed. Using an alias, Special Agent Ronald Ristroph visited Hoyt's Tavern and spoke with Defendant, who made statements evidencing his awareness that Gourmet Grocers was a shell company and his own involvement in sending money overseas. Defendant was then arrested, charged, arraigned and held without bail.

Thereafter, a grand jury was convened and returned a true bill, formally indicting Defendant for illegal gambling and money laundering. During those proceedings, Lucy

Washington ("Washington"), a high-ranking member of the criminal operation who doubled as a bartender at Hoyt's Tavern, testified that it was her understanding Defendant and Roulette were not in any way working together in the illegal gambling operation and that it was solely run by Roulette. Unfortunately, Washington passed away suddenly on June 21, 2021.

Prior to trial, Defendant moved to suppress (1) the evidence found in the storage locker on the grounds that testing the key without a warrant was a violation of his Fourth Amendment right to be free from unreasonable searches, and (2) the statements made to the undercover agent on the grounds that they were obtained in violation of his Sixth Amendment right to counsel. Both motions to suppress were denied. At trial, Defendant attempted to introduce the grand jury testimony of Washington into evidence as a hearsay exception pursuant to Federal Rule of Evidence 804(b)(1). Defendant's motion to admit the grand jury testimony was denied. At the conclusion of the jury trial, Defendant was convicted on all counts and sentenced to ten years in federal prison.

Discussion

A. Warrantless Use of Key Under the Fourth Amendment

This case presents an issue of first impression in the Fourteenth Circuit: whether a government agent testing Defendant's key on a locked storage locker located within his apartment building constitutes a search in violation of the Fourth Amendment.

The Defendant contends that inserting the key in the lock of a storage locker is an unreasonable, warrantless search under both the reasonable expectations test set forth in *Katz* v. *United States*, 389 U.S. 347, 360 (1967), and the common-law trespassory test described in *Florida v. Jardines,* 569 U.S. 1 (2013). We disagree in both regards.

Under the reasonable expectation of privacy test, Defendant argues that there is a reasonable expectation of privacy for the storage unit because it is inside the apartment building and in a secure area. To access the storage unit, one must use a key fob to access the storage room and then a key to access the individual storage lockers. However, this argument lacks merit. Defendant overlooks the fact that the storage room is a common area for multiple residents and is also accessible to building staff. *See United States v. Correa*, 653 F.3d 187, 190 (3d Cir. 2011) (holding that the defendant did not have a reasonable expectation of privacy in the common area of a multi-unit apartment building).

Defendant argues that a warrant was necessary to test the key because testing the key on his storage locker involved "obtain[ing] information by physically intruding" on his home. *Jardines,* 569 U.S. at 5 (quoting *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012)). We reject this argument. Applying the factors set forth in *United States v. Dunn*, 480 U.S. 294, 301 (1987), we find that Defendant's storage unit was not within the curtilage of his home. The storage unit was not in his apartment, but fifteen floors below his apartment unit. Additionally, the storage unit was within a storage room, which is a common area of the building.

Moreover, the intrusion here is fundamentally different from the intrusions in *Jardines* and *Jones.* There, the intrusions were on private property belonging to the defendant. In *Jardines*, officers were within the curtilage of the defendant's home by being on the porch. 569 U.S. at 6. In *Jones,* the intrusion was on the defendant's car. 565 U.S. at 402-03. By contrast, the agents here tested a key on property Defendant did not own since the test was performed in a common area of the apartment complex.

Further, this court sides with multiple sister appellate courts that have ruled that a warrant is not necessary prior to testing a key in a lock. *See, e.g.*, *United States v. Salgado,* 250 F.3d 438, 456-57 (6th Cir. 2001), *cert. denied*, 534 U.S. 916, and 534 U.S. 936 (2001); *United States v. Lyons*, 898 F.2d 210, 213 (1st Cir. 1990); *United States v. DeBardeleben,* 740 F.2d 440, 445 (6th Cir. 1984).

Defendant also argues that if this Court concluded that testing the key was a search, the search was unreasonable because there were no exigent circumstances requiring Special Agent Simonson's search of the storage locker. This is patently incorrect. There were valid concerns that the Defendant would flee because suspects connected to the illegal enterprise were fleeing to Brooklania, a country with no extradition agreement with the United States. Moreover, a warrantless search is reasonable if the information could be ascertained in other ways. *See United States v. Concepcion*, 942 F.2d 1170, 1172-73 (7th Cir. 1991). Here, the government agents could have easily identified the storage unit as Defendant's by asking building staff. Therefore, even if testing the key was a search, it would have been a reasonable one.

The Court holds that testing Defendant's key on his storage locker located within his apartment building is not a search and did not violate the Fourth Amendment.

B. Sixth Amendment Right to Counsel

"In all *criminal prosecutions,* the *accused* shall . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. (emphasis added). As prior Supreme Court precedent has pointed out, the literal language of the Sixth Amendment "requires the existence of both a 'criminal prosecutio[n]' and an 'accused,'" for the rights guaranteed under the Amendment to attach. *United States v. Gouveia*, 467 U.S. 180, 188 (1984). These two necessary preconditions were not met here. There was neither a "prosecution" nor was the Defendant considered an "accused" at the time of the wired conversation with Special Agent Ristroph.

The Supreme Court has delineated exactly when the right to counsel is activated. In *Kirby v. Illinois*, the Court announced that a person's Sixth Amendment right to counsel attaches "only at or after the time that adversary judicial proceedings have been initiated against him." 406 U.S. 682, 688 (1972). Taking it a step further, the Court provided five specific instances where adversary judicial proceedings are considered initiated, including: "formal charge, preliminary hearing, indictment, information, or arraignment." *Id*. at 689.

This Supreme Court precedent has provided circuit courts with clear guidance and, as the majority of courts have interpreted, a bright line rule as to when the right to counsel attaches. In a variety of contexts, circuit courts have followed the *Kirby* language to hold that the right had not

attached unless one of the specified events had occurred. *See, e.g.*, *United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000); *United States v. Moody*, 206 F.3d 609, 613-14 (6th Cir. 2000); *United States v. Mapp*, 170 F.3d 328, 334 (2d Cir. 1999).

A minority of courts do not rely solely on these five stated instances as the only points after which the right attaches, and instead look to the transition from investigation to prosecution as a guide. We do not agree with this approach. Abiding by a straightforward bright line rule allows for uniformity and public confidence in the consistency of our legal system. We will not manufacture some new rule or one-off exception that diminishes the clarity of when attachment occurs and goes plainly outside the articulated standards that the Supreme Court has provided for these situations. As Justice Stevens expressed in his concurrence in *Gouveia*, "the Court has now adopted a stance that 'foreclose[s] the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings.'" *Moody*, 206 F.3d at 613 (quoting *Gouveia*, 467 U.S. at 193).

Notably, in cases where the Government engaged in actions similar to those in this case, such as taking material witness depositions and recording an undercover conversation, the courts did not suppress the evidence, citing the Supreme Court's creation of a bright line rule. *See Hayes*, 231 F.3d at 675. Regardless of what the dissent thinks the rule "should" be, as numerous circuits have acknowledged, "the Supreme Court . . . [has] reduced the Sixth Amendment right to counsel to a bright line test . . . [and] . . . identified with particularity the stages of a criminal proceeding which . . . implicate the right to counsel." *Moody*, 206 F.3d at 613.

It is undisputed that at the time of the conversation in question there had been no formal charge, preliminary hearing, arraignment, indictment, or information filed against the Defendant. Thus, it is abundantly clear that the Defendant's right to counsel had not yet attached. The statements made by the Defendant to Special Agent Ristroph during this wired conversation could not have occurred in violation of a right he did not yet possess, and accordingly the statements were properly admitted at trial.

C. Admissibility of Grand Jury Testimony Under Rule 804(b)(1)

Defendant's final claim of error is based on the trial court's decision to preclude the testimony of Washington. Whether exculpatory grand jury testimony can be admitted against the government under Federal Rule of Evidence 804(b)(1) is a matter of first impression for this Court. Defendant contends that the district court erred in not admitting a transcript of Washington's grand jury testimony, and that the error was prejudicial because the testimony was exculpatory. We disagree.

Washington was unable to testify at trial because she passed away before trial commenced, in an unfortunate bicycle accident. As a result, Washington's testimony represents an out-of-court statement offered to prove the truth of the matter asserted and is hearsay. *See* Fed. R. Evid. 801(c). Both parties stipulated to Washington's unavailability as a witness. *See* Fed. R. Evid. 804(a)(4).

Rule 802 of the Federal Rules of Evidence prevents the admission of hearsay evidence unless a federal statute, the federal rules, or other rules set forth by the Supreme Court provide otherwise. Fed. R. Evid. 802. At trial, Defendant invoked the hearsay exception laid out in Rule 804(b)(1) that allows admission of the former testimony of an unavailable witness. The relevant part of the Rule provides for admission of testimony that "was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one" and "is now offered against a party who had [ ] an opportunity and similar motive to develop it by direct, cross-, or redirect examination." Fed. R. Evid. 804(b)(1). Additionally, the Supreme Court has recognized that Rule 804(b)(1) extends to grand jury testimony. *See United States v. Salerno*, 505 U.S. 317, 321 (1992).

The language crucial to this inquiry is "similar motive." *Id.* Circuits vary in their interpretations of "similar motive" and the application of Rule 804(b)(1) to exculpatory grand jury testimony. The Second Circuit considers whether the government had an interest of "substantially similar intensity" and takes a fact-based approach. *United States v. DiNapoli*, 8 F.3d 909, 914 (2d Cir. 1993); *see also United States v. Omar*, 104 F.3d 519, 523 (1st Cir. 1997) (applying a similar fact-based approach). Other circuit courts interpret the rule more broadly, holding the motive while questioning witnesses in either proceeding is similar because they both go toward guilt or innocence. *See United States v. Miller*, 904 F.2d 65, 68 (D.C. Cir. 1990). We are inclined to use the fact-based standard adopted by the First and Second Circuits.

Generally, the standard of proof required to indict at a grand jury, compared to the standard of proof required to convict a defendant at trial, influences the government's motives while questioning a witness in the grand jury. *See DiNapoli*, 8 F.3d at 913. In the present case, the Government had all but established probable cause by the time Washington testified at the grand jury. Evidence presented at the grand jury proceeding included testimony related to the incriminating contents of Defendant's storage locker, his close connection to Roulette, and proof of the money laundering scheme orchestrated through Gourmet Grocers. It is hard to imagine the government in this case, or any case, would have any serious interest in spending more time with a witness than necessary to obtain an indictment.

Relatedly, the government's motivation to attack and discredit a witness' testimony in the grand jury is lower than at trial. A grand jury proceeding serves a very different purpose than a trial proceeding. *See Omar*, 104 F.3d at 523. Trial is the last opportunity to interrogate and utilize a witness. A grand jury, however, is investigatory, and the government often must be strategic in its presentation of the evidence. It is clear from the record that the government did not attempt to discredit Washington's testimony. This is a sensitive case, involving many actors. Impeaching Washington's testimony may have required the government to reveal information received from the undercover conversation or call more witnesses, the identity of whom it did not want to reveal for fear they may flee the country. Further, discrediting Washington was unlikely to have influenced the grand jury's decision to indict. Although Washington was integral to the criminal operation, the government had no incentive to press Washington when an indictment was all but guaranteed given the other evidence presented in the grand jury.

Based on our interpretation of Rule 804(b)(1) as applied to the facts before us, we conclude that the trial court did not abuse its discretion and properly excluded the exculpatory testimony as hearsay that did not fall within the Rule 804(b)(1) exception.

Conclusion

For the foregoing reasons, the rulings of the district court are affirmed.

HERMAN, *Circuit Judge, dissenting*

For the reasons stated herein, I disagree with the majority and would reverse the district court's decisions to deny Defendant's motions to suppress as well as the district court's decision to exclude the grand jury testimony.

A. Warrantless Use of Key Under the Fourth Amendment

The Fourth Amendment protects persons' reasonable expectation of privacy against unreasonable governmental intrusion into their property and effects. *See Florida v. Jardines*, 569 U.S. 1 (2013); *United States v. Jones*, 565 U.S. 400, 406 (2012); *Katz v. United States*, 389 U.S. 347, 360 (1967). The majority relies upon case law that preceded *Jones* and *Jardines*, failing to appropriately apply modern Supreme Court precedent. Defendant's storage locker was private property intruded upon by law enforcement officers within the curtilage of his home.

The Defendant demonstrated an actual expectation of privacy and one that society would recognize as reasonable in both the identity of his storage locker and the contents within. The fact that he does not own the apartment building is of no moment. Courts have found a reasonable expectation of privacy in ownership or regular occupancy of a home, for a guest in another's home or hotel room, in business premises, and in a rental storage unit. *See United States v. Hamilton*, 538 F.3d 162, 167 (2d Cir. 2008). The Ninth Circuit held that a "formalized arrangement among defendants indicating joint control and supervision of the place is sufficient to support a legitimate expectation of privacy." *United States v. Johns*, 851 F.2d 1131, 1136 (9th Cir. 1988). The Seventh Circuit, recognizing that the "Fourth Amendment protects private information rather than formal definitions of property," held that the keyhole itself "contains information [] about who has access to the space beyond." *See United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991). This private information inside the lock is "both used frequently by the owner and not open to public view." *Id.* Here, Defendant had the only key to his storage locker and one of a limited number of key fobs to enter the storage room inside private property. Defendant also took pains to keep the area private by using a lock and papering the metal slats to protect the area from observation.

Determining curtilage in multi-family buildings is a difficult question with limited clear guidance. The Supreme Court has held that the curtilage of the home, "the area immediately surrounding and associated with the home," is treated "as part of the home for Fourth

Amendment purposes." *Jardines*, 569 U.S. at 6. There is a world of difference between the back yard or parking garage of an apartment building and a locked, limited access, storage room inside an apartment building. Further, Defendant used his locker as an extension of his home to store personal effects intimately connected to home life, such as clothes, books, and crockery.

Finally, perhaps the most persuasive argument for the Defendant, is that the insertion of his key into his storage locker by the government agent was a physical intrusion, or trespass, into his "effects." The *Jones* line of reasoning does not displace the reasonable expectation of privacy test but rather adds an additional prong. 565 U.S. at 404, 406. Even if, *arguendo*, Defendant lacked a reasonable expectation of privacy in his storage locker, it is not dispositive in demonstrating a reasonable search because the government physically intruded into his property. The insertion of a key into a car lock constitutes a search because "the government physically occupied private property for the purpose of obtaining information." *United States v. Dixon*, 984 F.3d 814, 816, 819 (9th Cir. 2020). Similarly, the pressing of the buttons on garage door openers constitutes an unlawful search of the openers. *See United States v. Correa*, 908 F.3d 208, 218 (7th Cir. 2018). Here, both the use of the key fob to enter a private storage room held in joint tenancy, and insertion of the key into the locker constitute unlawful searches.

Warrantless searches of property are presumptively unreasonable and the principal exception to this expectation is exigent circumstances. *Bain*, 874 F.3d at 16. If the search was not *per se* unreasonable, the reasonableness analysis requires weighing the defendant's privacy interests against law enforcement interests to either a reasonable suspicion or probable cause standard. *Id.* at 17. The government has the burden of proving reasonableness, and the court must look at the totality of the circumstances. *Id.* Here, there were no exigent circumstances requiring Special Agent Simonson to go poking around Defendant's apartment building and using the keys on doors to obtain information of ownership. No one was fleeing and there was no risk of destruction of evidence. On the contrary, Defendant was detained upstairs with Special Agent Sayed.

Defendant's storage locker is protected against unreasonable search whether it is treated as an effect or as part of the curtilage of his home. Therefore, the district court erred when it denied Defendant's motion to suppress the cash and thumb drive of records as the fruits of an unconstitutional search

B. Sixth Amendment Right to Counsel

Contrary to the assertions made by the majority, the Supreme Court has never laid down a bright line rule for when the Sixth Amendment right to counsel attaches. In *Kirby*, the Court held that the Sixth Amendment right to counsel attaches "at or after the initiation of adversary judicial proceedings." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The initiation of adversary proceedings occurs when the government has "committed itself to prosecute" and the adverse positions of both defendant and prosecutor have solidified. *Id*.

The Court in *Kirby* listed examples of what constitutes the initiation of adversary judicial proceedings, including formal charges, a preliminary hearing, indictment, information, or arraignment. *Kirby*, 406 U.S. at 689. The debate among the circuits is whether these examples

actually constitute a bright line rule, where the adversary proceedings cannot begin—and therefore, the Sixth Amendment right to counsel cannot attach—unless and until one of these events occurs. Importantly, the Supreme Court has yet to provide explicit guidance on the issue.

The majority simply ignores the reality that a suspect may become the "accused" before being officially charged or arraigned. Several of our sister circuits reject a formulaic approach and recognize that the Sixth Amendment right to counsel may attach prior to the initiation of formal criminal proceedings. *See, e.g.*, *Matteo v. Superintendent, SCLI Albion*, 171 F.3d 877, 892 (3d Cir. 1999); *United States ex rel. Hall v. Lane*, 804 F.2d 79, 83 (7th Cir. 1986). Even the decisions cited by the majority show that many courts are deeply discomfited by the consequences of adhering to a bright line rule. These courts recognize that an inflexible rule tends to shield the overreaching prosecutor and law enforcement agent, and leave defendants who were subjected to the full force of the government without any recourse. *See United States v. Hayes*, 231 F.3d 663 (9th Cir. 2000); *United States v. Moody*, 206 F.3d 609 (6th Cir. 2000).

By the time Special Agent Ristroph walked into Hoyt's Tavern, the Defendant had been confronted with "the prosecutorial forces of an organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby*, 406 U.S. at 689. The government engaged in a course of conduct that typically does not occur until after the filing of formal charges, and at the same time employed a method of investigation that is prohibited once the Sixth Amendment right to counsel attaches—the deliberate elicitation of incriminating statements from a defendant outside the presence of counsel. Although it may be rare for the government to conduct itself in such a way, the majority's approach leaves suspects completely without a remedy for the government's overreaching and, frankly, unconstitutional behavior.

It would "exalt form over substance" to rule that the Defendant was not an "accused" at the time the undercover interrogation occurred. *Moody*, 206 F.3d at 613. That Defendant was denied the right to have counsel physically present during the interrogation is a violation of the Sixth Amendment. The district court committed clear error in denying the motion to suppress Defendant's statements to the FBI undercover agent.

C. Admissibility of Grand Jury Testimony Under Rule 804(b)(1)

Defendant was prevented from presenting an adequate defense because of the district court's improper exclusion of exculpatory grand jury testimony. To admit favorable testimony from an unavailable witness at trial under Federal Rule of Evidence 804(b)(1), the defendant must demonstrate that the government had a "similar motive" in questioning the witness in the first instance as they would have had at trial. *United States v. Salerno*, 505 U.S. 317, 325-26 (1992). The explicit language of the Rule dictates that similar motive does not require the "same intensity" of questioning. *United States v. McFall*, 558 F.3d 951, 963 (9th Cir. 2009). The chance to develop direct or cross-examination is enough to fulfill the Rule's requirements. *Id.* Thus, the issue here turns on whether, based on the facts at hand, the government had a similar fundamental objective when questioning Washington at the grand jury proceeding as it would have had at trial.

The government has the requisite similar motive when questioning a witness involved in the criminal scheme at a grand jury proceeding and at trial because the questioning is directed at the defendant's guilt or innocence. *McFall*, 558 F.3d at 962. The government can strategically choose to what extent it examines a witness, and regardless of intensity, the same motive exists to undermine any false testimony. *Salerno*, 505 U.S. at 329 (Stevens, J., dissenting). Any other understanding of the facts would be in opposition to the intention behind Rule 804(b)(1). Here, the government sought Washington's testimony at the grand jury proceeding to determine the Defendant's guilt, just as it would have at trial. Even more, the government verified that Washington understood the repercussions of perjury, and still, she continued to assert that the Defendant had no knowledge of the operation. Accordingly, similar motive exists.

Washington, a known member of the criminal operation, made statements that clearly bolster the Defendant's defense. The Defendant has consistently asserted that he was unaware of the illegal activities, that he was renting out the basement space to his friend, and that Roulette set him up to take the blame for everything. In her grand jury testimony, Washington stated that Roulette explicitly told her not to tell Defendant about what was going on. When asked about Defendant's role in the gambling operation, Washington denied that he had any knowledge of what was happening.

Under the Rules, Defendant had the right to introduce the exculpatory testimony as part of his defense. We cannot allow the Federal Rules of Evidence to be manipulated to favor one side by excluding hearsay that fits squarely within the bounds of Rule 804(b)(1) merely because it supports Defendant's position. Washington's grand jury testimony would have aided a reasonable juror in assessing Defendant's guilt or innocence, and the district court erred when it excluded this evidence at trial.

For these reasons, I respectfully dissent from the judgment of the court.

No. 22 – 305

Supreme Court of the United States

THOMAS COLLINS,
Petitioner,

---against---

UNITED STATES OF AMERICA,
Respondent.

Date: December 13, 2022

The petition for writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted, limited to the following questions:

I. Whether law enforcement's warrantless insertion of a key into a locked storage unit to obtain identifying information is an unreasonable search under the Fourth Amendment, when the storage unit is inside a locked room within a residential apartment complex.

II. Whether adversarial proceedings have begun and a defendant's Sixth Amendment right to counsel attached at the time of a pre-indictment conversation with an undercover law enforcement officer where, prior to the conversation, the government had effectively completed its investigation and committed itself to prosecuting the defendant.

III. Whether exculpatory testimony given at a grand jury proceeding can be offered by defendant under Federal Rule of Evidence 802 when the witness who gave the testimony is unavailable under Federal Rule of Evidence 804(b)(1).