NO. 87663-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SHAWN DANIEL HINTON, Petitioner.

BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, that attempt to strike a balance between the effectiveness of police efforts to ensure public safety and the rights of citizens to be secure in their private affairs.

II. ISSUE PRESENTED

Whether the trial court and the Court of Appeals correctly found that neither article I, section 7 nor the Fourth Amendment were violated in the present case.

III. STATEMENT OF FACTS

WAPA agrees with the facts as stated in the State's brief. The following additional facts are important: When Detective Sawyer exchanged text messages with appellant who sought and agreed to buy illegal narcotics, the phone Detective Sawyer used for these texts had been lawfully seized from a third person. CP 21, FOF 1. This phone was not password protected and did not belong to Hinton. CP 22, FOF 2. Hinton's initial message lit up the screen while the phone was in Detective Sawyer's custody, allowing

Detective Sawyer to read the message without touching any buttons on the phone. CP 28, FOF 5; RP 13. Sawyer responded. CP 22-23, FOF 6.

Each of Hinton's subsequent messages to the seized phone showed in open view on the phone's screen. Each message was appended to each prior message in the chain, indicating to Hinton that the earlier messages had been saved to both his own and the seized telephones. RP 30-31. At no time did Hinton ask with whom he was texting. Hinton never made his messages exclusive to a specific recipient. CP 22-23, FOF 6. Hinton never indicated that his text messages were private and not to be shared with others. RP 14.

IV. ARGUMENT

This case concerns not whether a person has a reasonable expectation of privacy in his or her own telephone records; clearly he or she does. Rather, this case presents the question whether a person who sends a text message retains a privacy interest in that text message as it appears on someone else's telephone. The answer, for several reasons, is "no," once a person sends a text message to a third party, he loses any expectation of privacy in that message, so that an officer who legally possesses the recipient's telephone may read messages that appear on the screen.

A. HINTON'S TEXT MESSAGES APPEARED IN OPEN VIEW ON A THIRD-PARTY PHONE; NO SEARCH WAS NEEDED TO SEE THE MESSAGES.

WAPA agrees with the Court of Appeals and the State that no search of the seized phone occurred as to Hinton. The State's argument implies that no search occurred because Hinton's incoming texts were seen in open view. The open view doctrine explains that no search occurs when "an officer detects something by using one or more of his or her senses, while lawfully present at the vantage point where those senses are used." *State v. Cardenas*, 146 Wn.2d 400, 408, 47 P.3d 127 (2002) (citing *State v. Rose*, 128 Wn.2d 388, 393, 909 P.2d 280 (1996); *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994); *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981)). Merely looking at a visual display on a cellphone screen is not a search. Thus, article I, section 7 of the Washington State constitution is not implicated. Just as an unsealed postcard is open to being read by anyone with access to the postcard, so were the text messages in this case readily visible to anyone with access to the third party's phone. No search is needed or occurs when police read a message that is seen in open view. *See generally United States v. Bailey*, 193 F. Supp. 2d 1044, 1047 (S.D. Oh. 2002) (citing *United States v. Van Leeuwen*, 397 U.S. 249, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970)).

B. HINTON KNEW ABOUT AND IMPLIEDLY CONSENTED TO THE AUTOMATIC RECORDING OF HIS TEXT MESSAGES.

WAPA agrees with the Court of Appeals and the State that no search occurred because Hinton did not have a reasonable expectation of privacy in a text message sent to a telephone belonging to a third person. Where a defendant consents to the recording of a conversation, the conversations are not private, and do not violate article 1, section 7. *State v. Archie*, 148 Wn. App. 198, 199 P.3d 1005 (2009). *See also State v. Haq*, 166 Wn. App. 221, 257, 268 P.3d 997, *review denied*, 174 Wn.2d 1004 (2012). Here, Hinton knew his messages were being recorded because every prior message in the conversation was contained in the most recent message. CP 22-23, FOF 6; RP 30-31. Any reasonable person participating in such electronic communication can see plainly that their past statements have been recorded and are being reproduced. By continuing to engage in the communication, Hinton implicitly consented to recording of his texts in the seized telephone. *See State v. Townsend*, 147 Wn.2d 666, 677, 57 P.3d 255 (2002)) (emails and instant messages recorded by computer that Townsend believed was being operated by his intended victim).[1]

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[1]It should be noted that, in *Townsend*, only the applicability of the Privacy Act, RCW 9.73.030, was at issue. The State constitution was not addressed. *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007), squarely addressed the constitutional question. Though Hinton, argued to the trial court that Detective Sawyer had violated the Privacy Act violation, he apparently did not appeal that aspect of his argument, and the Court of Appeals therefore did

C. THERE IS NO REASONABLE EXPECTATION OF PRIVACY IN TEXTS THAT HINTON VOLUNTARILY SENT TO A THIRD PERSON.

Hinton offered no evidence that he possessed the phone that he argues was searched, that he had any reasonable expectation of privacy in its use or contents, that he had any interest in the actual possessor, or that he had any interest in how that third party's phone was used. Hinton never had dominion or control over the seized phone. Thus, Hinton could not have any reasonable expectation of privacy in the phone used by Det. Sawyer. Hinton's suppression arguments must fail because he lost any privacy interest in his message once he sent it, regardless of whether it was received by the phone, by the intended recipient, or by an unintended recipient.

It has long been the law that no person has any legitimate expectation of privacy in a telephone to which he places a phone call. *State v. Gonzales*, 78 Wn. App. 976, 983, 900 P.2d 564 (1995) (citations omitted). Similarly, no person has any legitimate expectation of privacy in records pertaining to a third party's phone. In *State v. Gunwall*, 106 Wn.2d 54, 63, 720 P.2d 808, 813 (1986), the Court found that the customer or subscriber to a telephone account has a reasonable expectation of privacy in the records of his or her

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not address that question. That issue is argued on appeal by Hinton's co-defendant at trial, Jonathan N. Roden. *State v. Roden*, 167 Wn. App. 59 (2012) (review accepted, Supreme Court No. 87669-0 (argument set for the same date at is this case).

own account held by the service provider. The Court did *not* consider whether a defendant has any reasonable expectation of privacy: (1) in phone company records of another person's account; (2) in the contents of a telephone that is owned or possessed by a third person; or (3) in a message sent via telephone to a third party. As to each of these other three issues, Courts have rejected a defendant's argument that he had a reasonable expectation of privacy.

In *Commonwealth. v. Benson*, 2010 PA Super 234, 10 A.3d 1268, 1273 (Pa. Super. Ct. 2010), the court observed: "Appellant had no legal right to request or control access to the information from the telephone company because he was not the owner of the telephone. He had no legitimate expectation of privacy in them." *Id.* at 1274. *See also State v. Gail*, 713 N.W.2d 851, 860-61 (Mn.2006) (phone user who was not the service provider's customer and who did not receive or pay the bills for the phone, had no expectation of privacy in the service provider's records for customer's account). Just as Hinton does not have any reasonable expectation of privacy in the telephone records for the third party's phone, he has no privacy expectation in the contents of a telephone that is neither his nor in his possession. This includes text messages that Hinton sent to that third party's phone.

Courts have long recognized that a person's reasonable expectation of privacy turns in large part on his ability to exclude others from the place searched. *See, e.g., State v. Jones*, 68 Wn. App. 843, 845 P.2d 1358, *review denied*, 122 Wn.2d 1018 (1993) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633(1980)). The sender of a text message has no ability to control what happens with the text once it is delivered to the intended recipient's account. What has come to be known as "misplaced confidence doctrine" perhaps began in 1966 with *Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), in which the Court held that the recipient will not repeat it. The Court expanded on this in *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), holding there is no reasonable expectation of privacy in that which one exposes to another, regardless whether that be in conversation with a government informant, an undercover agent, or other witness.

State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007), is instructive. In *Athan*, police used a ruse to cause Athan to send to an envelope by mail to what Athan believed was a law firm, but was in fact the police. Athan's DNA was found on the envelope flap. This Court held that Athan lost any privacy interest he might have had in his saliva when he voluntarily placed it in the mail. Once he sent the letter, what was done with it was not within his control. *Athan*, 160 Wn.2d at 367-368. Police use of a ruse did not vitiate

Athan's voluntary relinquishment of the envelope containing a sample of his saliva. Public policy allows for police use of a ruse, including some deceitful conduct, by police officers in order to detect and eliminate criminal activity. *Athan*, 160 Wn.2d at 377-378.

Athan is consistent with case law in other jurisdictions. In *State v. Kenny*, 224 Neb. 638, 641, 399 N.W.2d 821, 824 (1987), a defendant lost all control over a letter once he sent it through the mail, and thus lost any expectation of privacy in it. Accordingly, the letter defendant had mailed to a third person was admissible in his case. Other jurisdictions agree with Washington and Nebraska. *See, e.g., United States v. Jones*, No. 03-15131, 2005 WL 2284283, at 1 (11th Cir.2005)[2]; *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir.2004); *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir.2001); *United States v. Maxwell*, 45 M.J. 406, 418 (U.S. Armed Forces 1996).

The rule does not operate any differently when the information is sent via electronic communication. A defendant does not have any subjective expectation of privacy in the contents of a computer to which he had sent messages. *United States v. Haffner*, 3:09-CR-337-J-34-TEM, 2010 WL 5296920 (M.D. Fla. Aug. 31, 2010), report and recommendation adopted, 3:09-CR-337-J-34TEM, 2010 WL 5296847 (M.D. Fla. Dec. 20, 2010). The

[2]GR 14.1(b) permits the citation of this unpublished opinion.

sender of an email had no reasonable expectation of privacy in the sent message, because he could not control what the recipient did with it. *Commonwealth v. Proetto*, 2001 PA Super 95, 771 A.2d 823, 831 (Pa. Super. Ct. 2001), *aff'd*, 575 Pa. 511, 837 A.2d 1163 (2003). *See also Maxwell*, 45 M.J. at 418 (no reasonable expectation of privacy in an email message received by another person; the transmitter no longer controls its destiny). The same is true for electronic mail messages. A person loses "a legitimate expectation of privacy in an e-mail that had already reached its recipient." *Guest*, 255 F.3d at 333; *Lifshitz*, 369 F.3d at 190.

Courts have not always been clear regarding whether the expectation of privacy is lost when the message is received by the intended recipient's account, or by the intended recipient personally. This is partly because the law pertaining to digital communication is still developing. *See, e.g., Rehberg v. Paulk*, 611 F.3d 828, 845 (11th Cir. 2010), *aff'd*, 132 S. Ct. 1497, 182 L. Ed. 2d 593 (2012). The vast majority of published opinions regarding privacy in sent correspondence focuses on mailed letters where the message was actually received by the recipient. In those cases, the question whether the law requires that the intended recipient actually received it was not at issue.[3] The letters in those cases were almost always opened before coming

[3]*See, e.g., United States v. King*, 55 F.3d 1193, 1195 (6th Cir. 1995) (no reasonable expectation of privacy in letters King had written to his wife, which she had opened and read). Though it was not clear in that case that delivery was the cause of defendant's loss of

into law enforcement hands. However, in one case, where the letter had not yet been opened when police obtained it, the court held that the sender did not have any Fourth Amendment rights in the letter after it had been delivered to the intended recipient's address. *Kenny*, 399 N.W.2d at 823.

In analogous cases, courts have refused to grant the sender of messages any expectation of privacy in the contents of the recipients' mailboxes. *See State v. Champion*, 594 N.W.2d 526 (Minn. Ct. App. 1999), and cases cited therein. The court in *Champion* went further, observing that "[e]ven if it is reasonable to expect a mailbox to be accessed only by its owners, this expectation cannot flow vicariously to third parties." *Id.* at 529. In another case, the court observed that "a defendant has no legitimate expectation of privacy in messages and images transmitted over internet." *See United States v. Sawyer*, 786 F. Supp. 2d 1352, 1356 (N.D. Ohio 2011) (citing, *United States v. Meriwether*, 917 F.2d 955 (6th Cir. 1990), and *United States v. Haffner*, *supra* (Haffner had apparently sent child pornography to the third party's computer)).

In this case, the iPhone "lit up" when a text message was received, such that the incoming message could be read in open view by anyone in possession of the phone. CP 22, FOF 2. If the sender wishes to protect his

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his privacy in the letters, or whether it was receipt, the court stated: "If a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery."

privacy he can certainly password-protect or encrypt his message. Otherwise, the reason a person's expectation of privacy terminates on receipt is that the sender thereafter loses control over the message .

In *Culbreth v. Ingram*, 389 F. Supp. 2d 668, 676 (E.D.N.C. 2005), the court held that the sender of an email lost his legitimate expectation of privacy in the email once it reached the recipient's account, even though there was no evidence that the messages were received at or obtained from the intended recipient's device. Rather, the messages were obtained "from the [recipient's] account" after plaintiff's government employer had hacked into it to obtain an email sent by the plaintiff to a third party.

Searches of third party mailboxes are analogous. *See, e.g., State v. Champion, supra*; *United States v. Robinson*, 390 F.3d 853 (6th Cir. 2004) (defendant had no reasonable expectation of privacy in unopened package delivered to a mailbox rented by another person, even where the package was seized by law enforcement before it was picked up by the intended recipient.). *See also People v. Young*, 282 A.D.2d 402, 723 N.Y.S.2d 502, 503 (2001); *Bentwood Estates, Ltd. v. Quinn*, 3:05 CV 7035, 2006 WL 782726 (N.D. Ohio Mar. 27, 2006).

D. EVEN IF A SEARCH OCCURRED, HINTON LACKS AUTOMATIC STANDING TO CONTEST A SEARCH OF A TELEPHONE BELONGING TO A THIRD PARTY.

Washington first adopted the automatic standing rule in *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962), *overruled on other grounds*, *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012). Viability of the rule was reaffirmed under article I, section 7, in *State v. Williams*, 142 Wn.2d 17, 11 P.3d 714 (2000). The rule's purpose is "to guard against the risk of self-incrimination by the defendant who, in order to establish standing at the suppression hearing, would have to admit possession of the seized evidence which could later be used as admission of guilt at trial" *State v. Carter*, 127 Wn.2d 836, 850, 904 P.2d 290, 296 (1995).

Automatic standing only applies when three conditions are met: (1) defendant was legitimately on the premises searched; (2) the crime defendant is charged with involved possession as an essential element; and (3) the defendant was, at the time of the contested search and seizure, in possession of the contraband he wishes suppressed. There must be a direct relationship between the challenged police action and the evidence used against the defendant. *State v. Jones*, 146 Wn.2d 328, 334, 45 P.3d 1062, 1065 (2002). To have automatic standing, the defendant must be charged with possession of the very item that was seized. The issue of automatic standing is reviewed de novo. *State v. Evans*, 159 Wn.2d 402, 406, 150 P.3d 105 (2007).

1. Hinton Is Not Charged with Possession of the Third Party's Telephone, or of Messages He Sent to That Phone.

Hinton is charged with violating RCW 69.50.407, attempted possession of illegal narcotics. He wishes to suppress his text messages to a third person's telephone. He did not possess that phone. Nor did he possess messages after he had sent them to that phone. He is not charged with possessing the phone or the messages.

2. The Text Messages Hinton Wants Suppressed Are Not Contraband.

Hinton lacks automatic standing because the thing he wants suppressed is not contraband. In each of the below cases, the defendant had automatic standing to contest seizure of the contraband he was charged with possessing. Each of these cases contrasts with the present case. The cell phone that Detective Sawyer allegedly searched is not contraband.

Charge	Description of contraband seized, possession of which was essential element of the charge	Case
Illegal possession of gambling devices	Illegal gambling devices seized from car defendant was driving but did not own	*State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962), *overruled on other grounds*, *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012).
Possession of controlled substance	Heroin seized from apartment in which defendant was visitor	*State v. Williams*, 142 Wash. 2d 17, 11 P.3d 714 (2000)
Unlawful possession of a firearm	Stolen gun seized from purse belonging to passenger in defendant's car	*State v. Jones*, 146 Wn. 2d 328, 45 P.3d 1062 (2002)
Possession of controlled substance	Cocaine seized from hotel room in which defendant was visitor	*State v. Carter*, 127 Wn. 2d 836, 838, 904 P.2d 290, 291 (1995)
Possession of controlled substance	Methamphetamine seized from car in which defendant was a passenger but he did not own	*State v. Coss*, 87 Wn. App. 891, 943 P.2d 1126 (1997)
Possession of controlled substance	Methamphetamine seized from house in which defendant was a visitor	*State v. Magneson*, 107 Wn. App. 221, 26 P.3d 986 (2001)
Unlawful possession of a firearm	Firearm seized from trailer owned by another, in which defendant was found sleeping	*State v. Kypreos*, 110 Wn. App. 612, 39 P.3d 371, *review granted, cause remanded*, 147 Wn. 2d 1001 (2002)
Possession of controlled substance	Marijuana seized from apartment in which defendant was a guest	*State v. Libero*, 168 Wn. App. 612, 277 P.3d 708 (2012)

3. Hinton Cannot Satisfy The "Legitimately on the Premises" Prong of Automatic Standing.

While exchanging text messages with Hinton, Detective Sawyer used a telephone that had lawfully been seized from a third person. To have the ability to send texts to the seized phone (meaning that Hinton had the phone number) is not the same thing as being physically present when a search is conducted and the challenged contraband seized. In each of the above-cited cases, the defendants who were granted automatic standing were actually present when and where the contested search occurred. In contrast, Hinton was nowhere in the vicinity when Detective Sawyer read his text messages. Nor is there any evidence that he was present when the third party's phone was seized from that person. In each of the above-cited cases, the defendant was legitimately on the premises searched because he was physically present at both the time and location at which the search occurred.

4. Hinton Cannot Utilize Automatic Standing to Assert the Third Person Cell Phone Owner's Privacy Rights.

Automatic standing is not a means to collaterally attack every police search that results in a seizure of contraband. For example, a defendant, who was not in possession of a car at the time it was searched, did not have automatic standing to contest the search. *State v. Zakel*, 119 Wn.2d 563, 570, 834 P.2d 1046, 1050 (1992). *See also State v. Libero*, 168 Wn. App. 612, 277 P.3d 708 (2012)(Where police obtained consent from one tenant, but not

the second to search a residence, thus violating the article I, section 7 rights of one tenant, but not the other, automatic standing did not allow Libero, a visitor, to collaterally attack the search by asserting the rights of the tenant whose rights were violated.)

V. CONCLUSION

This Court should hold that the sender of a text message, page, e-mail, or similar electronic message has no expectation of privacy in the message once the message reaches the intended recipient's account or electronic device.

Respectfully submitted this 2nd day of April, 2013.

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APPENDIX A

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus ALBERT TERRILL JONES, a.k.a. Berto, ELGIN RAY LOFTON, a.k.a. E-Luv, LUTHER FORD, a.k.a. Chuck Ford, RONALD RAY LANGDON, MICHAEL WAYNE COBB, Defendants-Appellants.

No. 03-15131

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

149 Fed. Appx. 954; 2005 U.S. App. LEXIS 20352

September 20, 2005, Decided
September 20, 2005, Filed

NOTICE: [**1] NOT FOR PUBLICATION

PRIOR HISTORY: Appeals from the United States District Court for the Middle District of Florida. D. C. Docket No. 02-00122-CR-T-24-EAJ.

DISPOSITION: AFFIRMED.

COUNSEL: For Albert Terrill Jones, Federal Correctional Complex-Medium, COLEMAN, FL, Appellant: Christi R. Adams, Foley & Lardner, ORLANDO, FL.

For Elgin Ray Lofton, Appellant: Matthew P. Farmer, Farmer & Fitzgerald, P.A., TAMPA, FL.

For Luther Ford, Appellant: Elton J. Gissendanner, III, E.J. Gissendanner III, P.A., TAMPA, FL.

For Ronald Ray Langdon, SAN PEDRO, CA, Appellant: Daniel M. Hernandez, Daniel M. Hernandez, P.A., TAMPA, FL.

For Michael Wayne Cobb, Appellant: Scott Lyon Robbins, Attorney at Law, TAMPA, FL.

For United States of America, Appellee: Yvette Rhodes Harrison, TAMPA, FL.

JUDGES: Before TJOFLAT, PRYOR and ALARCON *, Circuit Judges.

* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

OPINION

[*957] PER CURIAM:

In this appeal, five defendants, each convicted of conspiracy to possess with intent to distribute various illegal drugs, assert numerous challenges to their convictions and sentences. Because the testimony at trial amply supported their [**2] convictions, the defendants did not have a legitimate expectation of privacy in text messages sent to or from another that precluded that other person from testifying, and the district court did not err when it applied the Sentencing Guidelines, we affirm each conviction and sentence.

I. BACKGROUND

Albert Terrill Jones, Elgin Ray Lofton, Luther Ford, Ronald Ray Langdon, and Michael Wayne Cobb were indicted on charges of conspiracy to possess with intent to distribute five kilograms of cocaine, fifty grams of crack cocaine, and 100 kilograms of marijuana, in violation of *section 841(a)(1) of Title 21 of the United States Code*. The conspiracy involved participants in California, Nevada, Tennessee, and Florida who shipped drugs and money across the county by parcel services. The conspirators used text message pagers to communicate with each other.

After the conspiracy was discovered, government agents identified Marquette McCalebb as the leader or a major part of the conspiracy. Special Agent Kevin McLaughlin of the Drug Enforcement Agency learned from a former conspirator that the conspirators communicated through text message pagers. McLaughlin contacted Skytel Communications, [**3] the service provider for the pagers. McLaughlin also contacted Federal Express, the United [*958] States Postal Service, Airborne Express, and DHL regarding shipments of drugs by mail.

McCalebb was arrested in California, and his home was searched. Agents discovered a large conspiracy ring that involved numerous participants: Jones, Langdon, Lofton, Ford, Cobb, and others. Each defendant had a different role in the conspiracy. Ford mailed packages containing drugs to Octavius Henderson and Jones in Florida. Ford received $ 50 to $ 100 for each package shipped. **[Rd. Br. 4].** Langdon supplied McCalebb with five to ten kilograms of cocaine per week. **[Rd. Br. 4].** Lofton, in Las Vegas, received drug proceeds on behalf of McCalebb. **[Rd. Br. 7].** Cobb and Jones, in Florida, received packages containing drugs. **[Rd. Br. 8-9].**

Skytel informed McLaughlin that it maintained records of the actual text messages sent by pager, and Skytel would disclose the records if it received an administrative subpoena. **[Rd. Br. 18].** McLaughlin, therefore, served Skytel with a subpoena for records of text messages sent on the defendants' pagers. **[Rd. Br. 18].** McLaughlin [**4] did not obtain a warrant. McCalebb, Jones, Cobb, and Langdon moved to suppress the text message records, **[Rd. Br. 17],** and the district court determined that the defendants established a subjective expectation of privacy in the text messages and suppressed the records. **[Rd. Br. 19-20].**

McCalebb pleaded guilty to conspiring to possess with intent to distribute five kilograms or more of cocaine in accordance with a written plea agreement, and agreed to cooperate with the government. **[Rd. Br. 21].** At the request of the government, McCalebb's attorney obtained records pertaining to McCalebb's pager from Skytel, which were forwarded to the government. Over the other defendants' objections, the district court ruled that McCalebb would be permitted to testify regarding text messages he had sent to and received from his co-defendants. **[Rd. Br. 21].** McCalebb was the star witness of the government.

A jury found Jones, Ford, Cobb, Langdon, and Lofton guilty of the charged conspiracy. The district court sentenced Jones to 300 months, Ford to the mandatory minimum sentence of 120 months, Cobb to 151 months, Langdon to 360 months, and Lofton to 188 months. Each [**5] defendant appealed.

II. STANDARD OF REVIEW

We review for abuse of discretion the evidentiary rulings of the district court. *Chrysler Intern. Corp. v. Chemaly, 280 F.3d 1358, 1360 (11th Cir. 2002).* We review de novo the denial of a motion for judgment of acquittal. *United States v. Peters, 403 F.3d 1263, 1268 (11th Cir. 2005).* We review for abuse of discretion the denial of a motion for new trial. *United States v. Day, 405 F.3d 1293, 1297 (11th Cir. 2005).*

Whether the evidence presented at trial is sufficient to support the criminal conviction is a question of law subject to de novo review. *United States v. Diaz, 248 F.3d 1065, 1084 (11th Cir. 2001).* "The evidence is viewed in the light most favorable to the government and all reasonable inferences and credibility choices are made in the government's favor." Id.

We review de novo the application of the Sentencing Guidelines by the district court, and review for clear error its findings of fact. *United States v. Crawford, 407 F.3d 1174, 1177-78 (11th Cir. 2005).* We review de novo a preserved error regarding the constitutionality [**6] of a sentence, *United States v. Paz, 405 F.3d 946, 948 (11th Cir. 2005),* but review for plain error [*959] an error raised for the first time on appeal. *United States v. Rodriguez, 398 F.3d 1291, 1298 (11th Cir. 2005).*

III. DISCUSSION

The five defendants each raise a number of issues on

appeal. One issue is common to Jones, Langdon, and Cobb: the admission of testimony by McCalebb regarding text messages. We will first consider that common issue, and we will then address the unique arguments of each defendant in turn.

A. The District Court Did Not Abuse Its Discretion When It Admitted Testimony By McCalebb Regarding Text Messages He Received.

Jones, Langdon, and Cobb argue that the district court abused its discretion when it admitted testimony regarding the text messages from McCalebb's pager. The district court initially suppressed the text message records, which the government had obtained by administrative subpoena from Skytel. The district court nevertheless allowed testimony regarding the text messages when McCalebb pleaded guilty and agreed to testify at trial. The district court concluded that McCalebb could waive any privacy right he [**7] had with regard to the messages.

"A person has an expectation of privacy protected by the *Fourth Amendment* if he has a subjective expectation of privacy, and if society is prepared to recognize that expectation as objectively reasonable." *United States v. Miravalles, 280 F.3d 1328, 1331 (11th Cir. 2002)* (citing *Katz v. United States, 389 U.S. 347, 361, 19 L. Ed. 2d 576, 88 S. Ct. 507, 516 (1967)* (Harlan, J., concurring)). An individual's right to privacy is limited, however. "The *Fourth Amendment* does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller, 425 U.S. 435, 443, 48 L. Ed. 2d 71, 96 S. Ct. 1619, 1624 (1976)* limited by statute.

We have not addressed previously the existence of a legitimate expectation of privacy in text messages or e-mails. Those circuits that have addressed the question have compared e-mails with letters sent by postal mail. Although letters are protected by the *Fourth Amendment*, "if [**8] a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery." *United States v. King, 55 F.3d 1193, 1195-96 (6th Cir. 1995)* (citations omitted). Similarly, an individual sending an e-mail loses "a legitimate expectation of privacy in an e-mail that had already reached its recipient." *Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001)*; *United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004)*. See also *United States v. Maxwell, 45 M.J. 406, 418 (C.A.A.F. 1996)* ("Drawing from these parallels, we can say that the transmitter of an e-mail message enjoys a reasonable expectation that police officials will not intercept the transmission without probable cause and a search warrant. However, once the transmissions are received by another person, the transmitter no longer controls its destiny."), cited in *Guest, 255 F.3d at 333*.

The government elicited testimony from McCalebb concerning text messages that he sent or received through his pager. Because the defendants did not have a reasonable expectation of privacy in the text messages received or sent by McCalebb, the [**9] district court correctly permitted McCalebb to testify regarding the content of those messages.

The defendants also erroneously argue that the earlier ruling of the district court [*960] suppressing the text messages is law of the case and precludes the later decision to permit McCalebb to testify. Whether McCalebb could testify regarding text messages that he sent and received was a separate issue from whether the government was entitled to use text messages it obtained without a warrant, and the earlier ruling was not law of the case for that issue. McCalebb's testimony did not violate the *Fourth Amendment* and suppression was not warranted.

B. Albert Terrill Jones

1. Even If The District Court Abused its Discretion When it Admitted *Rule 404(b)* Evidence, Any Error was Harmless.

Jones argues that the district court abused its discretion when it admitted evidence of Jones's 1995 conviction, under *Federal Rule of Evidence 404(b)*, to prove his intent to conspire to distribute drugs. We need not address the admissibility of that evidence, however, because any error of the district court was harmless.

"Evidentiary and other nonconstitutional errors do [**10] not constitute grounds for reversal unless there is a reasonable likelihood that they affected the defendant's substantial rights; where an error had no substantial influence on the outcome, and sufficient evidence uninfected by error supports the verdict, reversal is not warranted." *United States v. Matthews, 411 F.3d 1210,*

1229 (11th Cir. June 8, 2005). In Matthews, we concluded that we could not say that improperly-admitted *Rule 404(b)* evidence was harmless because, "despite the district court's limiting instruction, it seems fairly likely to us that the Government's witnesses seemed credible to the jury only because Matthews had been caught dealing drugs once before." *411 F.3d at 1230.* This case is distinguishable from *Matthews.*

Several other defendants were convicted along with Jones. The jury must have found the testimony against the other defendants sufficiently credible to convict them. It does not, therefore, seem "fairly likely" that the "Government's witnesses seemed credible to the jury" only because of Jones's previous conviction. Because there was ample testimony against Jones, any error in admitting the *Rule 404(b)* evidence did [**11] not have substantial influence on the outcome and was, therefore, harmless.

2. The District Court Did Not Commit Plain Error When It Sentenced Jones.

Jones argues that the district court erred, under *United States v. Booker, 543 U.S. 220, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005),* when it treated the Sentencing Guidelines as mandatory in sentencing Jones. Because Jones did not preserve this argument in the district court, we review it for plain error. *United States v. Rodriguez, 398 F.3d 1291, 1298-1300 (11th Cir. 2005).* Although, under Booker, the district court plainly erred when it treated the Guidelines as mandatory, the plain error standard also requires a showing that the plain error also affected Jones's substantial rights. *Id. at 1301.* Nothing in the record suggests that the district court would have imposed a lesser sentence if it had applied the Guidelines in an advisory fashion. Jones, therefore, cannot satisfy the plain error standard. Id.

C. Luther Ford

1. The District Court Properly Denied Ford's Motion for a Judgment of Acquittal.

Ford argues that the district court erroneously denied his motion for a judgment of [**12] acquittal, under *Federal Rule of Criminal Procedure 29,* because the evidence [*961] was insufficient to prove his knowledge of and intent to join the conspiracy. **[Ford Br. 7].** "To uphold the denial of a *Rule 29* motion, we need only determine that a reasonable fact-finder could conclude that the evidence established the defendant's guilt beyond a reasonable doubt." *United States v. Descent, 292 F.3d 703, 706 (11th Cir. 2002)* (quotations and citation omitted).

"To prove participation in a conspiracy, the government must have proven beyond a reasonable doubt, even if only by circumstantial evidence, that a conspiracy existed and that the defendant knowingly and voluntarily joined the conspiracy." *United States v. Garcia, 405 F.3d 1260, 1269 (11th Cir. 2005)* (citation omitted). "To satisfy this burden, the government need not prove that the defendant[] knew all of the detail[s] or participated in every aspect of the conspiracy. Rather, the government must only prove that the defendant[] knew the essential nature of the conspiracy." *Id. at 1269-70* (quotations and citation omitted). "Whether [**13] [the defendant] knowingly volunteered to join the conspiracy may be proven by direct or circumstantial evidence, including inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme." Id. (quotations and citation omitted).

Ford argues that the government did not introduce evidence that he knowingly and voluntarily participated in the conspiracy and knowingly possessed illegal drugs. **[Ford Br. 8].** The government introduced evidence that Ford routinely shipped packages for McCalebb to Jones and Henderson under the name of Ford's employer, and Ford received $ 50 to $ 100 for each package shipped. **[R. Br. 36].** This evidence was sufficient for a jury to conclude beyond a reasonable doubt that Ford knowingly and voluntarily participated in the conspiracy, and the district court did not err when it denied the motion for judgment of acquittal.

2. The District Court Did Not Abuse Its Discretion When it Denied Ford's Motion for a New Trial.

Ford argues that a new trial was warranted because the verdict was against the great weight of the evidence. To grant a motion for new trial because the verdict is against the great weight [**14] of the evidence, "the evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Cox, 995 F.2d 1041, 1043 (11th Cir. 1993).* "Motions for new trials based on weight of the evidence are not favored. Courts are to grant them sparingly and with caution, doing so only in those really exceptional cases." Id. (quotations and citation omitted).

The district court denied Ford's motion and stated that, "considering the evidence presented at trial, the Court does not find that the weight of the evidence contradicts the jury's verdict as to [Ford]." **[R52:2].** As discussed above, the evidence showed that the other conspirators paid Ford to ship packages for McCalebb to Jones and Henderson under the name of Ford's employer. The district court did not abuse its discretion.

D. Elgin Ray Lofton

1. The District Court Correctly Denied Lofton's Motions for Judgment of Acquittal and New Trial.

Lofton argues that his motions for judgment of acquittal and new trial should have been granted because the testimony of McCalebb was so unbelievable as to infect the entire trial. **[Lofton** [**15] **Br. 39-40].** The evidence presented at trial established that Lofton received drug proceeds [*962] from other conspirators and delivered them to McCalebb. **[Rd. Br. 37-38].** Lofton did not have a pager, but he spoke with McCalebb regularly. **[Lofton Br. 16].** Lofton received each month $ 20,000 from Los Angeles and $ 30,000 to $ 60,000 from Tennessee and Florida. **[Lofton Br. 24].** The evidence was sufficient to support the verdict and the district court did not err when it denied the motion for judgment of acquittal. *Garcia, 405 F.3d at 1269-70.* Additionally, the district court did not abuse its discretion when it denied the motion for a new trial because the verdict was not against the great weight of the evidence. *Cox, 995 F.2d at 1043.*

2. The District Court Did Not Clearly Err when It Found that Lofton Was Not Entitled to a Minor-Role Reduction.

Lofton also argues that the district court erred when it refused to grant a reduction because of Lofton's minor role in the offense, which he contends was limited to receiving money. **[Lofton Br. 42].** "A district court's finding regarding a defendant's role in the offense is reviewed [**16] for clear error." *United States v. Ryan, 289 F.3d 1339, 1348 (11th Cir. 2002).* "A defendant warrants a two-level reduction for playing a minor role in an offense if he is less culpable than most other participants, although his role could not be described as minimal." *Id.* (citing *U.S.S.G. § 3B1.2, cmt. n.1*). The analysis employed by the district court compares the defendant's role both to both the relevant conduct used in calculating his base offense level and the conduct of the other conspirators:

> The district court conducts a two-pronged analysis of the defendant's conduct to determine whether the defendant warrants a minor-role adjustment. First, the district court must assess whether a defendant's particular role was minor in relation to the relevant conduct attributed to him in calculating his base offense level. Only if the defendant can establish that [he] played a relatively minor role in the conduct for which [he] has already been held accountable-not a minor role in any larger criminal conspiracy-may a downward adjustment be applied. The second prong of the analysis, if reached, requires the district court to [**17] assess a defendant's relative culpability vis-a-vis that of any other participants.

Id. at 1348-49 (internal quotation marks and citations omitted). The defendant bears the burden of showing his entitlement to the reduction. *Id. at 1348.*

The district court found that Lofton did not have a minor role in the offense. The district court based this finding on Lofton's substantial activities, which included Lofton's receipt of at least 24 packages of drug proceeds **[Rd. Br. 59]** that he changed into smaller bills and laundered. **[Lofton Sent. Tr. 32].** The finding of the district court was not clearly erroneous, because the evidence belies Lofton's arguments.

E. Ronald Ray Langdon

1. The District Court Did Not Abuse Its Discretion When it Admitted Evidence Seized From Langdon's House.

Langdon argues that the district court erred when it denied his motion to suppress evidence seized during an illegal search of his residence. **[Langdon Br. 22-23].** Although the district court found that the warrant to search Langdon's residence was not supported by probable cause, the district court found that a good faith exception applied [**18] to the search. **[R329:2].** "Under [the] good faith exception to the exclusionary rule, suppression is necessary only if the officers were dishonest or reckless in preparing their affidavit or could

[*963] not have harbored an objectively reasonable belief in the existence of probable cause." *United States v. Robinson, 336 F.3d 1293, 1296 (11th Cir. 2003)* (quotations and citation omitted).

An affidavit listed two pieces of evidence that supported the warrant:

> (1) four Express Mail labels addressed to "R. Langdon" or "R. London" written in what appears to be the same handwriting as some of the labels addressed to McCalebb and addressed to a different address than that which was ultimately searched and (2) a statement that DEA Agent McLaughlin informed him that text messages sent by co-defendant McCalebb identified Langdon as a supplier of six kilograms of cocaine to Preston Dent, an unindicted co-conspirator.

[R329:2]. The district court found that reliance on the warrant was in good faith and reasonable, because "the affidavit was not reckless or dishonest or so lacking in indicia of probable cause as to render official belief in its existence [**19] entirely unreasonable." **[R329:3].**

We need not determine whether probable cause existed, because the good faith exception applies here. There is no evidence that the affidavit was dishonest or recklessly prepared, and a reasonable officer could have believed that based on the affidavit that there was probable cause to search Langdon's residence. The district court did not abuse its discretion when it admitted the evidence seized during the search.

2. The District Court Did Not Err When It Applied the Sentencing Guidelines.

Langdon argues that the district court erroneously enhanced his sentence for use of a firearm and obstruction of justice. An enhancement for obstruction of justice is appropriate when the defendant has perjured himself. *U.S.S.G. § 3C1.1 n.2.* Langdon testified at the suppression hearing that he did not use code words when communicating with his co-conspirators. **[Langdon Sent. Tr. 11-12].** The district court found that the testimony was false and applied the enhancement. This finding was not clearly erroneous. **[Langdon Sent. Tr. 19].**

Under *section 2D1.1(b)(1) of the Sentencing Guidelines*, a firearm enhancement [**20] may apply if a defendant possessed a weapon during the offense:

> If a defendant possessed a dangerous weapon during a drug-trafficking offense, his offense level should be increased by two levels. The commentary to *§ 2D1.1* explains that this firearm enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."

United States v. Audain, 254 F.3d 1286, 1289 (11th Cir. 2001) (quoting *U.S.S.G. § 2D1.1, comment. n.3*). During the search of Langdon's residence, two firearms were found, one on the bed in the master bedroom and one in the closet. Money was found nearby, and there were drugs in the residence. **[Langdon Sent. Tr. 33].** The district court did not clearly err when it found that it was not clearly improbable that the firearms were connected to the drug trafficking offense. **[Langdon Sent. Tr. 33].**

F. Michael Wayne Cobb

1. The Evidence Was Sufficient to Support Cobb's Conviction.

Cobb argues that the evidence presented was insufficient to show that he had knowledge of the conspiracy. **[Cobb Br. 24].** The evidence at [**21] trial showed that Cobb helped distribute the cocaine and marijuana, picked up packages of drugs [*964] from two individuals, paid for the delivery services, delivered drug proceeds, mailed drug proceeds to Lofton in Las Vegas, and sold cocaine to Sullivan. **[Rd. Br. 37].** The testimony in the record amply supports Cobb's conviction.

2. The District Court Did Not Clearly Err When It Determined that Lofton Was Not Entitled to a Minor-Role Reduction.

The district court found that Cobb did not have a minor role in the conspiracy compared to the other conspirators. **[Cobb Sent. Tr. 25].** Based on the testimony at trial described above, the finding of the district court was not clearly erroneous. See *Ryan, 289 F.3d at 1348-49.*

IV. CONCLUSION

Each of the arguments of the defendants fails. The convictions and sentences imposed by the district court are, therefore,

AFFIRMED.

CONCUR BY: TJOFLAT

CONCUR

TJOFLAT, Circuit Judge, specially concurring:

I concur in the court's judgment. I write briefly, and separately, with respect to Part III, B, 2 of the court's opinion, which addresses Albert Jones's sentence, specifically his Booker claim. Adhering to binding [**22] precedent--United States v. Rodriguez--as it must, the court refuses to entertain the claim because "nothing in the record suggests that the district court would have imposed a lesser sentence if it had applied the Guidelines in an advisory fashion." Ante at . In other words, Jones failed to establish the third element of the plain-error test, i.e., prejudice that "affected his substantial rights." Id. For the reasons I expressed in *United States v. Thompson, 422 F.3d 1285, 2005 U.S. App. LEXIS 18985, No. 04-12218, 2005 WL 2099784, at *17-19 (11th Cir. Sept. 1, 2005)*, we should not expect to find anything in the record indicating that the court would have imposed a lesser sentence if it had treated the Guidelines as advisory rather than mandatory. To expect a pre-Booker court to say, at sentencing, that it would impose a lesser sentence were the Guidelines not mandatory would be to expect the court to have anticipated Booker and the new sentencing model it fashioned. I suggest that no one--save the justices of the Supreme Court--could have anticipated that model. This is one of the reasons why I contend that Rodriguez was wrongly decided. *United States v. Rodriguez, 406 F.3d 1261, 1281 (11th Cir. 2005)* [**23] (Tjoflat, J., dissenting from the denial of rehearing en banc). But Rodriguez remains the law; thus, Jones's sentence must be affirmed.

APPENDIX B

4 of 4 DOCUMENTS

UNITED STATES OF AMERICA vs. IAN HAFFNER

CASE NO. 3:09-cr-337-J-34-TEM

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION

2010 U.S. Dist. LEXIS 134460

August 31, 2010, Decided
August 31, 2010, Filed

SUBSEQUENT HISTORY: Adopted by, Objection overruled by, Motion denied by *United States v. Haffner, 2010 U.S. Dist. LEXIS 134453 (M.D. Fla., Dec. 20, 2010)*

COUNSEL: [*1] For Ian Haffner, BOND, Defendant: D. Gray Thomas, Elizabeth Louise White, Matthew R. Kachergus, William J. Sheppard, LEAD ATTORNEYS, Sheppard, White, Thomas & Kachergus, PA, Jacksonville, FL.

For USA, Plaintiff: Ronald Thomas Henry, LEAD ATTORNEY, US Attorney's Office - FLM, Jacksonville, FL.

JUDGES: THOMAS E. MORRIS, United States Magistrate Judge.

OPINION BY: THOMAS E. MORRIS

OPINION

REPORT AND RECOMMENDATION[1]

1 As a matter of course, within fourteen (14) days after service of this document, specific, written objections may be filed in accordance with *28 U.S.C. § 636*, *Rule 59, Federal Rules of Criminal Procedure*, and *Rule 6.02, Local Rules, United States District Court, Middle District of Florida*. Failure to file a timely objection waives a party's right to review. *Fed. R. Crim. P. 59*.

I. Status

This matter is before the Court on referral by the Honorable Marcia Morales Howard for a report and recommendation on Defendant Ian Haffner's motions to suppress evidence. Between May 5 and June 23, 2010, Defendant filed five motions seeking to suppress evidence obtained during the investigation of his case (*see* Docs. #36, #37, #38, #41 and #60). Defendant has moved to suppress statements he made to Immigrations and Customs [*2] Enforcement (ICE) agents on April 29, 2009, as well as information obtained by the ICE agents from a search of Mr. Haffner's laptop computer. The United States filed responses in opposition to each of Defendant's motions (*see* Docs. #42, #43, #44, #45 and #65). The Court held evidentiary hearings on June 8, 2010 and July 14, 2010. Transcripts of the proceedings have been filed (Docs. #56 and #74) (hereinafter referred to as "Tr. 1" and "Tr. 2", followed by the appropriate page number). [2] With the Court's permission, Defendant filed a supplemental memorandum of law in support of his position on June 24, 2010 (Doc. #61) and the United States filed a supplemental memorandum in opposition on July 1, 2010 (Doc. #63). Upon consideration of the argument from counsel and the evidence presented, the

undersigned recommends the motions to suppress be **denied.**

> 2 Also contained within the record is a transcript of the April 29, 2009 audio-taped interview of Defendant by ICE agents Greenmun and Jones. Defendant initially filed a transcript of the recording (*see* Doc. #40). The United States entered a copy of the transcript into the record during the June 6, 2010 hearing (Gov't Exh. 4). Government Exhibit [*3] 4 contains minimal corrections to the transcript offered by Defendant.

II. Background

On October 29, 2009, a grand jury returned a two count indictment charging Defendant Ian Haffner (hereinafter referred to as "Defendant") with knowingly receiving and attempting to receive visual depictions using a means and facility of interstate and foreign commerce, that is, by computer via the Internet, including by computer, the production of which involved the use of minors engaging in sexually explicit conduct, which visual depictions were of such conduct, in violation of Title *18, United States Code, Section 2252(a)(2)* (Doc. #1).

Defendant seeks to suppress the statements he made and any evidence seized by law enforcement officers on April 29, 2009, the date he was interviewed in his home regarding the possible child pornography believed to be on his computer. Defendant asserts the law enforcement agents were able to discover his identity and location through an unlawful search that occurred in the State of Virginia in February 2008 and unlawful access to his school records from Flagler College (*see* Docs. #36 and #60). Defendant requests suppression of the statements on the basis any statements [*4] he made were involuntary and without a knowing and intelligent waiver of his *Fifth* and *Sixth Amendment* rights as required by *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*. More specifically, Defendant asserts any statements he made resulted from the use of coercion, trickery and misrepresentations by the agents that led to his "acquiescence to the agents' claim of lawful authority"(Doc. #38 at 4; *see also* Doc. #60, "The student records unlawfully obtained by law enforcement were thereupon used to obtain other evidence from the Defendant.").

The United States argues the Defendant does not have standing to challenge the search of another person's computer in Virginia, nor does he have a reasonable expectation of privacy in the contents of that computer (Doc. #42). The United States further argues the Defendant was not subjected to a custodial interrogation that would trigger the application of *Miranda* to the April 29, 2009 interview, but even if he were found to have been in custody, the agents properly informed Defendant of his rights under *Miranda* (Doc. #43). The United States also asserts the agents did not illegally obtain any information from Flagler College, nor was the information they [*5] did obtain used to contact the Defendant or subsequently obtain statements and evidence from him (Doc. #65).

Upon consideration of all the evidence presented and the arguments made, the Court makes the following findings of fact and conclusions of law.

III. Findings of Fact

The evidence presented at the first hearing revealed that on April 29, 2009 at approximately 3:00 p.m. two individuals, Agent Greenmun and Detective Jones, who were working on a joint law enforcement task force overseen by Immigration and Customs Enforcement, went to Defendant's residence in St. Johns County to conduct an interview of the Defendant (Tr. 1 at 8, 78) The purpose of the interview was to determine if the Defendant was involved in the trading of child pornography over the internet (Tr. 1 at 8, 78). ICE became interested in Defendant because computer searches in Virginia and Victoria, Canada revealed a screen name (also known as a "handle") that was ultimately identified as belonging to Defendant (Tr. 1 at 38-50). Defendant's identity was obtained by ICE agents through a search of a David Didio's computer in Blacksburg, Virginia and the issuance of subsequent summons to the internet service providers Google [*6] and AmericaOnline (Tr. 1 at 42-49, 68-69; Doc. #36-1). When the ICE agents arrived at Defendant's home they were greeted by someone who the agents presumed was one of Defendant's roommates (Tr. 1 at 8).

When Defendant came to the door the agents identified themselves and asked if Defendant had time to talk (Gov't Exh. 4 at 2-3). Defendant invited the agents into his home and the three of them proceeded directly to the kitchen (Tr. 1 at 79-80). Defendant sat down at the kitchen table and Agent Greenmun sat across from Defendant (Tr. 1 at 80). Detective Jones stood to the side

in the doorway to the kitchen (i.e., the access opening for that room) (Tr. 1 at 81). Agent Greenmun informed Defendant the reason the agents were there was because Defendant's name had come up in an investigation involving child pornography (Gov't Exh. 4 at 4). Agent Greenmun and Defendant discussed the Defendant's internet and computer set-up at his residence, as well as Defendant's different handles (i.e., nicknames, screen names, or user ids on the internet) (Gov't Exh. 4 at 4-7).

Agent Greenmun verified Defendant attended school at Flagler College (Gov't Exh. 4 at 8-9). Defendant stated he was a senior at Flagler [*7] with a major in Psychology, and he would graduate in December (Gov't Exh. 4 at 8).

Agent Greenmun then gave Defendant a document with four bullet points that the agent described as a *Miranda* form (Tr. 1 at 8-9). [3] Defendant read the items listed on the *Miranda* form out loud (Gov't Exh. 4 at 9). In his reading of the *Miranda* form, Defendant actually noted and corrected the typographical error that was on the form (Tr. 1 at 99). Detective Jones informed Defendant that they were at Defendant's house as part of a criminal investigation (Gov't Exh. 4 at 10).

> 3 Government Exhibit 2: The U.S. Immigration and Customs Enforcement "Waiver of Rights" form given to Defendant contained the four following notes:
>
> > 1. You have the right to remain silent.
> > 2. Anything you say may be used against you.
> > 3. You have the right to have a lawyer.
> > 4. If you cannot afford a lawyer, one will be proved[sic] to you for free.

Both Agent Greenmun and Detective Jones then explained to Defendant how they identified Defendant through his "handle" and a computer search in Virginia, and why they thought there may be child pornography on Defendant's computer (Gov't Exh. 4 at 10-23). When asked if he recognized any of twenty-nine [*8] (29) pictures that the agents had with them, the Defendant answered, "No" (Gov't Exh. 4 at 18-19). Defendant then responded he hoped none of those photos would be found on his computer (Gov't Exh. 4 at 19). Greenmun and Jones explained that they were mainly concerned with making sure the trading in child pornography was not an ongoing issue (Gov't Exh. 4 at 20-23). They told Defendant the best way for them to "figure out the threat level" would be for Defendant to consent to a search of Defendant's computer (Gov't Exh. 4 at 23). Greenmun and Jones further told Defendant that as long as what Defendant told them was true, the computer would be returned to Defendant the following Monday (Gov't Exh. 4 at 24). Defendant expressed concern that he had not "cleaned [the computer] off in a long time" and there might be child pornography still on the computer (Gov't Exh. 4 at 24-25).

Greenmun specifically asked Defendant if he could see Defendant's computer, to which Defendant responded, "Yes. My room is a mess." (Gov't Exh. 4 at 30.) At that point, the agents and Defendant went upstairs to Defendant's bedroom, where the computer was located (Tr. 1 at 11). Detective Jones informed Defendant that [*9] whether ICE searched Defendant's computer or not was entirely up to Defendant (Gov't Exh. 4 at 31). Defendant repeatedly expressed a desire to "wipe my hard drive" and asked Greenmun and Jones if he could just wipe the hard drive and be done with the investigation (Gov't Exh. 4 at 24-29, 31-33). Detective Jones told Defendant that wiping the hard drive would not be helpful for either Defendant or ICE (Gov't Exh. 4 at 33).

After shutting down the computer and returning downstairs to the kitchen, Defendant signed a consent to search waiver (Tr. 1 at 19-20; Gov't Exh. 2). Agent Greenmun exchanged contact information with Defendant and told Defendant that if Defendant had any questions, Defendant should not hesitate to contact Agent Greenmun (Gov't Exh. 4 at 36- 38). After exchanging a few more words, Agent Greenmun and Detective Jones departed (Gov't Exh. 4 at 40-41). The entire encounter lasted less than forty (40) minutes (*see* Gov't Exh. 3 & Gov't Exh. 4).

At the time of the interview, Agent Greenmun and Detective Jones were dressed in plain clothes, rather than in uniform (Tr. 1 at 17, 101). Agent Greenmun testified that it was never his intent to arrest Defendant (Tr. 1 at 9) and at [*10] no point during the interview did he (Agent Greenmun) tell Defendant the he would be placed under arrest (Tr. 1 at 18). While Defendant agreed that the ICE

agents did nothing at the scene to suggest to Defendant that he was going to be placed under arrest, Defendant still testified to feeling detained (Tr. 1 at 104). Agent Greenmun and Detective Jones were armed, but did not show Defendant their weapons (Tr. 1 at 18, 101). Defendant described the ICE agents' demeanor as "cordial" (Tr. 1 at 100). Defendant testified that he did not know he could refuse consent to permitting the ICE agents entry into his home (Tr. 1 at 98). He stated he was hungover, surprised by their presence, (Tr. 1 at 78) and intimidated (Tr. 1 at 81). While showing signs of nervousness (Gov't Exh. 3 and Gov't Exh. 4), Defendant did not objectively demonstrate behavior that would evince his feelings of being overwhelmed and intimidated during the course of the interview (*see* Tr. 1 at 104-08, Gov't Exh. 3 and Gov't Exh. 4).

IV. Analysis and Conclusions of Law

Motions to suppress evidence relevant to a criminal trial present mixed questions of law and fact for the court's determination. *United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir. 1991)* [*11] (internal citations omitted). A circuit court of appeals reviews the district court's findings of fact under the clearly erroneous standard, but application of the law to those facts is subject to *de novo review. Id.*

A warrantless entry into a person's home is presumed to be an unreasonable violation of one's *Fourth Amendment* rights. *United States v. Ramirez-Chilel, 289 F.3d 744, 751 (11th Cir. 2002)* (citing *United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir. 1991)* (citing *Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)*). The warrrantless search of a residence is likewise presumed to be unreasonable. *Id.* However, consent to enter and consent to search a home are well recognized exceptions to the requirement that police obtain a warrant. *Id.* Yet, when consent to the entry into a residence was prompted by a show of official authority, the consent may not have been legally obtained and any evidence seized thereafter may be tainted by the illegal entry. *United States v. Edmondson, 791 F.2d 1512, 1515 (11th Cir. 1986)* (finding the defendant's action of stepping back from the front door with his hands behind his head to be an acquiescence to a show of official authority in light of the number [*12] of FBI agents present and the announcement of their presence by an agent yelling "FBI. Open the door.").

Defendant argues that pursuant to the *Fourth* and *Fifth Amendments, Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*, and *Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)*, all statements made during the questioning at Defendant's residence and any evidence obtained from the search of the computer in Virginia and the search of Defendant's computer should be suppressed in this case (Docs. #36, #37, #38, #41, #60, and #61). A number of legal issues have been identified in this matter as pertinent to the resolution of the motions to suppress. Those issues include: (1) whether Defendant had a reasonable expectation of privacy in communications saved on another person's computer; (2) whether Defendant was in custody during the questioning on April 29, 2009; (3) whether Defendant's statements and consent to search were knowing and voluntary; (4) whether the search exceeded the scope of Defendant's consent; and (5) whether the agents illegally obtained information from Flagler College before the April 29, 2009 interview that tainted the evidence obtained from the interview itself.

1. Whether Defendant had [*13] **a reasonable expectation of privacy in communications saved on another's computer**

The catalyst for identifying Defendant came from a search conducted on the computer reportedly belonging to a Mr. David Didio in Blacksburg, Virginia (Tr. 1 at 44-47, 68-69; Doc. #36-1). Defendant asserts that his identification was a result of the execution of an unlawful Virginia search warrant and therefore all evidence in this case derived from that search should be excluded (Doc. #36 at 3). Defendant claims the search warrant was unlawfully obtained because the affidavit on which it is based is invalid and not supported by probable cause (Doc. #36 at 1-2). The Court finds it need not reach the issue of the sufficiency of the warrant because it concludes the Defendant did not have a *Fourth Amendment* right of privacy in the contents of Mr. Didio's computer. Therefore, Defendant cannot challenge the search itself.

The *Fourth Amendment's* prohibition against unreasonable searches and seizures only extends to those instances where an individual demonstrates a reasonable expectation of privacy against government intrusion. *United States v. King, 509 F. 3d 1338, 1341 (11th Cir. 2007) citing United States v. Cooper, 203 F. 3d 1279, 1283-84 (11th Cir. 2000).* [*14] In order to have

standing to challenge the validity of a government search, an individual must actually have a reasonable expectation of privacy. *Id. See also Rehberg v. Paulk, 611 F.3d 828, 842 (11th Cir. 2010)* ("In order for *Fourth Amendment* protections to apply, the person invoking the protection must have an objectively reasonable expectation of privacy in the place searched or item seized.") (internal citations omitted).

Defendant must establish both a subjective and objective expectation of privacy. *See United States v. King, 509 F. 3d at 1341, quoting United States v. Segura-Baltazar, 448 F. 3d 1281, 1286 (11th Cir. 2006).* More specifically, Defendant must have had an actual expectation of privacy that society is prepared to recognize as reasonable. *Id.*

Defendant claims that he considered the screen name he used to communicate with Didio, and Defendant's instant message chats with Didio, to be private (Doc. #61 at 18; Tr. 1 at 88-89). Defendant argues that one of the reasons for using a screen name is to remain anonymous and to protect one's privacy (Doc. #61 at 18; Tr. 1 at 88). The Court acknowledges that Mr. Haffner may have believed he had a reasonable, and thus legitimate, [*15] expectation of privacy in the instant chats and the e-mail communications between himself and Mr. Didio. While whether Defendant believed the communications were private may be the first question to ask, it is not the operative question. The operative question is whether the expectation of privacy was reasonable as viewed through the eyes of society. *United States v. King, 509 F.3d at 1341-42.*

On this issue, the Court finds Mr. Haffner's expectation of privacy was not reasonable. Any subjective expectation that Defendant may have had in the privacy of the contents of Mr. Didio's computer was not one which society is prepared to recognize as reasonable.

Pertinent to this case, the Google Hello application served as an instant messenger with the ability to send images (Tr. 1 at 68-70). The messages Defendant sent via Google Hello could be seen by others on Mr. Didio's computer screen, could be saved and redistributed, and once sent could not be retrieved (Tr. 1 at 92-95). In content, a message sent by Google Hello is very similar to an e-mail or a written letter. Once Mr. Didio received the messages via the Google Hello application from Defendant, Defendant lost his reasonable expectation [*16] of privacy in the messages. *See generally Rehberg v. Paulk, 611 F.3d at 843* (noting some circuit decisions suggest an individual may not have a legitimate expectation of privacy in transmissions over the Internet or in e-mail that has already arrived at the recipient), *citing Guest v. Leis, 255 F. 3d 325, 333 (6th Cir. 2001); see also United States v. Lifshitz, 369 F. 3d 173, 190 (2d Cir. 2004)* (citing to *Guest* for the proposition that once an e-mail has reached its recipient the sender loses any legitimate expectation of privacy in the e-mail because at that moment the e-mailer becomes analogous to a letter-writer, whose expectation of privacy ordinarily terminates upon delivery of the letter). *Cf. United States v. Dunning, 312 F. 3d 528, 531 (1st Cir. 2002)* ("if a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery") (internal citations omitted).

Because any expectation of privacy Defendant may have had in Mr. Didio's computer and the conversations contained therein is unreasonable, Defendant suffered no violation of his *Fourth Amendment* rights when Mr. Didio's computer was searched. Defendant therefore cannot challenge the search.

2. [*17] **Whether Defendant was in custody**

Defendant claims that the statements made during the April 29, 2009 interview were obtained in violation of *Miranda* and *Edwards* (Doc. #37 at 1-2). Defendant asserts that he was not adequately advised of his *Miranda* rights and that he did not voluntarily, knowingly and intelligently waive his *Miranda* rights (Doc. #37 at 1-3). Thus, the Court must determine whether the Defendant was in custody in order to ascertain whether there was a need for *Miranda* warnings to be given. The requirements of providing a suspect with advice of his *Miranda* rights attaches at the point an individual is taken into custody by law enforcement officers. *Miranda v. Arizona, 384 U.S. at 491-92; United States v. Brown, 441 F. 3d 1330, 1347 (11th Cir. 2006).* Thus, the Court need consider the sufficiency of the *Miranda* warnings only if Defendant was in custody during the interview on April 29. [4]

4 Although Defendant asserts a violation of *Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)*, Defendant does not show, nor does the Court see, any violation of *Edwards*. In *Edwards*, the Supreme Court held that once a defendant asserts his right to an attorney, government officials must not subject

> the [*18] defendant to any further interrogation until counsel has been made available to the defendant, unless the defendant initiates communication with the police. *Edwards, 451 U.S. at 484-85.* Here, Defendant, himself, read aloud the substance of his *Miranda* rights, but did not request an attorney at any point during the April 29 encounter with ICE agents (Tr. 1 at 99; Gov't Exh. 4 at 9-10).

Custodial interrogations are inherently compulsive in nature. *Yarborough v. Alvarado, 541 U.S. 652, 661, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004), citing Miranda, 384 U.S. at 458.* To protect an individual's *Fifth Amendment* privilege against self-incrimination, suspects subjected to a custodial interrogation must be informed that they have a right to remain silent, that anything they say can and will be used against them in court, that they have the right to an attorney, and that if they cannot afford an attorney, one will be provided for them. *Thompson v. Keohane, 516 U.S. 99, 107, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995), citing Miranda, 384 U.S. at 444.* For purposes of *Miranda*, an individual is in custody "when there has been a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *United States v. Brown, 441 F. 3d at 1346, quoting* [*19] *California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983).*

There is no particular fact in a custody analysis that is outcome determinative. *United States v. Brown, 441 F. 3d at 1349.* All that is required for the *Miranda* analysis to apply is that the defendant be in "a police-dominated atmosphere" and subject to state interrogation. *See Illinois v. Perkins, 496 U.S. 292, 297, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990).* The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers *or the person being questioned. Stansbury v. California, 511 U.S. 318, 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)* (emphasis added).

To determine if Defendant was in custody on April 29, the Court will consider whether, under the totality of the circumstances, a reasonable person in Defendant's situation would have felt free to leave. *See United States v. Brown, 441 F. 3d at 1347, citing United States v. McDowell, 250 F. 3d 1354, 1362 (11th Cir. 2001).* In analyzing such circumstances, the Eleventh Circuit has found "[t]he test is objective: the actual, subjective beliefs of the defendant and the interviewing officer on whether the defendant was free to leave are irrelevant." *United States v. Brown, 441 F. 3d at 1347,* [*20] *quoting United States v. Moya, 74 F. 3d 1117, 1119 (11th Cir. 1996).* A reasonable person for purposes of the test is a reasonable innocent person. *Id.*

Here, there is no question that Defendant was not placed under arrest on April 29, 2009. Defendant invited the agents into the apartment (Gov't Exh. 4 at 3). Neither of the agents told Defendant he was under arrest, nor did they do anything to suggest to Defendant that he was under arrest (Tr. 1 at 104). Defendant was not handcuffed, nor was there any evidence of physical contact or control of Defendant by the agents. *See generally Yarborough, 541 U.S. at 664* (fact that police did not threaten defendant or suggest he would be placed under arrest weighed against a finding of custody); *see also United States v. Mittel-Carey, 493 F. 3d 36, 40 (1st Cir. 2007)* ("the element that carries the most weight is the level of physical control that the agents exercised over the defendant during the search and interrogation"). While Defendant was not specifically told that he was not under arrest, Defendant was informed the agents were at his home as part of a criminal investigation and if he wanted to stop the interview at anytime, he could (Gov't [*21] Exh. 4 at 10). Defendant also testified at the hearing that he knew he had the option to talk to an attorney rather than to the agents (Tr. 1 at 105).

Further, while it is not dispositive, it is significant that the interview took place in surroundings that were familiar to Defendant. *See United States v. Brown, 441 F. 3d at 1348* (when interrogations take place in the suspect's home, courts are less likely to find the circumstances were custodial), *citing United States v. Ritchie, 35 F. 3d 1477, 1485 (10th Cir. 1994); also see United States v. Newton, 369 F. 3d 659, 675 (2d Cir. 2004)* (noting that "absent an arrest, interrogation in the familiar surroundings of one's own home is generally not deemed custodial"). Defendant's own kitchen and bedroom are clearly familiar settings. The fact that Defendant was in a familiar setting weighs in favor of a non-custodial finding. *United States v. Brown, 441 F. 3d at 1349.*

The Court also considers the fact that the interview lasted for less than forty minutes and Defendant was not arrested at the end of the interview (Gov't Exhs. 3 & 4;

Tr. 1 at 9, 22). Both of these facts are consistent with questioning where a reasonable person would have felt [*22] free to end the interview and leave, or request the agents to leave. *See generally Yarborough, 541 U.S. at 665*; see also *Oregon v. Mathias on, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977)* (finding the suspect was not in custody during a half-hour interview at the offices of the State Police, after which the suspect was not arrested and left the police station without hindrance). In this case, only two law enforcement officers were present during the interview, they were in plain clothes and did not display their firearms at any point (Tr. 1 at 101). *See Mittel-Carey, 493 F. 3d at 39* (stating the number of law enforcement officers present at the scene is relevant to a custody determination). Defendant admits the interview was conducted in a very cordial manner (Tr. 1 at 100). Defendant also admits that the recording and transcript of the interview accurately depict the encounter; nothing was not captured that actually happened or should have been heard (Tr. 1 at 95-97).

The only piece of objective evidence that might weigh in favor of finding Defendant was in custody would be the fact that Detective Jones stood in the doorway of the kitchen area while much of the interview took place (Tr. 1 at 104). Defendant [*23] claims the detective's presence blocked the only avenue in and out of the kitchen and caused him to feel detained (Tr. 1 at 104). This single fact, however, does not overcome the weight of the other evidence, particularly when Defendant did not ask Detective Jones to move from the doorway, did not give any indication that he wanted the interview to end, and he moved freely from the kitchen upstairs to his bedroom and back again to the kitchen (Tr. 1 at 11, 18-20, 104-05).

Upon consideration of the totality of the circumstances, the undersigned concludes that Defendant was not in custody during the interview of April 29, 2009. Review of the transcript of the meeting at Defendant's residence and the audio recording of the entire interview reveals the tone of the interview was congenial and nonthreatening (Gov't Exhs. 3 & 4). The audio recording provides substantial support for the Court's determination that a reasonable person would have felt he could terminate the interview (Gov't Exh. #3). As Mr. Haffner was not in custody during the interview, the requirements of *Miranda* did not attach and the statements he made need not be suppressed. [5]

5 Even assuming arguendo that *Miranda* warnings [*24] were required to be given to Defendant under these facts, the undersigned finds the officers adequately complied with that requirement by providing Defendant with a written document that contained a statement of the individual *Miranda* rights, which Defendant read aloud and acknowledged he understood (Tr. 1 at 99, 105; Gov't Exh. 4 at 8-10). On the facts of this case, the Court is convinced Mr. Haffner understood the rights he recited to the agents.

3. Whether Defendant's statements and consent to search were voluntary

Defendant's next argument is that his statements and consent to search were not voluntary (Docs. #37-38, 61). Defendant asserts that his statements were the product of duress and coercion, and were made as a result of his acquiescence to the agent's claim of authority (Doc. #37 at 1-2). Defendant claims that his statements and his consent to search were involuntary because he did not feel free to leave, he was coerced, he was in a vulnerable state and was eager to reduce the degree and duration of contact between the agents and others on the premises.

Although the Court does not accept the requirement of *Miranda* warnings attached to the situation at hand, nevertheless, in [*25] an abundance of caution the Court will consider the voluntariness of Defendant's statements in light the legal precedence emanating from *Miranda*. Under *Miranda v. Arizona*, a defendant must be informed of his *Fifth Amendment* rights prior to custodial questioning. *384 U.S. at 492*. If a defendant is not informed of his *Fifth Amendment* rights, any pretrial statements elicited during the custodial interrogation are inadmissible at trial. *Id. Miranda* also holds, however, that a suspect may waive effectuation of the rights conveyed in the warnings provided the waiver is made voluntarily, knowingly, and intelligently. *Id. at 444, 475*. Under *Miranda*, a waiver of rights may be explicit, or it may be implied by a suspect's actions or words. *See North Carolina v. Butler, 441 U.S. 369, 378-79, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)*. In essence, the waiver inquiry has two distinct parts:

> First, the relinquishment of the right must have been voluntary in the sense it was the produce of a free and deliberate choice rather than intimidation, coercion,

> or deception. Second, the waiver must have been with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality [*26] of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (*internal quotation marks and citations omitted*). The Supreme Court, in *Moran*, further stated "we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Id. at 422.*

Defendant asserts that he was unable to make a knowing and intelligent waiver of his *Miranda* rights due, primarily, to coercion and intimidation (*see* Doc. #38; Tr. 1 at 81-82, 98). He argues the presence of two agents in possession of "large three ring binder" that apparently contained his "entire life" overwhelmed him, in some fashion, and led to his involuntary "acquiescence" to the presence of authority (Doc. #70 at 5-6; Tr. 1 at 85-86; Tr. 2 at 11-12). Upon consideration, the undersigned is not persuaded by this argument.

The voluntariness of a defendant's statements is determined from whether "the defendant's will was overborne." *Lynumn v. Illinois, 372 U.S. 528, 534, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963).* [*27] Voluntariness is determined by the totality of the circumstances. *Johnston v. Tampa Sports Auth., 530 F. 3d 1320, 1326-27 (11th Cir. 2008) citing Schneckloth v. Bustamonte, 412 U.S. 218, 226-27, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); United States v. Blake, 888 F. 2d 795, 798 (11th Cir. 1989).* Whether the person is in custody, the existence of coercion, the individual's awareness of his right to refuse, the individual's education and intelligence, and whether the person believes incriminating evidence will be found are all factors that should be considered in making a voluntariness determination. *Johnston, 530 F. 3d at 1326-27 citing Blake, 888 F. 2d at 798; see also United States v. Purcell, 236 F. 3d 1274, 1281 (11th Cir. 2001).* This list of factors is certainly not all-inclusive. *Johnston, 530 F. 3d at 1326-27.* Other possible factors include whether officers had their guns drawn, whether *Miranda* warnings were given, and whether individual was told a search warrant could be obtained. *United States v. Crapser, 472 F. 3d 1141, 1149 (9th Cir. 2007) citing United States v. Jones, 286 F. 3d 1146, 1152 (9th Cir. 2002).*

After reviewing the totality of the circumstances, the Court has determined that Defendant's statements [*28] and his consent to search were voluntary. First, as discussed above, Defendant was not in custody. While Defendant may have felt confined, a reasonable person in Defendant's position would have felt he was able to terminate the interview. The officers were invited in, were in plain clothes, and never indicated in any way to Defendant that they were armed (Tr. 1 at 79, 101; *also see* Gov't Exh. 4). The officers did not tell Defendant he was, or would be, under arrest (*see generally*, Gov't Exh. 4; Tr. 1 at 104). Neither did the officers promise Mr. Haffner that anything he said would not be used in a future prosecution. *Cf. United States v. Lall, 607 F.3d 1277 (11th Cir. 2010)* (finding the promise of an officer not to prosecute obviated earlier *Miranda* warnings concerning the voluntariness of a defendant's confession). Second, from the audio of the interview, it is clear the nature of the agents' behavior was low-key, professional and created a cordial atmosphere (Gov't Exh. 3). Nothing in the audio recording suggests the Defendant was intentionally intimidated or browbeaten into consent (Gov't Exh. 3). The agents conducted themselves in such a manner as to observe Defendant's rights.

Defendant [*29] claims that the agents' presentation of the *Miranda* card, combined with Agent Greenmun's statement that this action was "procedural," was coercive conduct to obtain Defendant's consent (*see* Doc. #61 at 7). Notwithstanding that *Miranda* warnings were not necessary under the circumstances, the Court can not accept Defendant's claims. The Court does find the agents presented the *Miranda* card and had Defendant read aloud his rights in an abundance of caution. Defendant was specifically made aware of his right to talk to an attorney and his right to stop the interview at anytime (Tr. 1 at 32, lines 1-3, 21-25; Gov't Exh. 4 at 9-10). Defendant also testified to understanding that he had the option to talk to an attorney rather than the agents (Tr. 1 at 105-06). Defendant was informed by the agents that he did not have to allow them to seize his computer, yet he signed a consent to search form and permitted the seizure

(Tr. 1 at 12, 33, 87, 98; Gov't Exh. 2; Gov't Exh. 4 at 31). On the record before the Court, there is no indicia of coercion.

Defendant asserts that he was in a vulnerable state due to life experiences and therefore his consent was made involuntarily (Doc. #61 at 7-9). Defendant [*30] testified to having experienced a number of deaths of close friends and family members since he was very young (Tr. 1 at 89-91). He testified these deaths "culminated in [his] brother's suicide in the summer of 2005" (Tr. 1 at 89) and he recently had "a good friend" pass away "from respiratory failure" (Tr. 1 at 91). Defendant maintains that he is a "very vulnerable person and all these deaths and experiences took a toll" on him (Tr. 1 at 90). Defendant also testified he had "gone out drinking" the night of April 28 and had not eaten within the twenty-four (24) hours before the agents arrived at his residence (Tr. 1 at 84; Tr. 2 at 12-13). Defendant claims that having not eaten combined with having gone out drinking the night before contributed to his anxious and confused condition on April 29 (Tr. 1 at 84-85; Tr. 2 at 12-13). [6] Defendant appears to argue this alleged overall vulnerability, and his mental and physical condition on April 29 in particular, interfered with his capacity to appreciate the consequences of waiving his rights. This argument is not persuasive.

> 6 Defendant testified at the July 14, 2010 hearing that he had recently been diagnosed with hypoglycemia, a condition [*31] that may impact his physical and mental well-being (Tr. 2 at 12). There is no additional evidence in the record pertaining to Defendant's hypoglycemia.

The undersigned has considered Defendant's alleged vulnerability and determined that while Defendant may have been through difficult times, Defendant was not so vulnerable on April 29, 2009 as to affect his ability to refuse to answer questions or to consent to a search of his computer. *See generally United States v. Ramirez-Chilel, 289 F. 3d 744, 752 (11th Cir. 2002)* (finding an individual's ability to refuse consent is an important factor when examining whether a consent to search was made voluntarily). Notwithstanding that Defendant may or may not have eaten for an extended period of time before the agents arrived at his residence, this fact was not disclosed to the agents and nothing in the audio recording of the interview suggests Defendant's demeanor was anything more than mildly nervous throughout the course of the approximately forty minute discussion. *Cf. United States v. Smith, 322 Fed. Appx. 876 (11th Cir. Apr. 10, 2009)* (the court found although the defendant had been intoxicated at least three hours prior to the jail interview, [*32] he made a knowing and voluntary waiver of his *Miranda* rights during the questioning); *United States v. Taylor, 508 F.2d 761 (5th Cir. 1975)* (the circuit court upheld the district court's denial of one defendant's motion to suppress and found the evidence did not support the defendant's allegation he was so affected by the influence of drugs allegedly taken that his statements were unreliable or involuntary); *United States v. Mack, No. 07-238, 2009 U.S. Dist. LEXIS 17290, 2009 WL 580430 (M.D. La. Mar. 6, 2009)* (the court found the defendant's confession was voluntary despite the defendant's argument that administration of the Taser three times had created a coercive environment and impaired his ability to understand the nature of his rights and the ramifications of waiving those rights). [7]

> 7 Unpublished opinions may be cited throughout this order as persuasive on a particular point. The Court does not rely on unpublished opinions as precedent. Citation to unpublished opinions on or after January 1, 2007 is expressly permitted under *Rule 32.1, Fed. R. App. P.* Unpublished opinions may be cited as persuasive authority pursuant to the Eleventh Circuit Rules. *11th Cir. R. 36-2.*

Defendant was twenty-two years old at the [*33] time of this incident and was a college senior with a major in a behavioral science (Gov't Exh. 4 at 8-9). Defendant was living independently in an apartment with a number of roommates (some of whom were in the apartment while the ICE agents were present) and was engaged in gainful employment, while also attending college (*see* Tr. 1 at 8, 77-79, 83-84). Defendant ultimately graduated from Flagler College with *magna cum laude* honors (Tr. 1 at 87). Defendant's age, level of education, and intelligence all weigh in favor of finding Defendant's statements were voluntarily made and Defendant had the ability to refuse consent.

The agents did not claim they could easily obtain a search warrant if Defendant refused to cooperate. *See United States v. Crapser, 472 F.3d at 1149* (finding the fact the defendant had been told a search warrant could be obtained was significant). In fact, in this instance, the Court does not find any assertion of authority to force Defendant to talk or to surrender the computer. The

agents truthfully told Defendant that if he refused consent, the investigation would not end. They did not tell Defendant that his computer would be searched whether or not he consented [*34] to a search.

Defendant claims that the student information obtained by ICE agents helped coerce him into making statements and consenting to the search of his computer (Doc. #60 at 1, Doc. #70 at 1). Defendant testified that the presentation of his school records "overwhelmed" him (Tr. 2 at 12). The Court accepts Defendant's contention that he believed the officers might find incriminating evidence on his computer (Gov't Exh. 4 at 24-25) [8] and acknowledges that this belief and the officers' apparent prior knowledge of his class schedule are factors to consider in determining the voluntariness of his statements and consent. *See generally Johnston v. Tampa Sports Auth., 530 F. 3d at 1328* (whether a person believes incriminating evidence will be found is one of a number of factors to consider in determining voluntariness). However, contrary to Defendant's assertions, the totality of the circumstances, as discussed above, reveals that Defendant's will was not overborne.

8 Excerpt of the transcript from the April 29, 2009 interview:

Agent Greenmun: ...provided what you're saying is true, and you seem pretty straightforward, you know, provided that's true, I can get [the computer] back to you [*35] before classes.

Mr. Haffner: My concern is that I haven't cleaned if off in a long time.

Agent Greenmun: When is the last time that you were downloading anything like this?

Mr. Haffner: It's-- it's a long, long time ago, but I mean, I don't -- I have a large hard drive so I rarely go through it.

Agent Greenmun: Okay, So you're saying as far as you haven't cleaned it off in a while, so that conversation may still be on that computer?

Mr. Haffner: Perhaps.

Agent Greenmun: And so there might be child pornography still on that computer?

Mr. Haffner: Perhaps.

Gov't Exh. 4 at 24-25.

Review of the audio recording reveals Mr. Haffner answered the agents' inquiries coherently and intelligently. It is also clear from the recording that Defendant was aware of the potential seriousness of the situation. When Agent Greenmun referred to Mr. Haffner's comment that he (Haffner) had been "trading with quite a few people," and asked the Defendant if he could see where he (Greenmun) was "going," Defendant responded, "Oh, I absolutely see where you're going" and further acknowledged why law enforcement might be concerned with such activity (Gov't Exh. 4 at 20). When Agent Greenmun inquired whether Mr. Haffner had [*36] some particular child pornography pictures still on his computer, the Defendant responded, "I certainly hope not" (Gov't Exh. 4 at 19). When Agent Greenmun referred to an internet chat in which the Defendant allegedly told the other party he had to get off the conversation because his mother was right behind him, the Defendant somewhat sarcastically thanked both the agents for messing up his day (Gov't Exh. 4 at 19).

Thus, upon consideration of the totality of the circumstances, the undersigned finds Defendant's statements and Defendant's consent to search his computer were voluntarily and knowingly given.

4. Whether the search of Defendant's computer exceeded the scope of Defendant's consent

Defendant next argues that the scope of the search of Defendant's computer exceeds any consent the Defendant may have given (Doc. #41 at 1-2). Defendant asserts that the written consent for a "complete search" of Defendant's computer and the taking of other items did not specify a scope, nor authorize a full scale forensic analysis of Defendant's computer (Doc. #41 at 1-2). Defendant claims the agents actually limited the length of time they could take to search Defendant's computer when they told [*37] Defendant the computer would be returned to Defendant the following Monday (Doc. #41 at 3-4).

The Eleventh Circuit in *United States v. Street*, discussing the scope of an individual's consent to search, noted that:

"[a] consensual search is confined to the

> terms of its authorization. The scope of the actual consent restricts the permissible boundaries of a search in the same manner as the specifications in a warrant. When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather it is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass." *United States v. Taylor, 458 F. 3d 1201, 1206 (11th Cir. 2006)* (quoting *United States v. Strickland, 902 F. 2d 937, 941 (11th Cir. 1990)).* In assessing reasonableness, we consider what the parties knew to be the object of the search at the time the search occurred. *United States v. Martinez, 949 F.2d 1117, 1120 (11th Cir. 1992).*

United States v. Street, 472 F. 3d 1298, 1308 (11th Cir. 2006). In the instant case, Defendant signed a form that consented to a "complete search" of Defendant's computer (Gov't Exh. [*38] 2). Therefore, the test for whether the search of Defendant's computer exceeded the scope of Defendant's consent is whether a reasonable law enforcement officer would interpret the consent to a "complete search" of a computer to include a full forensic analysis, in light of the fact that the object of the search was child pornography. *See id.*

Here, the Court concludes that it was reasonable for the agents to interpret a "complete search" to include a full forensic analysis. Defendant understood the object of the search to be child pornography, therefore it was reasonable for the agents to search in places where child pornography would reasonably be hidden. *See generally, United States v. Harris, 928 F. 2d 1113, 1118 (11th Cir. 1991)* ("the defendant knew the officer was looking for drugs; therefore, both defendant and the officer would reasonably interpret the consent as constituting consent to search in places where narcotics would reasonably be hidden"). Pornographic images could be easily hidden within mislabeled folders, or even within folders stored on the computer that were not visible upon a cursory search of the hard drive. A "complete search" of any computer, the purpose of [*39] which would be to find particular photographic images, would reasonably encompass review of every bit of data stored on the hard drive of the computer that might in actuality be an image of child pornography. The evidence before the Court does not support any claim to have restricted the scope of the search.

Defendant claims the agents impliedly limited the scope of the search by promising the return of the computer before the following Monday (Doc. # 41 at 3). However, it is clear from the audio of the interview that the agents only promised the computer would be returned that soon if Defendant was telling the truth and if there was no child pornography on the hard drive (Gov't Exh. 3, Gov't Exh. 4 at 23-24). The agents did not coax Defendant into giving consent, but bluntly told Defendant, "[Y]ou have to understand that we're not trying to sneak in on you or anything. Whether or not we look at your computer is completely up to you." (Gov't Exh. 4 at 31.)

No evidence in the record indicates Defendant attempted to withdraw or amend his consent to search after it had been given. The fact that Defendant did not object to the search, when the search exceeded what Defendant now claims was [*40] the scope of his consent, is persuasive that the search was, in fact, within Defendant's consent. *See, e.g., United States v. Gordon, 173 F. 3d 761, 766 (10th Cir. 1999)* ("a defendant's failure to limit the scope of a general authorization to search, and failure to object when the search exceeds what he later claims was a more limited consent, is an indication the search was within the scope of consent.").

Accordingly, the Court finds Defendant's argument that the actual search of Defendant's computer exceeded the scope of Defendant's consent is without merit.

5. Whether access to school records should render said records, and all evidence seized thereafter, subject to suppression

Finally, Defendant argues his school records were illegally seized from Flagler College in violation of the Family Educational Rights and Privacy Act (FERPA) (Doc. #60 at 1). Defendant claims that FERPA gives him a statutorily reasonable expectation of privacy in his educational records and therefore, any and all fruits of the seizure of his records should be suppressed (Doc. #60 at 1; Doc. #70 at 1). It is Defendant's belief that these educational records contributed to the discovery of Defendant's identity, [*41] coerced his waiver of *Miranda* rights and his consent to the seizure and search of his computer (Doc. #70 at 1). The United States claims

the records obtained from Flagler College did not violate FERPA and, in any event, were not used to identify and contact Defendant or to obtain statements and evidence from Defendant (Doc. #65 at 1-2). It is the position of the government that information received from the school is "directory information" (Doc. #65 at 2), that is not subject to the privacy interests set forth in FERPA. *See 20 U.S.C. § 1232g(a)(5)(A)* (defining directory information relating to a student to include, *inter alia*, name, address, telephone listing, date and place of birth, major field of study, dates of attendance, and degrees and awards received). The United States further argues that even if FERPA applied to the situation at hand, the government benefits from the law enforcement exception concerning the restriction on dissemination of student information to persons without the student's or parents' approval (*see* Doc. #65 *generally*).

The Court finds Defendant has misinterpreted the intent, and hence the application, of FERPA. "Congress enacted FERPA under its spending [*42] power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." *Gonzaga University v. Doe, 536 U.S. 273, 278, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)*. As noted by the Supreme Court in *Gonzaga University*, FERPA specifies in pertinent part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization.

Gonzaga University, 536 U.S. at 279, quoting 20 U.S.C. 1232g(b)(1). The non-disclosure provisions in FERPA "speak only in terms of institutional policy and practice, not individual instances of disclosure." *Id. at 288*.

In its examination of FERPA, the Court referred to its earlier decisions to support the finding that legislation enacted pursuant to Congress' spending power does not confer enforceable rights upon individuals. *Gonzaga University, 536 U.S. at 279-80* (citing *Pennhurst State, School and Hospital v. Halderman, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981))*. The plaintiff/respondent in [*43] *Gonzaga University* initially sued Gonzaga under *42 U.S.C. § 1983* for an alleged violation of FERPA concerning the release of certain personally identifiable information. *Gonzaga University, 536 U.S. at 276-77*. Ultimately, the Court held such an action was foreclosed because the relevant provisions of FERPA do not create any personal rights enforceable under *Section 1983. Id.*

Here, Defendant would have the Court find FERPA creates an individual privacy right that is enforceable under the terms of the Act. Such a finding, however, would clearly run counter to the intent of Congress as held by the Supreme Court in *Gonzaga University*. *See Gonzaga University, 536 U.S. at 287* (holding "there is no question that FERPA's nondisclosure provisions fail to confer enforceable rights"). Furthermore, there is no authority cited for applying the exclusionary rule to evidence obtained in violation of FERPA. Defendant claims that FERPA provides a statutorily reasonable expectation of privacy in his educational records (Doc. #60 at 2). The Court disagrees.

FERPA addresses the conditions under which a school may become ineligible for federal funding if it fails to follow certain standards for release of [*44] some types of student information. *20 U.S.C. § 1232g*. FERPA does not prohibit a request for, or the release of, student records. *Tombrello v. USX Corp., 763 F.Supp. 541, 545 (N.D. Ala. 1991)*; *see also, Student Bar Ass'n Bd. of Governors, of Sch. of Law, Univ. of North Carolina at Chapel Hill v. Byrd, 293 N.C. 594, 598, 239 S.E.2d 415 (N.C. 1977)* (FERPA does not forbid disclosure of information concerning a student). Furthermore, in somewhat analogous situations, both the First and Fifth Circuits have said that when the government itself violates a regulatory provision the obtained evidence need not necessarily be suppressed. *United States v. Edgar, 82 F. 3d 499, 510-11 (1st Cir. 1996)* (suppression of evidence is not a remedy for governmental violation of the Fair Credit Reporting Act); *United States v. Kington, 801 F. 2d 733, 737 (5th Cir. 1986)* (refusing to suppress records obtained in violation of the Right to Financial Privacy Act when Congress did not provide for that remedy in statute). Thus, even if the Court were to find the law enforcement officers who interviewed the Defendant had obtained his personal information from Flagler College under a violation of FERPA, suppression of subsequent [*45] evidence discovered as a result of the school reports would not necessarily follow.

The Court finds no basis to accept Defendant's claim that the officers' possession of Defendant's school records, which apparently was comprised of two pages that contained the Defendant's address of record at his parent's home and his class schedules for the most recent and the upcoming semesters, so intimidated him that his will was overborne (*see* Tr. 2 at 12-16). As discussed in more detail *supra*, the totality of the circumstances simply does not support Defendant's assertion.

Furthermore, the connection between the investigation into Mr. Haffner's alleged involvement with child pornography and the disputed school records is tenuous, at best. There is scant reference to the information from Flagler College on the audio recording of the April 29 interview (*see generally*, Gov't Exh. 4). Although ICE did contact Defendant after receiving the information from Flagler College, the school records did not contribute to the discovery of Defendant's identity.

The information from Flagler did not lead the agents to Defendant's residence in St. Augustine, Florida. The interview took place at 114 Cedar Street in [*46] St. Augustine, Florida (*see* Tr. 1 at 8; Doc. #65-3, Report of Investigation). Flagler College provided ICE with an address in Elkton, Florida (Gov't Exh. 2). Defendant was identified through an investigative process that included the seizure and search of a computer in Virginia belonging to a Mr. Didio (Tr. 1 at 39-42). Defendant's handle, gatekeeper2000, was found in Mr. Didio's friends list (Tr. 1 at 42-43).

In one of the chats with Mr. Didio, gatekeeper2000 identified himself as a twenty year old male (Tr. 1 at 47). The user name "gatekeeper2000" was registered with Google, which subsequent to a summons informed ICE that the user name "gatekeeper2000" was associated with the email address "xopsychokow@gmail.com" (Tr. 1 at 42-43). Following another summons, Google informed ICE that the name "Ian Haffner" went with the email address (Tr. 1 at 48-49). Google also provided ICE an alternative email address of "psychokow@aol.com," and IP connection logs (Tr. 1 at 48-49). ICE determined that the IP address used to log onto the xopsychokow@gmail.com account belonged to AT&T (Tr. 1 at 48-49). AT&T informed ICE that the physical address associated with the xopsycholkow@gmail.com email account [*47] was 114 Cedar Street, Apartment 1 in St. Augustine, Florida (Tr. 1 at 49).

On these facts, the Court is satisfied that there was an independent source for the identification of Defendant and concludes the use of the referenced information obtained from Flagler College was inconsequential to the preliminary investigation and April 29 interview of Defendant. *See generally, Segura v. United States, 468 U.S. 796, 805, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)* (evidence is not to be excluded if there is an independent source for discovery).

V. Recommendation

Based on the foregoing findings, the Court recommends Defendant's Motions to Suppress Evidence (Docs. #36, #37, #38, #41 and #60) be **DENIED**. All physical evidence obtained, and oral and written statements made subsequent to questioning of Defendant at his residence on April 29, 2009 should be admissible evidence.

DONE AND ORDERED at Jacksonville, Florida this 31st day of August, 2010.

/s/ Thomas E. Morris

THOMAS E. MORRIS

United States Magistrate Judge

APPENDIX C

1 of 1 DOCUMENT

BENTWOOD ESTATES, LTD., et al., Plaintiff, -vs- HONORABLE MAYOR JOHN QUINN, et al., Defendant.

Case No. 3:05 CV 7035

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

2006 U.S. Dist. LEXIS 13159

March 27, 2006, Filed

COUNSEL: [*1] For Bentwood Estates, Ltd., Burrwood, LLC, Plaintiffs: John J. McHugh, III, McHugh, DeNune & McCarthy, Sylvania, OH; Robert W. Maurer, Maurer, Newlove & Bakies, Bowling Green, OH.

For John Quinn, Honorable Mayor, City of Bowling Green, Matthew L. Rager, Prosecuting Attorney, Rick Katzenbarger, Director of Planning and Zoning, Robert Shetzer, Zoning Officer, Defendants: Timothy C. James, Brad A. Everhardt, Ritter, Robinson, McCready & James, Toledo, OH.

JUDGES: DAVID A. KATZ, SENIOR U. S. DISTRICT JUDGE.

OPINION BY: DAVID A. KATZ

OPINION

MEMORANDUM OPINION

KATZ, J.

This matter is before the Court on the Defendants' motion to dismiss Plaintiffs' complaint (Doc. No. 16). Plaintiffs have responded (Doc. No. 21); Defendants have replied (Doc. No. 22). The Court has jurisdiction under *28 U.S.C. § 1331*. Defendants' motion is granted as to Plaintiffs' federal constitutional claim. Without addressing the merits of Defendants' motion as to Plaintiffs' state-law claims, the Court remands the case to the Wood County, Ohio, Court of Common Pleas, for lack of subject-matter jurisdiction.

BACKGROUND

Plaintiffs are two owners of rental homes in Bowling Green, Ohio [*2] ("BG"), where a city ordinance prohibits more than three unrelated people from living in one house. Plaintiffs claim city officials searched their tenants' U.S. mailboxes, thereby determining that more than three people were living in some of the houses. The city officials then obtained search warrants, searched the houses, and prosecuted the tenants for violating the ordinance.

Plaintiffs have sued BG's mayor, prosecuting attorney, director of planning and zoning, and zoning officer, respectively, claiming they conspired to injure the Plaintiffs' rental businesses. Plaintiffs claim Defendants have violated their tenants' constitutional rights, which has, in turn, directly injured the Plaintiffs economically by causing prospective tenants to refuse to rent from them. Plaintiffs ask the Court to enjoin the city officials from searching their tenants' mail, and to award compensatory and punitive damages.

DISCUSSION

Defendants move under *Rule 12(b)(6)* to dismiss the complaint, claiming Plaintiffs lack standing to assert the constitutional rights of their tenants, and that their civil conspiracy claim is improperly pled because Plaintiffs have not pled an underlying tort. [*3] In response, Plaintiffs ignore the constitutional-standing issue, and argue that their civil conspiracy action is premised on properly pled claims of tortious interference with business relations and abuse of process. The Court grants Defendants' motion to dismiss as to Plaintiffs' federal constitutional claim, and, without ruling on the sufficiency of Plaintiffs' state-law tort allegations, remands those claims to state court.

A. Motion to Dismiss Standard

In deciding a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984)*, while viewing the complaint in a light most favorable to the plaintiffs, *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974)*; *Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976)*. The Court is without authority to dismiss the claims unless it can [*4] be demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957)*; *Westlake, supra, at 858. See generally* 2 JAMES W. MOORE, *MOORE'S FEDERAL PRACTICE, § 12.34[1]* (3d ed. 2004).

B. Constitutional Claims

Plaintiffs claim that by searching their tenants' mail boxes and using the information inside to prosecute the tenants, Defendants violated Plaintiffs' and their tenants' constitutional rights. Plaintiffs do not specify which constitutional right Defendants violated; however, the Court presumes Plaintiffs refer to the *Fourth Amendment* right to be free from unreasonable searches and seizures. *U.S. Const. amend. IV.*

The mailbox searches did not violate Plaintiffs' own *Fourth Amendment* rights, because Plaintiffs had no reasonable expectation of privacy in the insides of their tenants' mailboxes. As the Supreme Court has explained, "capacity to claim the protection of the *Fourth Amendment* depends not upon a property right in the invaded place but upon whether the person who claims the protection [*5] of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)*. Courts in this Circuit "employ a two-part inquiry for determining whether a legitimate expectation of privacy exists: First, we ask whether the individual, by conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he sought to preserve something as private. . . . Second, we inquire whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *United States v. Waller, 426 F.3d 838, 844 (6th Cir. 2005)* (internal quotations omitted).

Here, Plaintiffs have not plead that they sought to preserve their tenants' mailboxes as something private unto themselves, and the Court finds any such claim would be meritless, since, by their very nature, the mailboxes must be accessed by the tenants. *See id.* (citing "whether the defendant has the right to exclude others from the place in question; [and] whether he had taken normal precautions to maintain his privacy" as factors in the expectation-of-privacy determination).

Furthermore, the Plaintiffs lack [*6] standing to assert the violation of their tenants' *Fourth Amendment* rights. Generally, "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Barrows v. Jackson, 346 U.S. 249, 255, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953)*. "The reasons [for this] are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton v. Wulff, 428 U.S. 106, 113-114, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976)* (plurality opinion). Courts sometimes make exceptions to the rule where those justifications are inapplicable. *Id. at 114*. Such cases tend to occur where "the enjoyment of the right [of the third-party] is inextricably bound up with the activity the litigant wishes to pursue." *Id. at 114-15*; *see also, e.g., Family Planning Clinic, Inc. v. City of Cleveland, 594 F. Supp. 1410, 1413 (N.D. Ohio 1984)* (holding that an abortion clinic could assert the rights of its clients). Such is not the case here, where the Plaintiffs' activity of renting apartments [*7] in no way affects the

tenants' ability to be free from unreasonable searches and seizures.

In any event, "*Fourth Amendment* rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas, 439 U.S. at 133* (internal quotation omitted); *Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243, 1248 (9th Cir. 1982)* (holding that an adult theater could not assert its customers' *Fourth Amendment* right to be free from "dragnet searches" or police "spying"). Therefore, Plaintiffs may not state a claim based on the violation of their tenants' *Fourth Amendment* rights. Plaintiffs' federal constitutional claims are dismissed for failure to state a claim on which relief may be granted.

C. Subject-Matter Jurisdiction and Remand

When a federal district court has dismissed all claims over which it has original jurisdiction, it may decline to exercise supplemental jurisdiction over pendant state claims. *28 U.S.C. § 1367(c)(3)*. Moreover, "whenever a separate and independent claim or cause of action within the jurisdiction conferred by [*28 U.S.C. §] 1331* . . . is joined with one or more [*8] otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates." *28 U.S.C. § 1441(c)*. "When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims . . . ." *Musson Theatrical v. Fed. Express Corp., 89 F.3d 1244, 1254-55 (6th Cir. 1996)*.

Because the Court has dismissed all claims over which it has original jurisdiction, and because the litigation is in an early stage, the Court remands Plaintiffs' remaining claims, which are premised on Ohio tort law, to the Wood County Court of Common Pleas.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss (Doc. No. 16) is granted as to Plaintiffs' federal constitutional claims. The Clerk is instructed to remand this case to the Wood County, Ohio, Court of Common Pleas.

IT IS SO ORDERED.

DAVID A. KATZ

SENIOR U. S. DISTRICT JUDGE

JUDGMENT ENTRY

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, [*9] IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendants' motion to dismiss (Doc. No. 16) is granted as to Plaintiffs' federal constitutional claims.

FURTHER ORDERED that the Clerk is instructed to remand this case to the Wood County, Ohio, Court of Common Pleas.

DAVID A. KATZ

SENIOR U. S. DISTRICT JUDGE

OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; Sean Brittain; Jeremy Morris; Susan Storey; jahays@qwestoffice.net
Subject: RE: State of Washington v. Shawn Daniel Hinton, No. 87663-1

Rec'd 4-2-13

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From: Pam Loginsky [mailto:Pamloginsky@waprosecutors.org]
Sent: Tuesday, April 02, 2013 3:05 PM
To: Sean Brittain; Jeremy Morris; OFFICE RECEPTIONIST, CLERK; Susan Storey; jahays@qwestoffice.net
Subject: State of Washington v. Shawn Daniel Hinton, No. 87663-1

Dear Clerk and Counsel:

Attached for filing is a motion for leave to file an amicus curiae brief, the proposed amicus curiae brief, and a proof of service.

Please contact me if you should encounter any difficulty in opening any of the documents.

Sincerely,

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