NO. 2002-1850

United States of America
First Circuit Court of Appeals

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT CHAMPAGNE

Defendant/Appellant

BRIEF OF APPELLANT

APPEAL FROM CONVICTION IN THE NEW HAMPSHIRE DISTRICT COURT

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291.

The defendant was charged in the United States District Court for the District of New Hampshire with two indictments for federal criminal violations, that from March to July 2001, he possessed with intent to distribute cocaine, and conspired to do the same, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846.

Mr. Champagne's motion for suppression of evidence was denied. Accordingly, on January 29, 2002, he plead guilty and a finding of guilty was entered (*Paul Barbadoro,* C.J.).

Mr. Champagne was sentenced on July 2, 2002, to a term of imprisonment of 151 months on each count, to run concurrently (with a recommendation of drug treatment), and a term of supervised release of 5 years. The court also imposed a special assessment of $200.

A notice of appeal was timely filed on July 2, 2002.

STATEMENT OF ISSUES

1. Should this Court reject the creation of an anonymously-alleged murder scene exception to the Fourth Amendment warrant requirement?

2. Is an anonymous 911 call sufficient cause to violate the sanctity of a person's home?

3. Should the District Court have applied the exclusionary rule to the evidence gathered by the Hooksett Police after they burst into Mr. Champagne's motel room without probable cause, or *Terry*-type articulable suspicion, and based on nothing more than an anonymous 911 call?

4. Did the District Court err in calling a circular saw a weapon for the purposes of sentence enhancement?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

At about 5:15 on the morning of July 24, 2001, Robert Champagne and his roommate, Rodger Beaudoin, were waking up in their cheap hotel room in Hooksett, New Hampshire. Unknown to them, someone had called the emergency 911 system in neighboring Manchester, and falsely told the operator: "I would like to report a drug deal gone bad at Kozy 7 Motel, Room 10. I think there is a dead body in there." 911 TRN. *Addendum* at 57

The 911 operator notified the Hooksett police, which sent three police officers. SUPPRESSION TRN. at 93. Upon arrival, the police found nothing amiss – no noise, no commotion, no irate neighbors recently awoken by a "drug deal gone bad," no evidence of drug dealing or other crime, no evidence of murder or death. SUPPRESSION TRN. at 56, 81, 125, 126. They could see through the drawn curtains that the light was on in number 10. SUPPRESSION TRN. at 21, 93, 97.

The men inside heard the police knock on the door. Mr. Beaudoin was ordered out,[1] and as he opened the door in compliance, two of the officers burst into the room, causing Mr. Champagne, the defendant here, to reach for his valuables on his dresser. SUPPRESSION TRN. at 25, 60.

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[1]The court recognized conflicting testimony among the officers regarding what precisely was said to Mr. Beaudoin and by which officer. COURT'S MEMORANDUM at 3-4, *Addendum* at 41-42. The court found that whatever words were used, however, the officers' intent was to compel Mr. Beaudoin from the room and to forcibly enter. SUPPRESSION TRN. at 150-51, 196-98.

One of the officers remained outside, searched Mr. Beaudoin, and discovered in his pockets a small amount of cocaine, some paraphernalia, and a pocket knife. After bursting in, the other two officers handcuffed Mr. Champagne, searched him, and discovered on him some cocaine, paraphernalia, and a sum of cash. In the room the police also found an electric circular saw with its safety tab duct-taped up, but found no dead body or evidence of one.

Based on these items, the police obtained a warrant, which lead to further evidence. Upon conducting a follow-up investigation, they learned that Mr. Champagne's business consisted of driving daily to Boston to buy crack cocaine, and visiting nightly a series of Manchester bars to peddle the drugs. CHANGE OF PLEA TRN. at 8-10; PRE-SENTENCING REPORT at 5; SENTENCING TRN. at 34-35. The police found no evidence, however, that any drug sales took place in the room at the Kozy 7 Motel.

After his motion to suppress was denied (*Paul Barbadoro*, C.J.), Mr. Champagne plead guilty. He was sentenced accordingly, with a two-level increase for possessing the saw, which the court regarded as a weapon.

This appeal followed.

SUMMARY OF ARGUMENT

Mr. Champagne suggests first that this Court should reject the Government's invitation to create a new exception to the Fourth Amendment Warrant requirement. He argues that in this case, the "emergency aid" exception is essentially an anonymously-alleged murder scene exception, and would therefore violate Supreme Court precedent.

Mr. Champagne points out that the three elements employed by the Court in defining the exception are constitutionally infirm. False 911 calls are far too common to allow the police to place uncorroborated credence in the information received by 911 callers, and the subjective motivation of officers regarding the reason for conducting a search or seizure is constitutionally irrelevant.

Mr. Champagne then notes that this case can be guided neither by *Terry* nor the exigent circumstances exception, and that therefore the exclusionary rule must be applied.

Mr. Champagne also discusses the purposes of the exclusionary rule, and argues that applying it in this case would serve those purposes.

Finally, Mr. Champagne points to the implausibility of calling a circular saw a weapon for the purposes of sentence enhancement.

ARGUMENT

I. This Court Should Reject a New Anonymously Alleged Murder Scene Exception to the Fourth Amendment Warrant Requirement

A. Fourth Amendment and Inventing a New Exception

"A man's house is his castle." *Miller v. United States*, 357 U.S. 301, 307 n.7 (1958) (quote attributed to William Pitt). For the government to enter uninvited, it needs to demonstrate it has probable cause.[2] In Mr. Champagne's case the District Court recognized that it is unlikely that probable cause can stem from an anonymous 911 call alone. SUPPRESSION TRN. at 189. And because there was nothing amiss at the Kozy 7 Motel[3] when the Hooksett Police arrived which might corroborate the 911 call, there also wasn't an exigency, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), or *Terry*-type articulable suspicion. *Terry v. Ohio*, 392 U.S. 1 (1968); *Florida v. J.L.*, 529 U.S. 266 (2000) (holding that anonymous tip alone does not provide sufficient cause for *Terry* stop).

A "search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a

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[2]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST., amd. 4.

[3]The Fourth Amendment applies to one's hotel room with equal force as to one's house. *Johnson v. United States*, 333 U.S. 10 (1948).

carefully defined set of exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971).

The Supreme Court has already ruled that there is no murder-scene exception. *Thompson v. Louisiana*, 469 U.S. 17 (1984); *Mincey v. Arizona*, 437 U.S. 385 (1978). As there was no dead body, Mr. Champagne's motel room did not amount to a murder scene, but at most an *anonymously alleged* murder scene.

Because the District Court could find no other exception to justify the intrusion into Mr. Champagne's privacy, it reached out for a new exception to the Fourth Amendment warrant requirement. The "emergency aid" exception was invented by then Judge (but later Chief Justice) Warren Burger in a 1963 case, *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1963). It was "summarized" to three elements, which were applied by the District Court here, in a 1976 New York case, *People v. Mitchell*, 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607, 609 (1976):

> (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property;
>
> (2) The search must not be primarily motivated by intent to arrest and seize evidence; and
>
> (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

Mitchell, 39 N.Y.2d at 177-178, 347 N.E.2d at 609; COURT'S MEMORANDUM at 15, *Addendum* at 53.

The emergency aid exception has been accepted by some jurisdictions and rejected by others,[4] but neither the Supreme Court[5] nor the First Circuit[6] has squarely reached the issue.

B. Anonymously Alleged Murder Scene Exception Conflicts With Established Precedent

If applying the *Mitchell* three-prong test results in a finding that the Hooksett Police acted reasonably, the inquiry ceases: Upon getting a 911 call that there was a "drug deal gone bad" and a "dead body" at the "Kozy 7 Motel, Room 10," the Government argues the officers acted reasonably.

The problem with the argument, however, is that it cannot be reconciled with *Florida v. J.L.*, 529 U.S. 266 (2000). In *J.L.*, "an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and

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[4]*See e.g.*, *United States v. Richardson*, 208 F.3d 626, 630 (7th Cir. 2000), *cert. denied*, 531 U.S. 910 (2000) (finding exception); *United States v. Erickson*, 991 F.2d 529 (9th Cir. 1993) (applying exclusionary rule).

[5]*C.f. Mincey v. Arizona*, 437 U.S. 385, 392 (1978), (noting in dicta that police may make warrantless entries where "they reasonably believe that a person within is in need of immediate aid," and that "they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.").

[6]*See Balida v. McCleod*, 211 F.3d 166 (1st Cir. 2000); *United States v. Donlon*, 909 F.2d 650 (1st Cir. 1999); *McCabe v. Life-Line Ambulance Service*, 77 F.3d 540 (1st Cir. 1996); *United States v. Tibolt*, 72 F.3d 965 (1st Cir. 1995); *United States v. Miller*, 589 F.2d 1117, 1126 (1st Cir. 1978) (search of a boat).

wearing a plaid shirt was carrying a gun." *J.L.* 529 U.S. at 268. Based on this, the police went to the bus stop, and saw three black males. Apart from the tip, the officers had no reason to suspect that a crime was afoot, did not see a gun, and noticed no threatening, furtive, or suspicious movements. Nonetheless, the officers searched the youth with a plaid shirt, and found a gun in his pocket. The Supreme Court unanimously held that the anonymous tip was insufficient cause to conduct a frisk.

The Supreme Court, citing *Adams v. Williams*, 407 U.S. 143 (1972) and *Alabama v. White*, 496 U.S. 325 (1990), demanded of the tipster more "indicia of reliability" before allowing the police to interfere with a person's liberty. *J.L.* 529 U.S. at 273. "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *J.L.*, 529 U.S. at 270 (quotations and citations omitted). Moreover, the tip did not include any "predictive information" that would give the police "means to test the informant's knowledge or credibility."*J.L.*,529 U.S. at 266.

In Mr. Champagne's case, the danger alleged by the anonymous caller was greater – the possibility of a murder compared to carrying a concealed gun. The reliability of the anonymous call, however, was less. In *J.L.*, the caller provided an

accurate description of the youth and what he was wearing, in addition to his location. In Mr. Champagne's case, however, beyond the location, the fibbing caller provided no details, no predictive information, and no indicia of reliability.

If the only thing that must be alleged to give police authority to search a person is an adequate allegation of dangerousness,[7] as the District Court found here, than all anonymous tipsters intent on doing ill – jilted lovers, unrewarded business associates, officious neighbors – will of course, as in Mr. Champagne's case, allege murder.

But if there is no murder scene exception to the Fourth Amendment warrant requirement, how can there possibly be an *anonymously-alleged* murder exception? If it is not reasonable to set aside the warrant requirement when the police *know* there's been a murder, as in *Mincey*, it cannot be reasonable to set it aside when the police have merely heard from an anonymous caller that there *might* be a murder.

This case thus points out that the *Wayne/Mitchell* exception carves far too much out of the Fourth Amendment, and that its logical conclusion, squarely presented here, conflicts with established precedent.

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[7]As the District Court here pointed out, the Supreme Court in *J.L.* left open the possibility that "[t]he facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability." *Florida v. J.L.*, 529 U.S. at 273. But that sort of calculus was forbidden in *Mincey*, 437 U.S. at 391 ("We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.").

C. Public Protection Responses May Result in a Gift

There can be no question that the police must respond when they get a 911 call about a person recently dead. But reasonableness for police public protection is not necessarily the same as reasonableness for the Fourth Amendment.

When the officers busted into Mr. Champagne's hotel room they learned valuable information. As far as is known, before July 24, 2001, the Government had no reason to be suspicious of Mr. Champagne, and did not know of his alleged drug-dealing activities. The anonymous caller gave the police a gift – knowledge of Mr. Champagne's alleged crimes. But the gift does not extend to the evidence that was found at the Kozy 7 Motel. It should have been suppressed. If the Government wanted to prosecute Mr. Champagne, based on its gift-given knowledge, it should have proceeded like it usually does when its is suspicious that a particular person is involved in crime – open an investigation, collect evidence, follow the suspect's activities, make the case. *Silverthorne Lumber Co v. United States*, 251 U.S. 385 (1920). Had the police done so, they may have found enough evidence to get a search warrant for Mr. Champagne's abode.

Evidence of crimes discovered when the police respond to uncorroborated anonymous tips can thus be cost-lessly suppressed, because there is nothing barring the police from using their fortuitous knowledge to independently collect untainted evidence.

II. An Emergency Aid, or Anonymously Alleged Murder Scene Exception is Unconstitutionally Broad

Even if the emergency aid exception exists in some form, its elements as employed by the District Court are vague, unconstitutional, and incapable of being applied in this case.

A. *Mitchell* Prong 1: False 911 Calls Are Far Too Common for the Police to Reasonably Believe Their Details

The first prong of the *Mitchell* formula – that the police must have reasonable grounds to believe an emergency is at hand – cannot be met by an anonymous 911 call.

False and exaggerated 911 calls are *very* common. Although exhaustive research was not conducted, a cursory review of state court decisions within the last few years reveals numerous cases involving false 911 calls. *State v. Prion*, 52 P.3d 189 (Ariz. 2002) (false 911 call by man upset that prostitute had taken his money and not performed); *People v. Brown*, 117 Cal.Rptr.2d 738 (Cal.Super. 2001) (false 911 call by husband in domestic dispute regarding marital infidelity); *K.M. v. State*, 763 So.2d 472 (Fla.App. 2000) (false 911 fire alarm by high school pranksters); *Matter of D.D. J*, 640 N.E.2d 768 (Ind.Ct.App. 1994) (numerous false 911 calls by delinquent child); *Osborne v. Commonwealth*, 43 S.W.3d 234 (Ky. 2001) (false 911 call made to divert attention away from other

more serious situation); *Leonzal v. Grogan*, 516 N.W.2d 210 (Minn.App.Div. 1994) (probably false 911 call by feuding neighbors); *Buric v. Safir*, 736 N.Y.S.2d 342 (N.Y.App.Div. 2002) (series of 911 calls falsely reporting a person with gun at various locations, made by man apparently in effort to harass police officers); *People v. Simpson*, 656 N.Y.S.2d 765 (N.Y.App.Div. 1997) (legitimate 911 call, but caller exaggerated event to include a gun in order to increase police attention to the matter); *Matter of Kacey H.*, 636 N.Y.S.2d 214, (N.Y.App.Div. 1996) (prank 911 call by disturbed youngster); *State v. Finkes*, No. 01AP-310 (Ohio Ct.App. Mar. 28, 2002) (false 911 call to create defense in unrelated criminal case); *State v. Washington*, No. 00AP-1162 (Ohio Ct.App. May 3, 2001) (false 911 call as part of domestic dispute); *Commonwealth v. Cancilla*, 649 A.2d 991 (Pa. Super. 1994) (false 911 bomb threat made regarding old age home); *State v. Gass*, No. E2000-00810-CCA-R3-CD (Tenn.Crim.App. July 3, 2001) (false 911 calls brought to light by case); *McGuire v. Commonwealth*, No. 1413-00-4 (Va.Ct.App. Dec. 4, 2001) (unpublished opinion) (series of false 911 calls); *State v. Brooks*, No. 43006-8-I (Wash.Ct.App. Jan. 31, 2000) (false 911 calls regarding boyfriend not liked by girl's family); *Ahmed v. Andrews*, No. 40555-1-I (Wash.Ct.App., Mar. 30, 1998) (false 911 call targeting member of board of directors by member of country club distressed about way club being run); *State v. Vetos*, No. 02-1754-CR

(Wis.Ct.App. Mar. 13 2003) (unpublished opinion) (false 911 call by jealous former girlfriend); *State v. Greer*, No.97-1156 (Wis.Ct.App. Dec. 30, 1997) (evidence of false 911 call).

A Michigan newspaper reported that only 1 of every 200 emergency 911 calls placed in Detroit reported a legitimate emergency. *Making Emergency Calls Work*, DETROIT NEWS, Oct 10, 1994, at 8A. The Baltimore, Maryland Mayor's office reports that only about 6 percent of 911 calls involve felony incidents, and only about one-quarter of 911 calls involve any crime at all. Ten percent of 911 calls are burglar alarms, and 98 percent of those are false. *See* <http://www.ci.baltimore.md.us/news/crime/calls.html> (accessed Mar. 28 2003). Police departments around the country have put in place strategies to deal with the volume of false 911 calls. *Id.* And it is illegal in virtually every state to misuse the 911 system. An internet search on "Google" with the terms "false 911 call" reveals stories about an uncountable number of them, including many arrests and convictions that do not necessarily result in reported court decisions. There are even products on the market to aid police departments and college campuses to address the problem. *See e.g.*, <http://www.omnitronix.com/solutions/911.htm> (accessed Mar. 28, 2003).

It is apparent that false 911 calls are quite normal. It is thus not reasonable for the police to unskeptically believe every detail of a 911 call. It is not reasonable to treat 911 calls with an with an assumption of truth. If the police would later like to rely on a 911 call for evidentiary admissibility, they have a duty to be skeptical, and to make efforts at corroboration.

Moreover, a false 911 caller has an interest in reporting as dangerous a situation as possible to produce police results, *see e.g.*, *People v. Simpson*, 656 N.Y.S.2d 765 (N.Y.App.Div. 1997) (legitimate 911 call, but caller exaggerated event to include a gun in order to increase police attention to the matter), and to meet the dangerousness ingredient suggested by the Supreme Court in *Florida v. J.L.*, 529 U.S. at 273 ("[t]he facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability"). When these perverse incentives are combined with the normalcy of false 911 calls, it becomes clear that the police have a duty to be doubly skeptical.

Thus, if an element of the emergency aid formula is that the police must have reasonable grounds to believe an emergency is at hand, an anonymous 911 call alone cannot provide that reasonable belief. To have a reasonable belief, there

must be something more. Either the police have to possess other evidence, or the 911 call must be corroborated in some fashion.

In Mr. Champagne's case, the police testified that they had no additional evidence, and did nothing to corroborate the 911 call – they acted on the anonymous tip alone. SUPPRESSION TRN. at 79-81, 125, 126. Subjective concerns aside, *Scott v. United States*, 436 U.S. 128 (1978), the actions of the Hooksett police were not based on an objectively reasonable belief that there was an emergency at hand.

It must be stressed that the public expects police to respond to 911 calls alleging murder, but without corroboration, any evidence discovered as a result of the call does not meet Fourth Amendment reasonableness, and must be suppressed.

B. *Mitchell* Prong 2: Subjective Intent is Irrelevant

The District Court noted that there is some difficulty with the second prong – that the search not be primarily motivated by an investigatory intent – because it relies on the subjective view of the officers on the scene. The court also noted that there is a split among the circuits regarding whether that prong should be subjective or objective. *Compare United States v. Cervantes*, 219 F.3d 882, 889-90 (9th Cir. 2000) (subjective intent), *cert. denied*, 532 U.S. 912 (2001) *with United*

States v. Richardson, 208 F.3d 626, 630 (7th Cir. 2000) (subjective intent irrelevant), *cert. denied*, 531 U.S. 910.

It is unclear from the court's order whether it applied the facts to a subjective second prong. If so, the court's order is unconstitutional, as the Supreme Court has squarely stated that searches and seizures must be examined "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." *Scott*, 436 U.S. at 138; *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.")

The *Mitchell* second prong is baldly subjective, turning solely on the motivation of the officers. Any attempt to objective-ize it causes an absurdity, as one cannot have an *objective* motivation, and thus renders it without meaning. Thus, if *Scott* is to be followed, there is no *Mitchell* second prong,[8] and the "emergency aid exception" turns on the other elements. If the District Court nonetheless somehow applied an objective second prong, it is so vague as to be meaningless, and thus violates Mr. Champagne's due process rights.

[8]To be fair to the *Mitchell* court and to Justice Burger, it should be noted that the *Mitchell* test was decided before the Supreme Court settled on an objective standard in *Scott* and *Whren*.

C. *Mitchell* Prong 3: False 911 Calls Are Far Too Common to Reasonably Believe Details Concerning Location

The third prong of the *Mitchell* formula – there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched – has the same infirmity as the first prong and cannot be met by an anonymous 911 call alone. Because false 911 calls are so common, the police have a duty to be skeptical about not only the substance of the call, but also about the location the tipster might specify. Thus, the police cannot form an objective belief about the location without additional evidence. Moreover, the *Mitchell* third prong requires more than a reasonable belief; it demands a basis approximating probable cause.

The only basis on which the police responded to room 10 of the Kozy 7 Motel was the anonymous tip. If, for instance, the Hooksett Police checked with the motel clerk who rented the room to Mr. Champagne, then discovered his (lengthy) criminal record, observed his car in the lot which might have provided some corroboration, or taken some other action to produce an objective belief or probable cause that a crime was afoot, than the police would have had a basis to connect Mr. Champagne's motel room with a crime. But no such action was taken, and therefore there was no reasonable basis, approximating probable cause, to associate the alleged emergency with room 10 of the Kozy 7 Motel.

D. *Mitchell* Standard is Unconstitutionally Broad

Defining "emergency aid" according to the *Mitchell* three-part test is much too broad. If a person can be seized whenever the police want to make sure there's no emergency, this Court will have given the police free reign. The police are *always* interested in public safety. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (no public interest exception to the warrant requirement). The "exception that could cover a seizure as intrusive as that in this case" with the evidence as thin as it is here, "would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway v. New York*, 442 U.S. 200, 213 (1979).

Accordingly, this court should not adopt the "emergency aid" or "anonymously alleged murder scene" exception to the Fourth Amendment warrant requirement.

III. Not *Terry*: Not Exigent

The District Court left open the possibility, but didn't quite reach the issue, that this case is guided by *Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"). The Court "expressed skepticism as to whether, armed only with reasonable suspicion that Champagne was involved in a crime, [the officers] could make an uninvited intrusion into his motel room to investigate." COURT'S MEMORANDUM at 9, *Addendum* at 47; SUPPRESSION TRN. at 108. For this the Court relied on cases from other circuits that may or may not support using the *Terry* standard to justify an intrusion into a man's home with something less than probable cause. The Government conceded the difficulty. SUPPRESSION TRN. at 112.

A. Not a *Terry* Case

The District Court's and the Government's reluctance to rely on *Terry* was well-founded. The United States Supreme Court in *Terry* was careful to limit its scope to on-the-street stop-and-frisk situations: *Terry* has never been extended to allow the police to gain entrance to a home. The Supreme Court was also careful to specify that the purpose of the *Terry* frisk was for the officer's personal safety –

to ensure that the person briefly detained is not going to imminently injure the officer – and not as a way into a person's house.

Terry stops based on anonymous tips, moreover, must contain sufficient information to be objectively reliable. In *Alabama v. White*, 496 U.S. 325 (1990), the anonymous caller told the police the defendant would be leaving a particular apartment at a particular time in a particular vehicle, that she would be going to a particular motel, and that she would be in possession of cocaine. The Supreme Court found that although the case was border-line, because the call provided enough "predictive information" that was accurate, its information was reliable. In *Florida v. J.L.*, the caller provided an accurate description of the youth and his location, but nothing more, and the Court found there was insufficient cause to detain the defendant there for a *Terry* search. (Both of these cases, of course, did not involve entry into a person's home.) The anonymous call in this case – a drug deal gone bad and a dead body in room 10 of the Kozy 7 Motel – gave no predictive information, and disclosed even fewer details than the *J.L.* tip.

This case is not guided by *Terry*. Because the police *went in*, either this case doesn't fall into *Terry*'s realm, or it doesn't meet *Terry*'s standards.

B. Not an Exigent Circumstances Case

To enter a home, the police need probable cause – either a warrant demonstrating probable cause, or an on-the-spot exigency coupled with probable cause. *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Payton v. New York*, 445 U.S. 573 (1980); *Steagald v. United States*, 451 U.S. 204 (1981); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The District Court recognized, and the Government agreed, that it is unlikely there was probable cause or exigent circumstances to justify the entry into Mr. Champagne's motel room. SUPPRESSION TRN. at 108, 112, 189.

> Probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Draper v. United States, 358 U.S. 307, 313 (1959) (brackets, quotations, and citations omitted). The facts here do not amount to the probable cause standard. Likewise, there were none of the usual factors that lead to a finding of exigency: danger of flight or escape, loss or destruction of evidence, risk of harm to the public or police, mobility of a vehicle, or hot pursuit. *Johnson v. United States*, 333 U.S. 10, 14-15 (1948).

If the standard for entering a home were merely *Terry* articulable suspicion, there would be no need for the entire body of law defining "exigency" and "probable cause." A sizable chuck of Fourth Amendment law would become surplusage. Moreover, because the Fourth Amendment contains the "probable cause" language, the bar cannot be moved to anything lower.

Thus, this is not an exigent circumstances case. It also isn't a *Terry* case. There is no existing exception to the Fourth Amendment saving the evidence inside Mr. Champagne's motel room from the exclusionary rule.

IV. Exclusionary Rule Should Be Applied When Police Make Seizures Based on Uncorroborated Anonymous Tips

The Fourth Amendment, although usually coming to attention as a technical device for letting an obviously guilty criminal go free, serves to protect us all from unauthorized government intrusion into our privacy. *See e.g., Weeks v. United States*, 232 U.S. 383 (1914) ("The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society.")

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority.

Camara v. Municipal Court, 387 U.S. 523, 530-31 (1967).

As a society, we expect the Hooksett Police to check into Mr. Champagne's room for a dead body upon receiving the 911 call. But that expectation does not require a conclusion that there is Fourth Amendment reasonableness to use evidence gained there in a criminal prosecution.

The exclusionary rule – the suppression of logically relevant evidence collected through unauthorized government intrusion into our privacy– serves several purposes.

First, it serves "the imperative of judicial integrity." *Elkins v. United States*, 364 U.S. 206, 222 (1960).

> Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. . . . A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Terry v. Ohio, 392 U.S. 1, 13 (1968).

Second, it serves to "assure[] the people – all potential victims of unlawful government conduct – that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

Third, the exclusionary rule serves to restore victims of unconstitutional searches and seizures to the position they were in before the illegality occurred. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensating Device*, 51 GEO. WASH. L. REV. 633, 636 (1983).

Finally, the exclusionary rule is the only effective deterrent to misconduct by those charged with uncovering crime. *United States v. Leon*, 468 U.S. 897, 906-08 (1984); *Linkletter v. Walker*, 381 U.S. 618 (1965).

Calling 911 is the primary way citizens contact the police with real or fraudulent reports of crime. Now ubiquitous, however, it has never been so easy for people to make false reports anonymously, and answering them takes police away from more important duties. Thus, making false or extraneous 911 reports is a crime in most jurisdictions, including New Hampshire, N.H. REV. STAT. ANN. § 106-H:13; N.H. REV. STAT. ANN. § 641:4; *see also*, 47 U.S.C. § 227.

Applying the exclusionary rule when the police enter a home in response to a supposed emergency as a result of a false 911 call serves all its purposes. Judicial integrity suggests that courts should not condone illegal 911 calls or add their imprimatur to them.

Application of the exclusionary rule as a deterrent would be effective. First, private searches are not generally given Fourth Amendment scrutiny because citizens are encouraged to report evidence of crime to the police, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and because members of the general public are not repeatedly involved in uncovering crime such that a deterrent to unsavory action is necessary. *Id.* But in Mr. Champagne's case, the false 911 caller was pro-actively engaging in an illegal act that had the potential to take the police away from a real emergency where the life or property of a member of the public could have been effected. Any deterrence would be beneficial to both members of the

public whose safety may be neglected as a result of the false report, and the person who is the object of the false report.

Second, people who make fraudulent 911 calls are generally attempting to harass the target. *See e.g.*, *State v. Prion*, 52 P.3d 189 (Ariz. 2002) (false 911 call by man upset that prostitute had taken his money and not performed); *People v. Brown*, 117 Cal.Rptr.2d 738 (Cal.Super. 2001) (false 911 call by husband in domestic dispute regarding marital infidelity); *Buric v. Safir*, 736 N.Y.S.2d 342 (N.Y.App.Div. 2002) (series of 911 calls falsely reporting a person with gun at various locations, made by man apparently in effort to harass police officers); *State v. Vetos*, No. 02-1754-CR (Wis.Ct.App. Mar. 13 2003) (unpublished opinion) (false 911 call by jealous former girlfriend); *State v. Brooks*, No. 43006-8-I (Wash.Ct.App. Jan. 31, 2000) (false 911 calls regarding boyfriend not liked by girl's family); *Ahmed v. Andrews*, No. 40555-1-I (Wash.Ct.App., Mar. 30, 1998) (false 911 call targeting member of board of directors by member of country club distressed about way club being run). Such calls would be less likely if the caller knew that any evidence gained by the police from the resulting search would be suppressed and therefore less harassing.

Accordingly, the exclusionary rule's purposes are served and should be applied when police make seizures based on uncorroborated anonymous tips.

V. Using a Circular Saw as a Weapon is Clearly Improbable

The District Court imposed on Mr. Champagne a two-level sentencing increase for possessing in the motel room an electric circular saw. The Court regarded the saw as a dangerous weapon. U.S.S.G. § 2D1.1(b)(1).

To overcome the court's sentencing decision, Mr. Champagne must show that it is "clearly improbable" that the saw was a weapon connected to narcotics trafficking. U.S.S.G. § 2D1.1, comment 3.; *United States v. Ovalle-Marquez,* 36 F.3d 212 (1st Cir. 1994), *cert. denied,* 15 S.C.t. 947, *cert denied,* 115 S.Ct. 1322; *United States v. Gonzalez-Vazquez,* 34 F.3d 19 (1st Cir. 1994).

That the saw was a weapon is implausible. Anyone who has used a circular saw knows they are unwieldy instruments unless resting on the item to be cut, and too heavy to hold out for any length of time. Circular saws cannot be easily brandished by a strong person, and certainly not by a 117-pound 53-year-old man in poor health. PRE-SENTENCING REPORT at 2, 21.

Moreover, using it would wake everybody up. The court recognized the saw would be too noisy to make a good weapon, SENT. TRN. at 20, and took judicial notice of the cheapness of the Kozy 7 Motel. SENTENCING TRN. at 18, 25.

As a weapon, a circular saw without electricity would be useless. The only evidence that the saw was even plugged-in came unsworn from the prosecutor

who, upon being asked by the court said, "I believe it was, your Honor, I'd have to check with the law enforcement officers." SENT. TRN. at 18. The detail, if ever assayed, was not reported to the court.

There is no evidence as to how long the saw's wire was. A casual viewing of wires on circular saws at the local hardware store reveals they generally run about six feet. Assuming the saw was plugged into an outlet placed at the standard 18 inches above the floor, that would barely give a six-foot man the ability to hold the saw at arm's length (if he could effectively heft it), making it a poor weapon. There was no evidence that the outlet the saw was plugged into was electrically live – outlets in many motel rooms go off with a switch on the wall.

According to the Government, Mr. Champagne's livelihood came from selling cocaine in Manchester bars. CHANGE OF PLEA TRN. at 8-10; PRE-SENTENCING REPORT at 5; SENTENCING TRN. at 34-35. There was no evidence presented that Mr. Champagne ever sold drugs in his Hooksett motel room, that he had any significant quantity of drugs in the room beyond a small amount for personal use, that any drug customer ever visited him there, or that he ever intended the saw as a weapon.

The court imposed the weapons enhancement merely because it could find no other explanation for its presence. SENT. TRN. at 24. It was there, however, because Mr. Champagne was fixing a rusted portion of his car. SENT. TRN. at 20.

Accordingly, it is clearly improbable that the saw was used as a weapon, that it was intended to be used as a weapon, or that it was even reasonably capable of being used as a weapon. Accordingly, the court was in error in imposing a weapons enhancement.

CONCLUSION

In light of the foregoing, Mr. Champagne requests that this honorable court reverse the decision of the District Court such that the evidence tainted by the warrantless search of Mr. Champagne be suppressed, *Wong Sun v. United States*, 371 U.S. 471 (1963); or in the alternative, that his sentence be reduced to take into account the lack of a weapon.

Mr. Champagne requests his attorney be allowed to present oral argument.

Respectfully submitted,
Robert Champagne,
By his Attorney,
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Dated: March 31, 2003

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I hereby certify that on March 31, 2003, two copies of the foregoing, as well as a computer disk containing the foregoing, formatted by WordPerfect 8, will be forwarded to Mark E. Howard, Esq., Assistant United States Attorney.

Dated: March 31, 2003

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version 9, and that it contains no more than 6893 words, exclusive of those portions of the brief which are exempted.

Dated: March 31, 2003

Joshua L. Gordon, Esq.

ADDENDUM