**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF STONE**

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| UNITED STATES of America,<br>Plaintiff,<br><br>v.<br><br>Evan DUARTE,<br>Defendant. | No. ST-16-03 |

**ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS AND MOTION TO DISMISS THE INDICTMENT**

Leaks, J.

Defendant Evan Duarte was arrested and indicted on one count of conspiracy to commit extortion in violation of the Hobbs Act. 18 U.S.C. § 1951 (2012). Duarte pleaded not guilty to the charge, and subsequently timely filed two pre-trial motions. First, Duarte filed a motion to suppress a video file seized during a warrant-authorized search of his personal computer, arguing that the agent conducting the search violated the Fourth Amendment by exceeding the scope of the search warrant. Fed. R. Crim. P. 12(b)(3)(C). Second, Duarte filed a motion to dismiss the indictment for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B). Duarte argues that the conduct with which he was charged does not satisfy 18 U.S.C. § 1951's statutory requirements because he committed no overt act in furtherance of the alleged conspiracy to extort.

For the following reasons, this Court DENIES Duarte's motion to suppress and motion to dismiss.

**Facts**

The following facts are not in dispute. Evan Duarte married Jon Jones in February 2010. At the time, Jones worked as a producer on the Clap! Network's ("Clap!") popular television show, Rich People's Spouses ("RPS") of New Stone. Clap! is owned by MBC/Worldwide, a national multimedia corporation; Clap! is headquartered in the city of New Stone in the state of Stone. RPS of New Stone is part of a large multi-franchise reality TV series that follows the daily lives of wealthy people's spouses in several cities, including New Stone, Las Vegas, and New York. RPS cast members agree to be filmed twenty-four hours a day, seven days a week, for weeks at a time. Both the RPS raw footage and the edited show content for all of the RPS franchises is stored on servers at the Clap! offices in New Stone. Additionally, every computer on Clap!'s New Stone office network is imaged and backed up to those servers nightly.

Shortly after marrying Duarte, Jones was promoted to executive producer for all of the RPS franchises. In his new role, Jones was responsible for all content filmed for each of the show's franchises, had final say on all edits, and administered all content. Unfortunately, in 2013 and early 2014, Clap! was at the center of a series of tragedies. Over the

course of that year, three cast members on three different RPS franchises committed suicide under suspicious circumstances. At the time, FBI Agent Alli Nguyen worked as a detective in the Stone State Police Department. She, along with colleagues in New York and Las Vegas, investigated the alleged suicides. Although Nguyen believed the suicides were linked, she never found evidence to support her theory, and all three cases were eventually closed. In September 2014, Nguyen took a job with the FBI, and was assigned to the field office in New Stone.

In early December 2014, Clap! dealt with yet another crisis. RPS of New Stone cast member Jenny Vaccarro, wife of heiress to the Stone Travertine Empire Samantha Vaccarro, disappeared. An extensive search turned up no body, no evidence of foul play, and no information about her location. Officer Brandon Glanvill, a Stone State police officer, attempted to interview each RPS of New Stone cast member. Most of the cast members refused to talk to the police; the few that did claimed to know nothing about Jenny's disappearance. Officer Glanvill got a warrant to pull all of the data off of Jenny's cell phone, and he combed through her text messages to try to piece together the days before she went missing. Jenny's text messages revealed that she had sent numerous texts to her friend Nigela Farage three days before Jenny disappeared. The texts included messages like "If anything happens, don't look for me." After Officer

Glanvill confronted Farage with these text messages, she told him that the week before she disappeared, Jenny had also made several cryptic references about needing to find a way to come up with money that Samantha would not be able to trace. Farage also told Officer Glanvill that Jenny had expressed regret about agreeing to participate in RPS. Following his discussion with Farage and his review of Jenny's texts, Officer Glanvill believed that Jenny either intentionally disappeared or was in serious danger.

Officer Glanvill also obtained a warrant to search through Jenny's personal effects. That search revealed bank statements for several accounts located in the Cayman Islands and Aruba. The statements revealed that Jenny had transferred millions of dollars into these accounts the day before she disappeared. Jenny's wife Samantha claimed to know nothing about these accounts. One of these accounts listed transfers to what police were able to identify as a bank account in the United States. Computer forensic investigators determined that this account been accessed from an IP address at Clap! headquarters.

After reviewing the bank statements, Officer Glanvill suspected that Jenny had been involved in money laundering, a violation of 18 U.S.C. § 1956 (2012). He informed the FBI, and the Stone State Police transferred the file to the New Stone FBI field office for further investigation of possible money

laundering. Agent Nguyen asked to be assigned to the case, explaining to the Assistant Director of the New Stone field office that she had been involved in the investigation of the Clap! suicides while working for the Stone State Police. She told the Assistant Director that the way her investigation into the Clap! suicides ended "had never sat right" with her, and that she suspected that Jenny Vaccarro's disappearance and the suspected money laundering might be related to those suicides.

Agent Nguyen was assigned to the money laundering case in early January 2015. She immediately requested access to Clap!'s computer network. Given the bad press Clap! was receiving, Clap! CEO Andrea Cohen was eager to cooperate with the investigation. She allowed Nguyen and her team to search Clap's computers and to question employees. Forensic analysis of the Clap! computer network revealed that a computer belonging to Jon Jones's secretary had been used to research offshore banking. In addition, whoever conducted these searches had tried to scrub the information from the computer and the backups on the servers. Nguyen scheduled meetings with both Jones and his secretary. At her meeting with Jones's secretary, Nguyen learned that the secretary had been away on a week-long vacation the day her computer was used to research offshore banking.

Nguyen then met with Jones. Nguyen reported that Jones seemed a bit nervous during their interview, but that he

answered all of Nguyen's questions. He claimed that he only used his own laptop computer at work, and that he never logged on to his secretary's or anyone else's computer. Jones told Nguyen that using another employee's assigned computer would violate Clap's company policy.

On March 12, 2015, one week after her interview with Jones, additional forensic analysis of the Clap! network revealed encrypted messages transmitted from an IP address in the Cayman Islands. These messages had been accessed on Jones's Clap!-issued laptop. On March 13, 2015, a magistrate judge issued two search warrants, one for Jones's home and one for his office. Both warrants authorized law enforcement agents to search for and seize "any and all documents, computer systems, hard drives, or other digital storage media, or other instrumentalities relating to the crime of money laundering." Agents immediately executed the warrant for Jones's office, but discovered that his laptop was not there; ultimately, they found no relevant evidence in his office. While agents continued to search Jones's office, Nguyen arrived at Jones's home, search warrant in hand.

Upon her arrival, Nguyen found a distraught Duarte frantically pacing in the driveway. She asked him whether he knew where Jones was, but Duarte initially refused to answer. Nguyen then presented Duarte with her warrant. Upon seeing the warrant, Duarte admitted that he had no idea where Jones was,

but that Jones had been missing "for days" and had turned off his cell phone. After thoroughly reading the warrant, Duarte allowed Nguyen to execute the warrant. While other agents searched the home for physical documents, Nguyen located Jones's laptop in the library under a pile of books. She also found a laptop with Duarte's name etched into the back cover in the downstairs study. Pursuant to the warrant, Nguyen powered on both computers to conduct an initial search. Neither laptop was connected to the Internet during Nguyen's search. Neither laptop was password-protected.

Upon powering on Jones's laptop, Nguyen discovered that the hard drive had nothing on it; it had apparently been erased. Nguyen seized Jones's laptop, hoping that something could be recovered from it later. Duarte's laptop proved more fruitful. Nguyen began her search by opening the "My Computer" folder on the hard drive. Although the "My Computer" folder contained several subfolders with names like "Random Documents," "Work," "Taxes," and "Important," Nguyen began her search by opening a subfolder labeled "My Photos." Nguyen has stated that she "thought maybe Jones had hidden some files in there." Inside the "My Photos" folder, Nguyen found hundreds of apparent image files, all ending in .jpg. The folder was set to "details view," so each file displayed as an icon with a name and information

about the file type, size, and the last date the file was modified. Nothing appeared unusual to Nguyen.

The "My Photos" subfolder contained several other subfolders, including one entitled "pictures of cats." Nguyen opened the "pictures of cats" subfolder. Inside the subfolder, which was also displayed in "details view," Nguyen found several .jpg files, none larger than two megabytes ("2 MB") in size. Nguyen opened a few of these .jpg files and found only pictures of cats. She then noticed a file labeled "potatoes.jpg," which had a file size of over ten gigabytes ("10 GB").

Nguyen double-clicked on the file to open it, and and error message popped up, which stated that the file was "not a valid bitmap file." Suspecting because of the file's size that it might instead be a video, Nguyen opened a video player, dragged the potatoes.jpg file over the video player, and dropped it. A video began to play. The video showed Duarte speaking into what appeared to be the laptop's built-in camera. The video began with Duarte stating a date – January 1, 2015 - and explaining that as his New Year's resolution, he would be recording a daily video journal. Nguyen began to watch the file, which contained a series of separately-recorded videos in succession. At the start of each recording, Duarte stated the date. Most of the daily recordings were less than a minute long, and the first few revealed only mundane details of Duarte's life: that he and

Jones adopted a cat, and that Jones bought Duarte a new Maserati for Christmas.

The January 7, 2015 recording, however, opened with a nervous-sounding Duarte exclaiming, "Jon just told me that he thinks someone is blackmailing the RPS cast members, and that's why Jenny disappeared and all those other cast members killed themselves! I told him he should go to the police, but he said that he doesn't know who's doing it anyway, and that he has a better idea!" Duarte then revealed that Jones had told him that because Jones knew all of the cast members' "dirty secrets," Jones and Duarte should extort money from the wealthiest cast members. In the recording, Duarte further explained that he agreed to help Jones extort RPS cast members, but that he planned to secretly record Jones and himself discussing their agreement, "just in case I ever need it."[1] The video then cuts to Duarte and Jones discussing which RPS cast members might make good targets for extortion. Following that recording, the video file ends. After viewing the video, Nguyen began opening the other .jpg files in the "My Photos" folder, but found no other evidence relating to Jones's and Duarte's plan to commit extortion. After opening most of the .jpg files on the laptop, Nguyen stopped searching, seized the laptop, and turned it over

[1] The legality of the secret recording is not at issue. Under Stone law, only one party needs to consent to a recording.

to the FBI's computer forensics team. She then placed Duarte under arrest.

The FBI computer forensics team searched all of the remaining files on Duarte's laptop, but found no evidence of money laundering and no other evidence relating to the alleged extortion scheme. Moreover, FBI agents found no relevant physical evidence during their searches of Jones's home and office. Jones is still missing.

Duarte was indicted by a grand jury for conspiring to commit extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. The government admits that the only direct evidence linking Duarte to the alleged conspiracy with Jones to commit extortion is the video Nguyen found in the "potatoes.jpg" file.

**Discussion**

Motion to Suppress

Duarte asks this Court to suppress the video file discovered and seized by Agent Nguyen on the basis that her search exceeded the scope of the search warrant and violated his Fourth Amendment rights.

The Fourth Amendment requires that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. The warrant requirement protects citizens against government use of "general warrants as instruments of oppression." Stanford v. Texas, 379 U.S. 476,

480-82 (1965). Specifically, the particular description requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another." Berger v. New York, 388 U.S. 41, 58 (1967) (quoting Marron v. United States, 275 U.S. 192, 196 (1927)).

As a general rule, warrantless searches and seizures "are per se unreasonable" unless a "specifically established and well-delineated" exception to the warrant requirement applies. Katz v. United States, 389 U.S. 347, 357 (1967). Here, the government contends that the video file seized from Duarte's computer is admissible pursuant to the plain view exception to the warrant requirement. See Horton v. California, 496 U.S. 128, 134 (1990). This Court notes that the government has not relied on a good faith argument or the inevitable discovery doctrine to argue that the files discovered during the search are admissible. See United States v. Leon, 468 U.S. 897, 922 (1984); Nix v. Williams, 467 U.S. 431, 443-44 (1984).

Under the plain view exception, when a law enforcement agent conducting a search pursuant to a warrant comes across evidence that falls outside the warrant's scope, but is plainly visible, the "incriminating character" of which is "immediately apparent," she may seize that evidence. Horton, 496 U.S. at 135-36 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971)). Such a seizure does not violate the Fourth Amendment

because once something "is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." Id. at 133 (citing Arizona v. Hicks, 480 U.S. 321, 325 (1987)). The plain view exception, however, does not turn a specific warrant into a constitutionally prohibited general warrant. See id. at 138-39.

The plain view exception only applies when three conditions are satisfied. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993). First, searching officers must be "lawfully in a position from which they view [the] object" that they subsequently seize. Id. Second, that object's "incriminating character" must be "immediately apparent" to the officers. Id. Third, "officers [must] have a lawful right of access to the object." Id. Having a "lawful right of access" to an object means that an officer cannot exceed "the scope of the search" authorized by the warrant just to seize an object. Horton, 496 U.S. at 140-41.

Duarte contends that when Agent Nguyen opened the "images of cats" folder and manipulated the "potatoes.jpg" file within that folder, and then seized the video file she discovered, she exceeded the scope of the warrant authorizing her search. The government contends that the files were properly seized as incriminating evidence in plain view during an authorized search. Thus, the issue before this Court is whether the plain view exception should apply to digital searches at all and, if

so, whether the exception applies narrowly, as Duarte contends, or broadly, as the government contends. This is an issue of first impression before this Court.

The Supreme Court has not yet considered whether and how the plain view exception should apply to digital searches and the circuit courts of appeal are split on this issue. Some courts treat digital searches as distinct from physical searches and apply a narrow plain view exception to digital searches. See, e.g., United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1177 (9th Cir. 2010). Others apply the plain view exception broadly. See, e.g., United States v. Mann, 592 F.3d 779, 786 (7th Cir. 2010). This Court notes that most cases considering the plain view exception to digital searches were decided before the Supreme Court decided Riley v. California, in which the Court limited the search incident to arrest exception to prevent officers from searching an arrestee's cell phone without a warrant. 134 S. Ct. 2473, 2485 (2014).

Duarte contends that applying the plain view exception to digital searches violates the Fourth Amendment's requirement that a warrant must "particularly describe the things to be seized," which "makes general searches . . . impossible." Berger, 388 U.S. at 58 (quoting Marron, 275 U.S. at 196). He argues that the nature of digital searches "creates a serious risk that every warrant for electronic information will become,

in effect, a general warrant, rendering the Fourth Amendment irrelevant." Comprehensive Drug, 621 F.3d at 1176. Duarte further contends that applying the plain view exception to digital searches automatically violates the exception itself, because the incriminating nature of a digital file is typically not apparent until that file is opened or manipulated in some other way. Thus, the potentially incriminating content of a digital file can never be "immediately apparent." Dickerson, 508 U.S. at 375; see also Comprehensive Drug, 621 F.3d at 1177.

The Court finds, however, that applying the plain view exception to digital searches neither converts digital search warrants into general warrants, nor violates the requirements of the plain view exception. Digital search warrants would be virtually unworkable if officers were unable to open files to determine whether they were responsive to the warrant. Law enforcement must be able to conduct at least a cursory review of all files on a computer because digital files are more easily concealed or disguised than physical objects. See Mann, 592 F.3d at 782. Moreover, this Court finds that an officer executing a digital search warrant has a lawful right to examine the contents of the computer, and thus has a lawful right of access to all files visible on that computer. Just as the search of a file cabinet necessarily requires officers to review documents that may turn out to be unrelated to the scope of the search

warrant, the search of a computer requires officers to review files. See Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976).

As the Supreme Court observed in Riley, this Court recognizes that digital storage devices are fundamentally different from physical containers like filing cabinets. 134 S. Ct. at 2485. Computer searches, like the cell phone search at issue in Riley, "place vast quantities of personal information literally in the hands of individuals." Id. Ultimately, however, Riley applies only to warrantless cell phone searches incident to arrest, not to searches of digital storage devices authorized by a warrant.

Finally, Duarte contends that even if the plain view exception can apply to digital searches, it must be modified to protect against constitutional violations. He contends that the best way to restrict the plain view exception in the digital search context is to require an officer to seek a second warrant upon the inadvertent discovery of incriminating evidence outside the original warrant's scope. See United States v. Burgess, 576 F.3d 1078, 1095 (10th Cir. 2009). Moreover, he contends that Agent Nguyen's discovery of the video file was not inadvertent, as she could not have reasonably believed that such a large graphics file contained anything relevant to money laundering. He suggests that she was motivated to open the file because of

her suspicions regarding a link between Jenny Vaccaro's disappearance and the suicides of the other RPS cast members.

This Court rejects Duarte's position. Imposing an inadvertence requirement on the plain view exception in digital searches would violate the Supreme Court's holding in Horton. 496 U.S. at 130. Even if Agent Nguyen's discovery was not inadvertent, as Duarte has suggested, "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813 (1996).

For these reasons, this Court DENIES Defendant Evan Duarte's motion to suppress the video file seized during the search of his laptop.

Motion to Dismiss the Indictment

Duarte has been charged with conspiring to commit extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (2012). Duarte asks this Court to dismiss the indictment against him for failure to state an offense.

The Hobbs Act criminalizes, among other acts, "attempt[ing] or conspir[ing]" to commit extortion that would interfere with or impact interstate commerce. Id. § 1951(a). The Hobbs Act does not define "conspire," but defines extortion as "obtaining of property from another . . . [through the] wrongful use of actual or threatened force, violence, or fear." Id. § 1951(b)(2).

Duarte concedes that the alleged extortion here, if carried out, would impact interstate commerce. Duarte contends, however, that the government failed to properly charge and cannot prove that Duarte conspired to commit extortion, because Duarte has not committed an overt act in furtherance of the alleged conspiracy.

Duarte asserts that the Hobbs Act is ambiguous because the Act does not plainly define "conspire." He argues that Congress intended "conspire" to require an overt act. In contrast, the government contends that the Hobbs Act's language does not require an overt act to prove a conspiracy. This is an issue of first impression for this Court.

First, this Court must "begin[] with the language of the statute itself." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989). The government contends that the meaning of conspire in the Hobbs Act is plain, because "[a]bsent an indication otherwise, [courts] presume that 'Congress intends to adopt the common law definition of statutory terms,' and the common law understanding of conspiracy does not require an overt act for liability." United States v. Salahuddin, 765 F.3d 329, 335 (3d Cir. 2014) (quoting United States v. Shabani, 513 U.S. 10, 13 (1994), cert. denied, 135 S. Ct. 2309 (2015)). The Act, however, does not define the term "conspires," and over time, the understanding of what it means "to conspire" has changed

from the common law definition. See United States v. Garcia-Santana, 774 F.3d 528, 536 (9th Cir. 2014).

If a statute's language is ambiguous, this Court must look beyond the statute's plain language to give effect to congressional intent. Id. Courts should construe ambiguous statutes to avoid surplusage, and will not give effect to language "inadvertently inserted or . . . repugnant to the rest of the statute." Chickasaw Nation v. United States, 534 U.S. 84, 85 (2001) (internal quotation marks and citation omitted). Furthermore, courts construe statutes on the same subject in pari materia, so that the statutes do not conflict. Erlenbaugh v. United States, 409 U.S. 239, 243 (1972). Courts may also consider a statute's purpose and legislative history to give effect to congressional intent. See Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 25 (1977).

Although Duarte was charged under the Hobbs Act, an individual can be charged with a conspiracy to commit a crime under the general conspiracy statute, 18 U.S.C. § 371, or under a number of other conspiracy statutes. Under the general conspiracy statute, the government must prove that the defendant committed an overt act. 18 U.S.C. § 371 (2012) (stating that conspiracy to commit a crime requires at least one of the co-conspirators to "do any act to effect the object of the conspiracy"). Duarte contends that this Court should interpret

the Hobbs Act to be consistent with the general conspiracy statute. See United States v. Harrell, 629 F. App'x 603, 604–05 (5th Cir. 2015), cert. denied, 136 S. Ct. 1395 (2016); United States v. Villarreal, 764 F.2d 1048, 1051 (5th Cir. 1985).

This Court finds, however, that other conspiracy statutes that are similar to the Hobbs Act do not require proof of an overt act. See Shabani, 513 U.S. at 13. Indeed, like the Sherman Act, and unlike the general conspiracy statute, the Hobbs Act "omits any express overt-act requirement." Salahuddin, 765 F.3d at 337. Duarte concedes that the Supreme Court, in Shabani, established a rule that statutes resembling the Sherman Act do not require the government to prove that the defendant committed an overt act in furtherance of a conspiracy. See Id. at 337-38 (citing Shabani, 513 U.S. at 14). Applying Shabani to this case, this Court finds that the Hobbs Act does not require proof of an overt act to prove a conspiracy to extort.

Alternatively, Duarte argues that the Court should find that the Hobbs Act requires an overt act to avoid absurd results. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (stating that courts should avoid "interpretations of a statute which would produce absurd results . . . if alternative interpretations consistent with the legislative purpose are available.") Duarte notes that courts and legislatures have become reluctant to impose "punishment of evil

intent alone," and instead seek to "assure that a criminal agreement actually existed." Garcia-Santana, 774 F.3d at 537. Given this shift, Duarte contends that making it easier for the government to prove a Hobbs Act violation than to prove a violation of § 371, the general conspiracy statute, would be absurd. This Court finds a more reasoned explanation for the difference in these statutes, however. Congress likely included an overt act requirement in § 371 because § 371 potentially criminalizes much more conduct than the Hobbs Act; thus, including an overt act requirement prevents § 371 from being impermissibly broad.

Finally, this Court acknowledges that the rule of lenity requires courts to construe "ambiguous criminal laws . . . in favor of the defendants subjected to them." United States v. Santos, 553 U.S. 507, 514 (2008). Duarte again asserts that the Hobbs Act's definition of "conspires" is ambiguous, and contends that this Court should construe the Hobbs Act to include an overt act requirement to avoid violating the rule of lenity. See Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409 (2003) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." (quoting McNally v. United States, 483 U.S. 350, 359–60 (1987)). The rule of lenity only applies, however, "when

'there is grievous ambiguity or uncertainty in the statute.'" Salahuddin, 765 F.3d at 340 (quoting Muscarello v. United States, 524 U.S. 125, 139 (1998)). Because this Court can infer Congress's intent from the rule laid out in Shabani, the Hobbs Act is not grievously ambiguous. See 513 U.S. at 14.

Therefore, this Court holds that the Hobbs Act does not require the government to allege or prove that Defendant Evan Duarte committed an overt act in furtherance of the charged conspiracy. As such, Duarte was properly charged with one count of conspiracy to extort, an offense under 18 U.S.C. § 1951(a).

For these reasons, this Court DENIES Duarte's motion to dismiss the indictment against him.

ORDERED: Defendant's motion to suppress and motion to dismiss the indictment are DENIED.

Order dated: January 8, 2016.

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTEENTH CIRCUIT**

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| UNITED STATES of America,<br>Appellee, | ) | |
| v. | ) | No. ST-16-03 |
| Evan DUARTE,<br>Appellant. | ) | |

**NOTICE OF APPEAL**

On June 1, 2016, Appellant Evan Duarte was convicted on one count of conspiring to commit extortion in violation of the Hobbs Act. He was sentenced to ten years in federal prison. Appellant appeals his conviction on the grounds that the United States District Court for the District of Stone improperly denied both his motion to suppress and his motion to dismiss the indictment against him. This Court will consider all issues raised in the court below.

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Lilly Vaderheel
Clerk

Dated: September 22, 2016