No. 15-4111

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
***Plaintiff/Appellee*,**

v.

ALI SABOONCHI,
***Defendant/Appellant*.**

On Appeal from the United States District Court
for the District of Maryland, Southern Division
(The Honorable Paul W. Grimm)

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

Table of Authorities. iii

Introduction. 1

Argument. 2

I. The warrantless search of Mr. Saboonchi's cell phones and USB drive was unreasonable under the Fourth Amendment. 2

A. *Riley* establishes that a traditional warrant exception cannot justify a warrantless search of a cell phone without conducting a searching inquiry into the purpose of the exception and the privacy interest at stake. 3

1. The intrusion into personal dignity and privacy that occurs with the government searches digital media at the border is unlike anything the Court has considered before - except for in *Riley*. 4

2. Assessing the heightened government interest at the border requires a close examination of the purpose and need for the warrant exception. 8

3. The government has failed to establish a need for a warrantless search of digital media at the border. 14

B. History does not support the warrantless search here. 18

C. There was no reasonable suspicion for this search. 21

D. The error was not harmless. 23

II. The District Court improperly instructed the jury regarding the required specific intent *mens rea*. 28

Conclusion. 31

Certificate of Compliance. 32

Certificate of Service

Addendum

TABLE OF AUTHORITIES

Page(s)

Cases

Almeida-Sanchez v. United States, 413 U.S. 266 (1973). 2

Arizona v. Gant, 556 U.S. 332 (2009).. . . . . 9, 11, 12, 17

Arizona v. Fulminante, 499 U.S. 279 (1991). 25, 26

Brigham City v. Stuart, 547 U.S. 398 (2006). 9

Bryan v. United States, 524 U.S. 184 (1998). 30

Chimel v. California, 395 U.S. 752 (1969).. . . . . 10, 17

Davis v. United States, 131 S. Ct. 2419 (2011). 27

Fahy v. Connecticut, 375 U.S. 85 (1963). 24

Florida v. Wells, 495 U.S. 1 (1990). 13

Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). 20

Gutierrez v. McGinnis, 389 F.3d 300 (2d Cir. 2004). 24

Indianapolis v. Edwards, 531 U.S. 32 (2000).. 11

Kremen v. United States, 353 U.S. 346 (1957).. 20

McDonald v. United States, 335 U.S. 451 (1948). 1

Mincey v. Arizona, 437 U.S. 385 (1978).. 14

Payton v. New York, 445 U.S. 573 (1980). 19

Riley v. California, 134 S. Ct. 2473 (2014). . . . . *passim*

Sibron v. New York, 392 U.S. 40 (1968).. 11

Tennessee v. Garner, 471 U.S. 1 (1985).. . . . . 18, 19

Terry v. Ohio, 392 U.S. 1 (1968).. 9

Thompson v. Leeke, 756 F.2d 314 (4th Cir. 1985).. . . . . 23, 24

United States v. Alvarado–Valdez, 521 F.3d 337 (5th Cir.2008).. 25

United States v. Archibald, 589 F.3d 289 (6th Cir. 2009).. 27

United States v. Aversa, 984 F.2d 493 (1st Cir. 1993).. 30

United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013). 23

United States v. Doyle, 650 F.3d 460 (4th Cir. 2011). 22

United States v. Flores-Montano, 541 U.S. 149 (2004).. . . . . 11, 18

United States v. Hassanshahi, 75 F. Supp. 3d 101 (D.D.C. 2014).. 23

United States v. Herrera, 444 F.3d 1238 (10th Cir. 2006). 27

United States v. Ickes, 393 F.3d 501 (4th Cir. 2005).. 7

United States v. Jackson, 636 F.3d 687 (5th Cir. 2011). 24, 25

United States v. Kim,
__ F. Supp. 2d __, 2015 WL 2148070 *19 (D.D.C. 2015).. 12

United States v. Montoya de Hernandez, 473 U.S. 531 (1985). . . . . *passim*

United States v. Ogberaha, 771 F.2d 655 (2d Cir. 1985). 22

United States v. Ramsey, 431 U.S. 606 (1977).. . . . . 10, 11, 18, 20

United States v. Robinson, 414 U.S. 218 (1973). 5, 10

Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995). 13

Virgin Islands v. John, 654 F.3d 412 (3d Cir. 2011). 22

Wyoming v. Houghton, 526 U.S. 295 (1999). 3

Statutes and Rules

Fourth Amendment. . . . . *passim*

50 U.S.C. § 1701. 29

50 U.S.C. § 1702. 29

50 U.S.C. § 1705. 29

31 C.F.R. § 560.203.. 29

31 C.F.R. § 560.204.. 29

Executive Order 12957. 29

Executive Order 12959. 29

Executive Order 13059. 29

Addendum

Bostock v. Saunders Opinion, [1773] 95 E.R. 539, 3 Wil. K.B.

Introduction

The government raises the alarm that requiring a warrant based on probable cause to search digital media seized at the border would give a "free pass" to people who want to harm the United States. Search warrants, however, have never provided a "shield" for criminals, nor provided "a safe haven for illegal activities." *McDonald v. United States*, 335 U.S. 451, 455 (1948). Probable cause warrants are a far cry from a prohibition on conducting searches.

Because the Founders deemed individuals' privacy "too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of individuals," they chose instead to entrust "an objective mind" with weighing the need to invade a person's privacy. *Id.* A neutral judicial officer is a necessary buffer between the people and the police; removing it causes "grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Id.* at 14.

The government's discussion of "plenary" authority to inspect people and things crossing the border lays claim to an absolute, unqualified right to search. It assumes that the balance between the sovereign's interest at the border and the individual's privacy interest rests permanently and immovably on the government's side. From the founding of the Republic, however, the Constitution has curtailed law

enforcement's insatiable desire to search everything and anything. "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973) (internal quotation omitted). While the Supreme Court has been generous in recognizing the government's interests in conducting warrantless border searches, it has never approved blanket authority for any and all border searches. Individuals crossing the border have always been, and are still today, free from unreasonable searches and seizure. *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985). "Nothing in the underlying premises of the 'border exception' supports . . . a ring of unbridled authoritarianism surrounding freedom's soil." *Id.* at 565 (1985) (Brennan, J., dissenting).

Argument

I. The warrantless search of Mr. Saboonchi's cell phones and USB drive was unreasonable under the Fourth Amendment.

The government doggedly recites the age-old adage that warrantless searches at the border are reasonable simply because they occur at the border. But geography alone does not determine reasonableness. The Supreme Court rejects a "mechanical application" of warrant exceptions decided decades ago when faced with searches of digital content on cell phones. *Riley v. California*, 134 S. Ct. 2473, 2484 (2014).

The government, however, insists upon just such a mechanical application of the border search doctrine.

A. *Riley* establishes that a traditional warrant exception cannot justify a warrantless search of a cell phone without conducting a searching inquiry into the purpose of the exception and the privacy interest at stake.

The government steadfastly denies *Riley's* relevance to this case. It has little choice but to take that position, since acknowledging the principles of *Riley* means accepting that this search was unreasonable.

Although *Riley* considered a search incident to arrest, the analytical framework it applies is identical to what the Supreme Court instructs courts to use when evaluating warrantless border searches. *Riley* began by explaining that "[W]e generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.'" *Riley*, 134 S. Ct. at 2484 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

Nothing in this statement limits it to searches incident to arrest or excludes border searches. It applies to any warrantless search. It describes the identical process that the Court applies to the border exception, along with every other warrant

exception. *Montoya de Hernandez*, 473 U.S. at 537 (evaluating a border search by balancing the government's intrusion into an individual's Fourth Amendment interests against promoting legitimate government interests).

The Court noted that "a mechanical application" of the search incident to arrest exception, as it was understood and analyzed in 1973 "might well support the warrantless searches" of the two cell phones at issue, but rejected that approach. *Riley*, 134 S. Ct. at 2484. Instead, it considered the purposes behind the exception and the competing privacy interests at stake. This Court, too, must refuse the government's invitation to engage in a mechanical application of the border exception without considering the privacy implications of modern cell phones.

1. The intrusion into personal dignity and privacy that occurs when the government searches digital media at the border is unlike anything the Court has considered before – except for in *Riley*.

The government insists that the warrantless search was reasonable because Mr. Saboonchi had a diminished expectation of privacy when he returned to the United States after a day trip to Niagara Falls. It is true that a traveler crossing the Rainbow Bridge between Canada and the United States may have less expectation of privacy than a traveler driving across the Woodrow Wilson Bridge between Maryland and Virginia. The government, however, equates a diminished expectation of privacy

with a non-existent expectation of privacy. At no point in its entire brief does the government acknowledge the undeniable privacy interest individuals enjoy in digital media and cell phones. (Gov. Br. at 25-44.) Unlike the government, this Court does not have the luxury of ignoring half of the constitutional equation.

The defendants in *Riley*, like Mr. Saboonchi, had a diminished expectation of privacy. Indeed, a person who is subject to a lawful custodial arrest "'retains no significant Fourth Amendment interest in the privacy of his person.'" *Riley*, 134 S. Ct. at 2488 (quoting *United States v. Robinson*, 414 U.S. 218, 237 (1973) (Powell, J., concurring)). The government may exercise substantial authority over a person being taken into custody, meaning that searching the person and his readily accessible personal property constitutes "only minor additional intrusions" into the individual's Fourth Amendment privacy interest. *Id*.

Albeit diminished, a constitutionally protected privacy interest still exists. *Id.* "The Fourth Amendment does not fall out of the picture entirely." *Id.* The simple fact that a person is being arrested does not render every search *per se* reasonable. *Id.*

An arrestee's diminished expectation of privacy is indistinguishable from the diminished expectation of privacy travelers have at the international border. If anything, a traveler's privacy interest is greater than an arrestee's because a traveler

is not being taken into custody. Nevertheless, by choosing to cross the border, individuals do subject themselves to government authority in a way that they do not when going about their business on the streets of any American city or town. But travelers crossing the border, like arrestees, still enjoy the right to be free from unreasonable searches and seizures. *Montoya de Hernandez*, 473 U.S. at 539. Their privacy interests – like those of the defendants in *Riley* – are not erased.

Accepting that people still retain a privacy interest in their person and property when being arrested, the *Riley* Court assessed the weight of that privacy interest in the particular property at issue: cell phones. Obviously, the property at issue here is identical. No possible distinction exists between *Riley's* conclusions regarding the substantial privacy interest in the digital content of cell phones and Mr. Saboonchi's privacy interest in his digital content.

The data stored on and accessible from an individual's cell phone implicates personal dignity and privacy in historically unprecedented ways.[1] *Riley* provided examples of the type of information the government can scrutinize on a phone such as Mr. Saboonchi's: private concerns about symptoms of a disease, alcohol, drug and

[1] Mr. Saboonchi's phone was an iPhone, and thus carries substantial storage capacity and the ability to access the internet and apps. The Supreme Court, however, did not limit its discussion of the privacy implication of searching cell phones to smart phones. One of the two phones at issue in *Riley* was an "old fashioned" flip phone.

gambling addiction, information about tracking a pregnancy, romantic and sexual plans or partners. 134 S. Ct. at 2490. Searching a cell phone allows the government to monitor a person's sexual partners or keep track of the person's children.[2] This information is not just private, like the financial or political information that is also available from and on cell phones, but intrudes upon a person's bodily dignity.

Neither the Supreme Court nor this Court has ever considered this great a trespass on a privacy interest or personal dignity in the context of a border search.[3] The type of search that occurred here implicates a greater intrusion than the most invasive border search that the Supreme Court has yet condoned. *Compare Montoya de Hernandez*, 473 U.S. 531. That case, which involved a deeply offensive intrusion into a person's bodily dignity, still revealed a more limited amount of information that was nonetheless targeted as narrowly as possible at the purposes of the warrant

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[2] *See, e.g.,* https://www.gotinder.com/; https://www.ashleymadison.com; https://itunes.apple.com/us/app/ashley-madison/id359478823?mt=8; http://www.parents.com/parenting/technology/best-apps-for-paranoid-parents/#page=1.

[3] Although the border search in *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005), involved data, that case does not apply here. As discussed in Mr. Saboonchi's opening brief, the case predates *Riley* by almost a decade. Moreover, the parties did not raise, and this Court did not address the issues presented here. The government claims that *Ickes* permits a search of digital devices as if they are any other container (Gov. Br. at 29), but to the extent *Ickes* says such a thing, *Riley* overruled that premise.

exception. The Court noted that the search was less intrusive than other searches that might reveal similar information, like an involuntary x-ray or a strip search. *Id.* at 541. Regardless, the government actually sought and obtained a warrant after detaining the individual for sixteen hours.

Measuring the diminished expectation of privacy in an automobile, suitcase, or envelope being carried across the border against a heightened government interest does not guide the constitutional analysis here. *Riley* does. *See Riley* 134 S. Ct. at 2488 (dismissing the government's argument that searching cell phones is just like searching any other type of personal property). Even a diminished expectation of privacy in the type of information revealed by searching cell phones is prodigious.

2. Assessing the heightened government interest at the border requires a close examination of the purpose and need for the warrant exception.

Having assessed the privacy interest, courts must next assess the government's interest. Without identifying and quantifying both interests, courts cannot balance them.

According to the government, the constitutional balance begins and ends by stating that the government has a heightened interest. If the search occurs at the border, so the government says, then it is reasonable. (Gov. Br. at 28.) The government's argument follows the mechanical approach that the Court rejected in

Riley.

The Fourth Amendment reasonableness inquiry actually requires a more searching consideration of the interests that lay behind the warrant exception and the need for that exception. "The scope of [a] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968). Assessing whether the search furthers that interest, and then quantifying the need for the particular warrant exception is an essential step in the analysis that applies to all warrant exceptions. *See Arizona v. Gant*, 556 U.S. 332, 338 (2009); *Brigham City v. Stuart*, 547 U.S. 398, 403-04 (2006) (permitting a warrantless entry into a home under the emergency aid exception only if "the circumstances, viewed objectively justify the action."); *see also Riley*, 134 S. Ct. at 2494 (explaining that "the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search").

The government's assertion that a warrant exception applies is not enough to excuse the lack of a warrant if the search does not further the judicially-approved purpose of the search. *Gant*, 556 U.S. at 344. For example, when arresting a person in a home, "[t]here is ample justification . . . for a search of the arrestee's person and dn the area within his immediate control – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs." *Chimel v. California*, 395 U.S. 752, 763 (1969). Thus, a court must identify the justification for the warrant exception, then determine whether the government action comports with that purpose.

The government argues that its interests when conducting a custodial arrest are not comparable to its interests at the border. (Gov. Br. at 30-31.) The Supreme Court says otherwise. It described the border search exception as "similar" to the search incident to arrest exception. *United States v. Ramsey*, 431 U.S. 606, 621 (1977) (citing *Robinson*, 414 U.S. at 224). The government argues that its interests are limited when effecting a custodial arrest because it may only search the person and the immediate vicinity of the arrestee. (Gov. Br. at 30-31.) But this addresses only *what* may be searched, not *why* the government is allowed to bypass the objective decisions of a neutral magistrate.

In fact, the government's interests in both situations are alike. The government's interests in conducting warrantless searches during an arrest are to disarm the arrestee and preserve evidence that may be easily lost or destroyed. *Riley*, 134 S. Ct. at 2483. At the border, the government's interests also involve security and identifying contraband or inadmissible items. *Montoya de Hernandez*, 473 U.S. at 537; *see also Ramsey*, 431 U.S. at 620 (describing the interest as controlling "who

and what may enter the country."). "The government's interest" at the border is to prevent "the entry of unwanted persons and effects." *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

In one respect, the government is correct that its interests at the border differ from during an arrest – but the difference actually cuts against the government. While collecting evidence of the crime for which the person is being arrested *is* a justification for that warrant exception, it is *not* for the border exception. A general interest in enforcing criminal laws is not one of the governmental interests in conducting border searches. *See Flores-Montano*, 541 U.S. at 152; *Montoya de Hernandez*, 473 U.S. at 537; *see also Ramsey*, 431 U.S. at 620. And when the government undertakes a warrantless search, based on one justification, but the search in fact is aimed at collecting evidence of a crime, that search is unreasonable.[4] *See Sibron v. New York*, 392 U.S. 40 (1968). Warrantless searches are reasonable when they "serve purposes closely related" to the original point of the exception. *Id.*

A warrantless search is reasonable under the border exception when the search is narrowly tailored to the purposes of the exception: furthering the sovereign's right and need to protect its territorial integrity. *See Gant*, 556 U.S. at 339; *Edwards*, 531

[4] The Supreme Court has "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Indianapolis v. Edwards*, 531 U.S. 32, 41 (2000).

U.S. at 41-42 (noting that border searches are reasonable when "closely related" to protecting the integrity of the border); *United States v. Kim*, __ F. Supp. 2d __, 2015 WL 2148070 *19 (D.D.C. 2015). If the particular search, or type of search, does not further the goals of a border search, then the warrantless search is unreasonable.

The Supreme Court concluded that a warrantless search of a cell phone fails to increase security and is unnecessary to identify and preserve contraband or evidence. Neither basis for the exception "has much force with respect to digital content on cell phones." *Riley*, 134 S. Ct. at 2484. Once the physical phone is seized, the Supreme Court held, "data on the phone can endanger no one." *Id.* at 2485.

Permitting a warrantless search of data on a cell phone would "untether the rule from the justifications underlying the . . . exception." *Id.* (quoting *Gant*, 556 U.S. at 343). A warrantless search of that category of personal effects fails to promote officer safety or the identification and preservation of evidence. *Id.* Because the governmental interests at the border are parallel, *Riley*'s conclusion that the government's interests in conducting a warrantless search are inadequate when it comes to the digital content of cell phones controls the decision here.

Considering the type of information stored in and accessible from the digital media searched in this case, it is clear that the search was not narrowly tailored to protecting the integrity of the border. The government is searching for evidence, not

contraband when it searches, for example, photographs, resumes, contacts, location information, health information, or communications with family and friends. The truth of this purpose is made particularly clear from the fact that the search occurred days later after Mr. Saboonchi was already home in Maryland and that the decision to search was made weeks before he traveled.

The government complains that Mr. Saboonchi is casting aspersions on the particular officer's subjective motives in conducting the warrantless border search. (Gov. Br. at 35.) The Fourth Amendment requires that the search be objectively reasonable. Thus, the particular officer's subjective intention to initiate a specific search may not be relevant.

But the purpose of the exception and the purpose of searching the class of property is important. "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). *See also Florida v. Wells*, 495 U.S. 1, 4 (1990) (explaining that an inventory search "must not be a ruse for a general rummaging in order to discover incriminating evidence" and that police officers "must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of a crime.") (internal quotation omitted)). Here, the purpose

of the search was evidence collection in a criminal prosecution. That is the typical purpose of searching digital content of data. Because searching this category of item does not serve the purposes of the border search exception, the exception does not apply.

3. The government has failed to establish a need for a warrantless search of digital media at the border.

Whether law enforcement needs to conduct a warrantless search is a critical aspect of determining reasonableness. *See Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978) (holding that warrants are generally required unless "the needs of law enforcement [are] so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."). Indeed, *Riley's* discussion of the governmental interests is inextricably intertwined with the perceived *need* for the exception to advance those interests. Here, like in *Riley,* the government has failed to demonstrate any need to conduct this type of search of digital media under its border authority.

There is simply no need for a warrantless search in order to prevent the introduction into the United States of digital contraband. The government has offered no – and *can* offer no – reason why dispensing with the Fourth Amendment's standard and preferred procedure impedes its interests at the border. The government can serve its interests by simply seizing and securing the device, then applying for a

warrant. *Riley*, 134 S. Ct. at 2486. The border patrol has ready means to achieve this by turning off the device, removing a battery, placing it in a Faraday bag, or simply not turning the device on in the first instance. *Id.* at 2487.

Digital contraband is just different from physical contraband. Digital contraband, unlike physical contraband, can easily be interdicted with a warrant – just like the Court explained in *Riley*. The government has few alternatives when faced with narcotics being smuggled in a gas tank, or even in someone's alimentary canal. Refusing a warrantless search in that context likely means foregoing discovery of the contraband. Similarly, the government has little or no alternative when a person crossing the border carries a manila folder stuffed with papers that evince some national security threat. The same cannot be said for digital content on cell phones, USB drives, or computers. Alternatives abound.

Moreover, the government has not offered a compelling real-world explanation for why a warrantless search, as opposed to one based on a probable cause warrant, is necessary. Theoretical threats are insufficient to overcome privacy interests. *See Riley*, 134 S. Ct. at 2486 ("We have been given little reason to believe that either problem is prevalent."). The government provides no example of malware being smuggled into the country. Nor can they. It is virtually unthinkable that someone wishing to deploy malware into the United States would bother carrying the software

across the border. A perpetrator of this very real threat is far more likely to sit comfortably at his or her internet-connected computer, wherever that may be, without troubling to travel into the United States. And while some examples of carrying child pornography across the border certainly do exist, by far the overwhelming majority of prosecutions that begin at the border involve some other contraband or inadmissible persons. Certainly identifying and preventing child pornography from entering the country is a laudable goal, but it can be achieved without resorting to the extraordinary step of conducting a warrantless search.

The government's inflammatory warning that requiring a search warrant – or any level of suspicion – to search digital content would give "those who would do harm to this country" a "free pass" to conceal, obfuscate, and encrypt information that they would later access with impunity to the detriment of our national interests is nothing but fear-mongering. (Gov. Br. at 39-40.) The government implies that it could not disclose the basis for suspicion to a court if the information is classified. (*Id.*) But it goes without saying that federal judges have access to classified information and routinely make decisions based upon classified information and evidence.

The government argues that courts should avoid rules that apply to whole categories of items. (Gov. Br. at 33.) The Supreme Court, however, prefers the

opposite. *Montoya de Hernandez* addresses alimentary canals as a category. *Gant* addresses cars as a category. *Chimel* addresses homes as a category. *Riley* addresses cell phones as a category. The Court has a "general preference to provide clear guidance to law enforcement through categorical rules. If police are to have workable rules, the balancing of the competing interests . . . must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers." *Riley*, 134 S. Ct. at 2491-92 (internal quotation omitted).

The government persists in its argument that its interest is absolute and the individual's is irrelevant. (*See* Gov. Br. at 28-36.) Neither history nor the Supreme Court supports that position. When courts *actually* balance the government's interest against an individual's privacy interest, the government's interest falls short. Searching a traveler's cell phone reveals a comprehensive view of the individual's private life. More is visible than even would be is the government searched the traveler's home. The government's interest, substantial as it is, is less than the individual's interest, even when the individual's interest is discounted. The Fourth Amendment's reasonableness balance thus tilts in favor of the individual. The warrantless search of Mr. Saboonchi's cell phone and USB drive was unreasonable under the Fourth Amendment.

B. History does not support the warrantless search here.

The government also attempts to justify the warrantless search by claiming that the exception is "longstanding" and "has a history as old as the Fourth Amendment itself." (Gov. Br. at 30 (quoting *United States v. Ramsey*, 431 U.S. 606, 619 (1977)).) This search occurred in the twenty first century, when the government has tools at its fingertips to surveil citizens in ways impossible to imagine centuries ago. In addition, the quantity and quality of information that the government can and does access would have been inconceivable. In dismissing the import of *Riley*, the government "distort[s] almost beyond recognition" the Fourth Amendment balance that must occur here. *See Tennessee v. Garner*, 471 U.S. 1, 13 (1985).

The technology involved in this case – both that possessed by Mr. Saboonchi and deployed by the government – was unimaginable when the Fourth Amendment was written, let alone when the Supreme Court last seriously considered a challenge to the border search exception in 2004. *See United States v. Flores-Montano*, 541 U.S. 149 (2004). As discussed above, rote application of decades-old, much less centuries-old, search and seizure law would utterly fail to account for current and future privacy interests.

"Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the

purposes of a historical inquiry." *Garner*, 471 U.S. at 13. Eighteenth century common law "'has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage.'" *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 591 (1980)).

Nevertheless, even in the eighteenth century, probable cause was required to conduct the closest possible analog to searching a cell phone, under the government's border authority. In *Bostock v. Saunders*, an excise officer searched a home for the purposes of enforcing customs duties, without a warrant supported by probable cause. [1773] 95 E.R. 539, 3 Wil. K.B. 434.[5] Although the officer relied on codifications of what was later to become the border search exception, because he acted without probable cause adjudged by a neutral magistrate, the officer was personally liable for trespass. *Id.* at 440-41 (Op. of Justice de Grey); *see also id.* at 442 (Op. of Justice Nares) ("He ought to have proved . . . that he made information on oath of the cause and ground of his suspicion, and what that cause and ground of suspicions was, that the jury might judge whether there was any probable cause or ground of suspicion that the tea was fraudulently concealed in the plaintiff's house.").

The limit on the border search doctrine in this 240 year-old case is consistent with the limit that the Supreme Court embraced 40 years ago. As discussed in the

[5] A copy of this opinion is appended to this brief.

Appellant's Opening Brief, searching the entire contents of a home or ransacking an entire office – without probable cause warrants – is so offensive to the Fourth Amendment that those searches could not qualify as reasonable, even under the border exception. *Ramsey*, 431 U.S. at 618 n.13 (referring to *Kremen v. United States*, 353 U.S. 346, 347-48 (1957), and *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931)).

As we know from *Riley*, the warrantless search of Mr. Saboonchi's iPhone and USB drive was at least as offensive and the searches that crossed the line in *Bostock* and that *Ramsey* described. "A cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." *Riley*, 134 S. Ct. at 2491 (emphasis supplied).

In 1773, the government was not permitted to intrude upon an individual's precious privacy in the home under the border doctrine. In 1977, the Supreme Court explained that a similar type of search was so offensive as to be unreasonable. Here, the government conducted that offensive type of search, but pretends that the individual's privacy interest is negligible. *Riley* says otherwise. This search has been unreasonable for at least 240 years. Yet, the technological changes of the last few

years highlight how very intrusive it is, and how dangerous it is to permit the government to intrude upon it without any neutral third party assessing the need.

C. There was no reasonable suspicion for this search.

The government claims that the search was nevertheless constitutional because it had reasonable suspicion that Mr. Saboonchi was involved with exporting goods to Iran. (Gov. Br. at 42-43.) Even if reasonable suspicion is the appropriate standard for searching data at the border, it did not exist here.

At most, the government (and the district court) identifies facts that establish that Mr. Saboonchi had mailed goods to Dubai for transshipment to Iran and understated their value—more than a year before the border crossing. (JA 389. *See* JA 227-29.) The government offers no link between these facts and the phone or digital devices that Mr. Saboonchi was carrying across the border in March 2012. The facts that the government identifies do not amount to reasonable suspicion that, at the moment of crossing the border a year later, his cell phones would contain any relevant evidence. Without any particularized fact suggesting that the devices contained contraband, the government could not justify the search. Justifying an intrusive non-routine search requires "reasonable suspicion that the party to be searched *is guilty of illegal concealment*." *United States v. Ogberaha*, 771 F.2d 655, 657 (2d Cir. 1985).

Without suspicion that the particular search will be productive, the search is unreasonable. The suspicion must be particularized to the object of the search. For example, in *Montoya de Hernandez*, the suspicion permitted detention for a monitored bowel movement, but not for drawing blood. An affidavit in a warrant that establishes only that a crime was committed is insufficient to support a search unless the affidavit establishes a nexus between the items to be searched and seized and the probable cause. *See United States v. Doyle*, 650 F.3d 460 (4th Cir. 2011) (holding that facts alleging assault in an affidavit were insufficient to provide probable cause for a warrant to search for evidence of child pornography); *Virgin Islands v. John*, 654 F.3d 412, 419 (3d Cir. 2011) (although the affidavit provided reason to believe that the defendant had committed one particular crime, the affidavit–and thus the warrant–was "wholly lacking in probable cause" because it contained absolutely no facts that established that the defendant was remotely connected to the crime identified in the warrant).

Even if the government reasonably suspected that Mr. Saboonchi had violated the Iran trade embargo in early 2011, that does not translate to reasonable suspicion to conduct a non-routine border search in March 2012. The suspicion, to the extent it existed at all, did not provide a basis to conduct a general rummaging for evidence in Mr. Saboonchi's cell phones, when the suspicion did not land on the digital

devices. *Compare United States v. Cotterman*, 709 F.3d 952, 968-69 (9th Cir. 2013) (detailing the aspects of reasonable suspicion that linked the suspicion to the digital devices, not simply to a crime in general); *United States v. Hassanshahi*, 75 F. Supp. 3d 101, 121-22 (D.D.C. 2014) (same).

There was no reasonable suspicion that Mr. Saboonchi was carrying contraband or concealing evidence on his person, in his car, or in his digital devices, when he crossed the border. And the government cannot satisfy its burden of justifying this search on the basis that it had reasonable suspicion that Mr. Saboonchi may have committed a crime a year earlier. The reasonable suspicion must be tied to the actual search. Here, if it existed at all, that critical nexus was wholly absent.

D. The error was not harmless.

The government claims that violating Mr. Saboonchi's constitutional rights was harmless. (Gov. Br. at 45-46.) It is wrong.

A constitutional "error is harmless only when the court . . . can conclude beyond a reasonable doubt that the error *did not influence the jury's verdict.*" *Thompson v. Leeke*, 756 F.2d 314, 316 (4th Cir. 1985) (internal quotations omitted) (emphasis added). "The test, therefore, is not whether laying aside the erroneously admitted evidence there was other evidence sufficient to convict beyond a reasonable doubt . . . but, more stringently, 'whether there is a reasonable possibility that the

evidence complained of might have contributed to the conviction.'" *Thompson*, 756 F.2d at 316 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

An error is not harmless just because the verdict may have been the same if the unconstitutionally collected evidence had not been admitted. *United States v. Jackson*, 636 F.3d 687, 698 (5th Cir. 2011). This Court cannot merely excise the erroneously admitted evidence, then determine if sufficient properly admitted evidence supported the jury verdict. *See Thompson*, 756 F.2d at 316; *see also Gutierrez v. McGinnis*, 389 F.3d 300, 307-08 (2d Cir. 2004) (under the stringent test for constitutional errors, even if the other proof of guilt is overwhelming, a constitutional error is not harmless if a reasonable possibility exists that the error might have contributed to the conviction). The question is not "whether there was sufficient evidence on which the [defendant] could have been convicted without the evidence complained of"; rather, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy*, 375 U.S. at 86-87; *see also United States v. Alvarado–Valdez,* 521 F.3d 337, 341 (5th Cir.2008) (when the jury considers evidence that violates the constitution, the defendant "is entitled to a new trial unless . . . 'there was [no] reasonable possibility that the evidence . . . might have contributed to the conviction.'").

Here, the government simply lists other evidence that it claims support the

jury's verdict. The government thus impermissibly conflates the standard for assessing sufficiency of the evidence and harmless error.

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court identified certain aspects of the erroneously collected evidence that demonstrated an impact on the jury. When the improperly collected evidence leads to the admission of other prejudicial evidence, the error is not harmless beyond a reasonable doubt. *See id.* at 300. A prosecutor referring to the evidence in opening and closing demonstrates that an error is not harmless beyond a reasonable doubt. *Id.* at 297-98. When the government relies on unconstitutional evidence in closing argument, courts "'cannot see how the government can conclusively show that the tainted evidence did not contribute to the conviction.'" *United States v. Jackson*, 636 F.3d 687, 697 (5th Cir. 2011) (quoting *Alvarado-Valdez*, 521 F.3d at 342-43). That happened here.

The evidence that the government obtained from the illegal search had an impact on the jury verdict. The evidence was the first that the government offered in the trial, and the government relied on it to establish the wilfulness mens rea, which was the only contested element of the charges. The government used the evidence to advance a theory that Mr. Saboonchi had experience in international trade and had an understanding of the implications of doing business with Iranian companies. The government used the evidence to establish Mr. Saboonchi's email address and

physical address, then related those facts to every email and shipment that it discussed in the ensuing weeks of trial.

In addition, the government used this illegal search as a springboard to other highly prejudicial evidence – something that *Fulminante* recognized as evincing prejudice from the error. The government used the illegal search as a means of questioning Mr. Saboonchi and eliciting incriminating statements. It used these statements, as well, to advance its theory that Mr. Saboonchi acted with wilful intent. It also referred to these statements multiple times during its closing argument. (*See, e.g.* JA 2668, 2682.)

Although the quantity of evidence was not large, the government cannot meet its burden of establishing beyond a reasonable doubt that the evidence from the unconstitutional search had no impact on the jury. To the contrary. The evidence directly related to the most important issue in the case and it established facts that the government referred to over and over during every discussion of every transaction. In addition, the government used the illegal search as a springboard to obtain other prejudicial evidence. The constitutional error itself was substantial, and its impact was palpable. This Court should therefore reverse Mr. Saboonchi's convictions.

Inexplicably, the government also claims that it conducted the unconstitutional search in good faith. (Gov. Br. at 44.) It offers no theory for why this exception to

the exclusionary rule should apply. Just as good faith did not excuse the warrantless search in *Riley*, where the government thought it could conduct a warrantless search but in fact could not, good faith has no application here. No binding circuit precedent explicitly authorized the particular search practice. *Compare Davis v. United States*, 131 S. Ct. 2419, 2428 (2011).

No neutral magistrate had condoned the government conduct before it undertook the search. The good faith exception only applies when someone other than the officer responsible for the search "made the mistaken determination that resulted in the Fourth Amendment violation." *United States v. Herrera*, 444 F.3d 1238, 1249 (10th Cir. 2006) The government assumed it had unfettered authority to conduct this search. The good faith exception does not apply to a government agent's assumption that she can do something that the constitution forbids.

Finally, the government never raised this argument below. It had the burden of establishing the constitutionality of the search, and the only grounds it chose to pursue were that and the search was valid in its entirely. It cannot now raise good faith for the first time on appeal. *United States v. Archibald*, 589 F.3d 289, 296 (6th Cir. 2009).

II. The District Court improperly instructed the jury regarding the required specific intent *mens rea*.

The government claims that Mr. Saboonchi is raising a new argument in his challenge to the district court's instruction on *mens rea*. (Gov. Br. at 53.) Not so.

At trial Mr. Saboonchi argued that the jury had to decide that he specifically knew what the Iran trade embargo prohibited, not just that what he did was unlawful in a general sense. Not only did he object to the government's proposed instruction on the grounds that it diluted the government's burden of proving specific intent, but he offered a different jury instruction that would have required the jury to decide that Mr. Saboonchi specifically knew that his actions violated the embargo and that ignorance of the law constituted a defense. (JA 572-73.) Moreover, during the charge conference, the defense reiterated its objection to the language permitting the jury to convict if it decided Mr. Saboonchi had a general knowledge of the unlawfulness of his actions. (JA 2358-60.) His argument relating to the erroneous jury instruction is preserved.

The government contends that a heightened scienter requirement does not apply to the charges here because the regulations at issue are "straightforward." (Gov. Br. at 54.) The relevant regulations, however, are a tangled mess. No single code section or regulation identifies what is permissible and what is prohibited. The

following statutes, regulations, and executive orders must be read in combination in order to identify what the ITSR prohibits: 50 U.S.C. §§ 1701, 1702 and 1705; 31 C.F.R. § 560.203; 31 C.F.R. § 560.204; Executive Order 12957; Executive Order 12959; and Executive Order 13059. Sometimes changes to what is permissible do not even appear in the regulations themselves. Would-be exporters must consult the agency, rather than the regulations, that oversees licensing. (JA 753.)

Cases that address more straightforward schemes therefore simply do not determine the correct *mens rea* here. A general knowledge of unlawfulness may be sufficient to sustain a conviction for violating some regulations, but not for violating the IEEPA and ITSR.

Finally, probing more deeply into the cases cited by the government, and by Mr. Saboonchi in his opening brief, reveals that the actual jury instructions given in cases similar to this reflect his requested instruction, not the diluted instruction. *See* Opening Br. at 48-49, 56-57. Those juries therefore determined wilfulness consistently with Mr. Saboonchi's proposed instruction, not with the one given here.

When the government charges someone with willfully violating a complex regulatory scheme, rather than the lesser civil violation,"willfully" means that the defendant knows of the actual provision in the statute or regulation that prohibits the defendant's conduct. *Bryan v. United States*, 524 U.S. 184, 194 (1998). Convicting

someone of a criminal violation of complex regulatory crimes requires the government to prove that the defendant had specific knowledge of the law because that type of law "sometimes criminalize[s] conduct that would not strike the ordinary citizen as immoral or likely unlawful. Thus, [the] sets of laws may lead to the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally." *Id.* at 195 n.22 (quoting *United States v. Aversa*, 984 F.2d 493, 502 (1st Cir. 1993)).

The instructions here, however, allowed the government to prove its case without requiring the jury to find the appropriate specific intent. This Court should therefore remand for a new trial.

CONCLUSION

Searching Mr. Saboonchi's digital media was not a valid border search and was unreasonable under the Fourth Amendment. In addition, the trial court improperly instructed the jury regarding the specific intent element of the offense, prejudicing Mr. Saboonchi's ability to argue that he lacked the necessary *mens rea*. This Court should therefore enter an order suppressing the evidence and granting him a new trial.

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CERTIFICATE OF COMPLIANCE

1. This Brief of Appellant has been prepared using WordPerfect X4 software, Times New Roman font, 14 point proportional type size.

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12/11/2015
Date

/s/
Meghan Skelton
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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief of Appellant was filed electronically via CM/ECF, and a hard copy of the Brief of Appellant and Joint Appendix were sent via inter-office mail to:

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/s/
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ADDENDUM

is intrusted with the goods to carry and deliver them to the use of the proprietor thereof, in a reasonable time, he contracts to execute that trust for a reasonable reward to be paid him, and if he be guilty of a breach of that trust and contract, he is, by law, answerable to the owner in damages.—In this case the defendants have been guilty of great negligence, for they neither delivered the silks to Samuel Ireland at his house, nor **[433]** gave him any intelligence of the arrival of the box at the defendant's warehouse in London; and therefore Serjeant Walker prayed judgment for the plaintiff.

Serjeant Glynn è contrà, for the defendants, contended. That when they received the goods at their warehouse in Birmingham, they only undertook to carry them from thence to their warehouse in London and no further, and that it was the duty of Ireland the consignee, upon the arrival of the goods at London, to have then sent and inquired for the same, according to the advice thereof which he must have received from his correspondent the plaintiff at Birmingham, as is the constant and invariable custom and usage amongst merchants and traders, both in respect to foreign and inland trade and commerce.

But if what is insisted upon for the plaintiff be law, every carrier of goods to London, must not only provide porters for light goods, but waggons and barges for the carriage of heavy goods from their respective warehouses to all places within the bills of mortality; but this is not the usage, nor is it practicable. That the defendant could not give intelligence of the arrival of the goods to Ireland, because there was no legible direction on the box, as the case states. So he prayed judgment for the defendant.

Curia. We are to determine this case upon the facts and particular circumstances therein stated, so there is no necessity for us to consider of the laws in general respecting carriers.—It is stated to us, that these defendants hire a porter at a stated salary by the week, to carry out goods which come by their coach, and receive the porterage of such goods as are sent out by that porter; therefore we apprehend we are bound to say, that the defendants were obliged to send the goods by their porter to be delivered at Samuel Ireland's house in Princes-Street Spittal-Fields, according to the direction, and the promise and undertaking laid in the declaration; as the defendants constantly kept a porter for this purpose, they engaged and specially undertook [in this particular case] to deliver the goods to Mr. Ireland, by their porter.

There can be no doubt but carriers are obliged to send notice to persons to whom goods are directed, of the arrival of those goods within a reasonable time, and must take special care that the goods be delivered to the right person. It was by the negligence of the defendants that the direction of the box was obliterated. The master of a stage-coach takes a greater price for the carriage of goods than other carriers, so is certainly bound either to send out the goods from his warehouse in London to be **[434]** delivered to the persons to whom the same are directed, or to send notice of the arrival thereof within a reasonable time;—if the defendants in this case were to be asked in what manner they usually deliver the goods at London, they would answer, "We always keep a porter at London by whom we send out the goods to be delivered to the persons to whom the same are directed;" our opinion is confined to this particular case only.

Judgment for the plaintiff.

BOSTOCK *versus* SAUNDERS AND OTHERS. C. B. Trespass lies against an excise officer for breaking and entering the plaintiff's house, under a warrant of the Commissioners of Excise, obtained upon the defendant's own information that he suspected teas were concealed in or about the plaintiff's house; where no such goods are found. [See *Boot* v. *Cooper & Al.*, cited 1 Term Rep. K. B. 535, contrà.]

[Over-ruled, *Cooper* v. *Booth*, 1785, 3 Esp. 138.]

2 Black. Rep. 912, S. C.]

Trespass vi et armis, for breaking and entering the plaintiff's dwelling-house, and continuing therein for the space of twelve hours, without the leave and against the will of the plaintiff, and disturbing him in the quiet and peaceable possession thereof to his damage of 100l.—Issue being joined upon the general plea of not guilty, this

cause was lately tried before Lord Chief Justice de Grey, when a verdict was found for the plaintiff, and 100l. damages, subject to the opinion of the Court upon this case.

The defendant being an officer for the duties of excise on the 22d of October 1772, upon oath made by himself before two Commissioners of Excise, that he had cause to suspect and that he did suspect that tea was fraudulently hid and concealed in or about the house of the plaintiff in Hatton-Street, London, obtained a warrant from the same commissioners in the following words, viz.

Chief Office of Excise in London for the duties of excise, &c.

"Whereas John Saunders one of the officers for His Majesty's duties of excise hath this day made oath before us Commissioners of Excise that he hath cause to suspect, and that he doth suspect that tea is fraudulently hid and concealed in some place or places in or about the house of Henry Bostock, of Hatton-Street, merchant, within the limits of the chief office aforesaid, with an intent to defraud His present Majesty of his duties thereon: setting forth in and by his said oath the ground of his suspicion, and the same appearing to us to be reasonable ground of suspicion; we therefore by virtue of the power and authority to us given, do judge it reasonable, and by this present warrant under our hands and seals, do autho-**[435]**-rize and impower the said John Saunders to enter into all and every room and place in and about the said house, and the out-houses thereunto belonging, and to seize all such tea and other goods liable to the duties of excise, or inland duties upon coffee, tea, &c. as he shall find so fraudulently hid and concealed, as forfeited to His Majesty's use, together with all the casks or other vessels and things wherein the same shall be contained; and all constables and other His Majesty's officers are hereby authorized and required to be aiding and assisting to him in the execution hereof, and for so doing this shall be to him and every one of them a sufficient warrant. Given under our hands and seals this twenty-seventh day of October, in the year of our Lord one thousand seven hundred and seventy-two."

A. LUCAS.
R. STONHEWER.

The officer Saunders by virtue of this warrant entered the plaintiff's house, and searched, but found no tea or other goods liable to excise in the plaintiff's house.

The question is, whether the plaintiff is intitled to recover, and arises upon the statute of the 10th of Geo. 1, ch. 10, sect. 13, whereby it is enacted that if any officer shall have cause to suspect that any coffee, tea, &c. is fraudulently concealed in any place, either entered or not entered, then, if such place be within London or the bills of mortality, upon oath made by such officer before two commissioners for the duties, setting forth the ground of his suspicion, the commissioners may, by warrant, authorize the officer, by day or by night, but if by night, in the presence of a peace officer, to enter into such places, and to seize and carry away all the coffee, tea, &c. which they shall find so fraudulently concealed, as forfeited for the King's use, together with the bags, &c. and if any person shall hinder the officers from entering such places, or in seizing or carrying away such coffee, tea, &c. the offender shall forfeit 100l.

Saunders the officer, upon his own oath of suspicion that tea was fraudulently concealed in the plaintiff's dwelling-house, obtains the warrant, and by virtue, or under colour thereof enters the plaintiff's house, together with the other defendants his assistants, they search the house but without success, for they found nothing, the suspicion was groundless; and now the question is, whether the plaintiff shall have this action.

It was not proved at the trial, nor is it stated to the Court, what the ground or cause of suspicion was, that Saunders had **[436]** when he swore he had cause to suspect that tea was fraudulently hid and concealed in the plaintiff's house, that does not appear to the Court, they [at the excise-office] have printed forms of these informations and warrants with blanks always ready to be filled up occasionally with the names of whatsoever persons they are pleased to suspect; the form of the oath or information runs thus, viz. "A. B. maketh oath that he hath cause to suspect and doth suspect that tea is fraudulently hid and concealed in some place or places in or about the house of C. D." and thereupon a printed blank warrant is filled up; then, away goes the officer with the warrant and his myrmidons with him, and enter the house of C. D. by day or by night, with a peace-officer (perhaps an ignorant drunken petit constable) they ransack the whole house, search every room, chest, cupboard and drawer in it.

I apprehend, all these summary jurisdictions given by Act of Parliament, are to be construed and measured by the rules and principles of the common law, for leges ipsæ cupiunt ut jure regantur.

How is the law, as to granting warrants by justices of the peace, to search for stolen goods and seizing them? They are not to be granted without oath of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do shew his reasons for such suspicion. The execution of these warrants depends upon the event, viz. it is lawful if the goods are there; unlawful, if not there; and although the justice of peace who granted the warrant and the officer who executed it may justify in trespass, yet the person who makes the information cannot justify. 2 H. H. Pl. Coron. 150, 151. 2 Wilson, 291, 292.

Saunders, in this case is both the informer, and the officer who executes the warrant of the commissioners to search, upon a pretended suspicion that tea was fraudulently concealed in the plaintiff's house, but no ground or cause of such suspicion was proved upon the trial, or appears to the Court, and therefore this informer and his assistants, by law, must answer for the trespass they have committed, without any cause whatever.

The person whose house is searched must not resist under the penalty of 100l. be he ever so sure and certain that he has no such thing as any tea, coffee, &c. in or about his house; but at the peril of this penalty, he must peaceably and quietly submit to have every room, cupboard, closet and drawer in his house opened and ransacked, and all his private affairs pryed into, by **[437]** any little excise-officer who is pleased to make such an oath as in the present case; what a terrible condition are Englishmen reduced to, if the plaintiff cannot, by law, recover satisfaction for the injury which hath been done to him!

The officer is the informer, to whom the warrant is to be granted, and by whom it is to be executed according to the Act of Parliament; he is a mere volunteer, and is the person whom the statute has pointed out to make satisfaction if he does wrong; he doth not stand in the light or situation of a sheriff or other law officers, who are bound to execute writs and process issuing out of the King's Courts, without knowing, or being permitted to examine whether the same issued legally and regularly or not.

The Statute of 12 Car. 2, ch. 19, to Prevent Frauds and Concealments of the King's Customs and Subsidies, was the first Act which gave such power to enter houses to search, &c. but by sect. 4 it is provided that if the information whereupon any house shall be searched shall prove false, the party injured shall recover his full damages and costs against the informer by action of trespass.

The statute of 13 & 14 Car. 2, ch. 11, sect. 32, gives the writ of assistance, and enacts that all persons aiding and assisting, &c. shall be saved harmless; but it has been resolved that whoever enters by such writ of assistance, if he finds nothing, he is a trespasser ab initio. This Act of 10 Geo. 1, now under consideration (having followed one or other of the said Acts of Car. 2,) has pointed out the person who shall be answerable in trespass if his information proves false. The defendant's information in the present case has proved false, and if he is not, by law, answerable to the plaintiff in damages, the liberty of this country will have received a most severe blow, and every man's house, from the highest to the lowest, will be open to excise and Custom-House officers; the defendants have done wrong, and there is no case in the law wherein a man shall take advantage of his own wrong.

Serjeant Walker for the defendants.—It is a general principle of law that where any officer acts under the command of a Court of Justice, or of a Judge or magistrate who has jurisdiction, the person commanded is justifiable. In trespass against the sheriff, it is enough for his justification to shew a writ: so it is in the case of his bailiff or officer; with this difference, that the sheriff must shew the writ was returned, if returnable; the bailiff need not, because it is not in his power. 1 Salk. 408, 409. The same rule holds in criminal cases, Moore 408, *Broughton* versus *Mol*-**[438]**-*shoe*, "False imprisonment by *Broughton* against *Mulshoe*, who justified, because the plaintiff being in the presence of a justice of the peace, the justice, not having opportunity to examine him, commanded the defendant to take him into his custody and safeguard until the next day, which he did, being constable, which is the same imprisonment: and this was held a good justification without alleging the cause which the justice had for imprisoning the plaintiff, and without shewing a warrant in writing, because

in the presence of the justice; and the justification is as proper for any other man, as it is for the constable." I cite this case to shew that where the justice has jurisdiction to command the constable, he might justify although the justice had done wrong, for he was bound to obey the command of the justice whatever was the cause; so it is also with regard to the execution of warrants when the magistrate is absent. The officer must give credit to the command or warrant of the magistrate, and can no more dispute his authority than the sheriff can dispute the authority of this Court. 14 Hen. 8, 16 a. 1 Vent. 273. 10 Rep. 76 b. The case of *The Marshalsea*, S. P. Freeman 407.

In the present case the warrant is directed to the officer Saunders the defendant, who is bound to obey the commissioners who have given the same under their hands and seals: but it is objected, why does not Saunders shew the information? I answer, it is not in his power, the commissioners have it, and their warrant is sufficient to justify him.

But it is also objected, that Saunders the officer gave the information of his ground of suspicion, and therefore ought to shew it; I answer, that when Saunders made the information upon oath, it then became the suspicion of the magistrates the commissioners, with whom the Legislature have intrusted the authority to grant the present warrant thereupon to search the plaintiff's house for concealed tea, &c.; the warrant is compulsory, and not distinguishable from any other warrant of a magistrate having jurisdiction given by Act of Parliament to grant a warrant in any particular case; it is upon this ground I argue that Saunders was obliged to obey the command of the commissioners and execute the warrant, and is justified thereby whether he found any tea concealed in the plaintiff's house or not.

Gould Justice.—Surely brother Walker your client might have shewn the information and the ground of his suspicion at the trial, if he had thought fit.

Walker Serjeant.—Whatever was the ground of suspicion whereupon the magistrate acted, the officer need not shew it to **[439]** the Court, he cannot be a witness because he is a defendant, and if the warrant will not protect him, he is without defence.

Serjeant Burland in reply.—I admit that if a constable or other officer acts in a case where he is bound to obey, he is justifiable, and if the warrant granted by a justice be wrong, he only is answerable. If my brother can shew that Saunders was bound and compelled to give the information, I will admit he is not answerable; but on the contrary it appears he is a mere volunteer in this business, as I before said.

In the case of an information before a justice of the peace, there are necessarily three persons of the drama, the informer, the magistrate, and the constable or officer, who act different parts; but here the defendant Saunders voluntarily takes upon himself to act two parts, the part of the informer and the officer, which he was not bound to do.—This Act of Parliament points out the person against whom the redress shall be had, if wrong be done (namely) the officer, [the informer], who is to execute the warrant, is that person who shall be answerable in such a case as this; if it was otherwise, I could not help thinking myself an absolute slave, for it would be indifferent to me whether a set of these myrmidons, excise and Custom-House officers, or a band of soldiers, could enter my house by day or by night, and do me such injury (as in this case has been done to the plaintiff) with impunity; it would be monstrous to suppose that the Legislature hath given any such power to these persons, so I do not doubt but the Court will give judgment for the plaintiff, who is as eminent a tradesman as any in London.

This case was well argued again at the Bar in this term by Serjeant Kemp for the plaintiff, and Serjeant Glynn for the defendant; when the Court was so clear that judgment ought to be given for the plaintiff, that Serjeant Kemp was told by the Lord Chief Justice he had no occasion to reply.

Lord Chief Justice de Grey.—This case has been spoken to at the Bar extremely well, it is a question of great consequence to the King's subjects, who ought certainly to know the persons against whom they shall have remedy, whenever they shall be injured in a case like this.

This is a question of construction upon an Act of Parliament, the 10 Geo. 1, ch. 10, sect. 13, which enacts, that if any officer shall have cause to suspect that any coffee, tea, &c. is fraudulently concealed, &c. then upon oath made by such officer before two of the commissioners, setting forth the ground of his suspicion, they **[440]**

may, by warrant, authorize the officer to enter, &c. seize and carry away all the coffee, tea, &c. which he shall find concealed, &c.; and if any person shall hinder the officers from entering, or seizing, or carrying away such coffee, tea, &c. the offender shall forfeit 100l.

Saunders the officer, upon his own oath, obtains a warrant, searches the plaintiff's house, finds nothing; he both acquires and executes the warrant. It is contended he is justifiable as acting under the command of the commissioners, and that it is sufficient for him to shew their warrant authorizing him to enter the plaintiff's house, &c. in like manner as a bailiff of the sheriff is justifiable in the execution of his warrants. But the case of a sheriff's bailiff is very different from this; the bailiff is bound to execute the sheriff's warrant; the officer of excise is the party promoting, and acting for his own benefit under an authority which he has obtained by his own oath, and he is not bound to obey like a sheriff's officer; Saunders swears to his suspicion, he is mistaken, and his suspicion is groundless, he finds no teas concealed; the whole matter rises and ends in himself.

The question is, whether the excise-officer is justified in all events, or whether he acts at his peril; I am of opinion he acts at his peril, and is a mere volunteer.—In cases of warrants granted to search for stolen goods, the informer makes oath that a felony has been committed, and of the reasons he has for suspicion that the goods are concealed in such a place; the execution of these warrants depends upon the event; the search is lawful if the goods are there; unlawful, if not there; and although the justice of peace and the officer may justify in trespass, yet the informer cannot. 2 H. H. Pl. Coron. 150.

It is said the warrant to search the plaintiff's house was granted upon a judgment formed by lawful magistrates, [the commissioners]; I think the commissioners were bound to grant the warrant upon the oath of Saunders, and could not form any judgment upon the matter, the commissioners have no power to summon the suspected party or any witnesses, they cannot examine on both sides, so it was impossible for them to judge; if the commissioners had such power it would be nugatory, for the goods would be removed before such examination could be had.—I think the stat. 10 Geo. 1, ch. 10, sect. 13, is compulsive upon the commissioners to grant the warrant to the officer to enter and search, upon his oath of suspicion that teas, &c. are fraudulently concealed; so it points out the very person liable, if any injury be done, and no goods found; and it is reasonable **[441]** and just that the informer who obtains and executes the warrant should be answerable in this case; and in my opinion the production of the warrant of itself is not a sufficient justification. Whether, upon the trial, the information would have been admissible evidence for the defendant, is not now for the Court to determine; but as it was then called for, by the plaintiff, I think it ought to have been produced; but as no evidence was given at the trial of any probable cause or ground of suspicion that tea was fraudulently concealed by the plaintiff, the jury found a verdict for him, and gave the whole damages in the declaration; and I am of opinion he must have judgment.

Gould Justice.—It is not necessary to determine whether an action will or will not lie against the commissioners; but thus much I will say, that if a warrant, like the present, should be granted by them, upon a frivolous, vain and groundless suspicion, an action might well lie against them; but I do not give any opinion as to this.

The officer by his own act having obtained the warrant, I think it is not necessary now to determine, whether he was then bound to execute the same. The statute says, if the officer shall have cause to suspect, &c. then upon his oath setting forth the ground of his suspicion, the commissioners may grant a warrant authorizing him to enter, search, &c. no evidence was given of the ground of the defendant's suspicion, he ought to have shewn to the Court and jury the cause of his suspicion; suppose the defendant had been obliged to have pleaded specially, I think he could not have justified under the warrant alone, but must have pleaded the facts upon which he grounded his suspicion, and if, upon the facts pleaded a probable cause had been shewn, he might (perhaps) have been justified in the opinion of the jury, although no goods were found; I am also of opinion that judgment must be given for the plaintiff.

Blackstone Justice.—Upon the first argument of this case I was and still am of opinion that judgment must be given for the plaintiff. I think this is not such

a warrant as actually commands and requires execution, but I look upon it as a permission to the officer to act at his peril.—I should rather think the commissioners would be liable to an action, if there was not good ground of suspicion laid before them before they granted the warrant, but I give no opinion as to this.—After the officer has acquired the warrant, I think it remains still in his option whether he will execute it or not.

[442] Nares Justice.—I am of opinion with my Lord Chief Justice and my brothers, that the plaintiff must have judgment; and so I was upon the first argument.

By the 12th sect. of the Stat. 10 Geo. 1, ch. 10, power is given to the officers, in the day-time to enter all warehouses, &c. used for keeping coffee, tea, &c. and to take accounts thereof, &c. this sect. only has respect to druggists, grocers, &c. &c. &c. or other persons selling or dealing in coffee, tea, &c. by wholesale or retail; but the Legislature seeing that coffee, tea, &c. might be fraudulently concealed in private houses, made further provision by sect. 13 for the security of the subject with respect to the officer's power of entering into private houses to search, &c. the officer himself, who makes information that goods are concealed, must be the person authorized by warrant from the commissioners to enter, search, &c. who have a discretionary power to grant such warrant.—In the present case, the officer informs on oath, acquires a warrant, enters and searches the plaintiff's house, but finds nothing, and an action of trespass is brought.—What ought the officer to have shewn besides the warrant? He ought to have proved upon the trial, that he is an officer, that he made information on oath of the cause and ground of his suspicion, and what that cause and ground of suspicion was, that the jury might judge whether there was any probable cause or ground of suspicion, that tea was fraudulently concealed in the plaintiff's house; but he proved nothing of this; et de non apparentibus et non existentibus eadem est ratio, it would therefore be very strange indeed for the Court to say he is justified under the warrant alone; if a commission of bankruptcy be sued out against a person not liable to be a bankrupt, and he be declared a bankrupt thereupon, and his goods be seised to the use of the assignees, trespass lies against the assignees who cannot justify under the Lord Chancellor's commission alone, but must shew every requisite necessary to prove the party was liable to be a bankrupt; [see 2 Wilson, 382].

Judgment for the plaintiff, per totam Curiam.

DEWELL *versus* MARSHALL. C. B. In replevin the jury at the trial omit to assess the defendant his damages, a writ of inquiry shall issue.

2 Black. Rep. 921, S. C.

In replevin, the plaintiff declares for taking and detaining his goods at the parish of A. in a certain place there called B. The defendant, as churchwarden and overseer of the poor of the parish of A. avows (under the stat. 43 Eliz. ch. 2, sect. 19,) the taking the goods as a distress for the poor's rate; to which the plaintiff pleaded in bar that the defendant took the **[443]** goods of his own wrong, without any such cause alleged by the defendant; issue being thereupon joined and tried, a verdict was found for the defendant; but the jury did not assess any damages. The defendant signed final judgment the 3d of May last, when the prothonotary allowed him 42l. 10s. costs.

It was now moved on the behalf of the defendant, that a writ of inquiry might issue to inquire what damages the defendant had sustained by reason of the premises, for that the defendant is intitled to recover treble damages by the stat. 43 El. ch. 2, sect. 19, by reason of the wrongful vexation, with his costs also in that part sustained; whereupon the Court made a rule to shew cause why a writ of inquiry should not issue.

Upon shewing cause it was objected for the plaintiff, 1st, that the defendant having already signed final judgment and had his costs taxed, had made his election, and now comes too late. 2dly, that the damages must be assessed by the same jury who tried the issue, as appears by the 19th sect. of the said statute.

But per Curiam, the same jury who tried the issue may assess the damages; but if they do not, we must do justice, and award a writ of inquiry to the sheriff; and a writ of inquiry was accordingly issued to assess the defendant his damages.