

III. CONFLICTING EVIDENTIARY FINDINGS

On June 11, 2002 at approximately 9:15 a.m., Deputy Guy Dow and Chief Todd Lyford stood at the door of a camp in Knight's Landing, Brownville Junction, Maine, search warrant in hand. Lt. Robert Young was a short distance away. The precise details of what they did, when they did it, and in what order are the focus of the Government's motion. Specifically, the Government seeks clarification of three events: 1) the knock; 2) the entry; and, 3) the announcement.

A. The Sequence of Events

1. The Magistrate's Findings

Magistrate Judge Kravchuk held an evidentiary hearing on June 24, 2004. In her July 21, 2004 Recommended Decision, she found:

My findings of fact regarding the execution of this warrant are succinctly stated in Government Exhibit #2, the police report prepared by Guy Dow following the execution of the warrant. Dow related that he went to the Knight's Landing camp with representatives of the Piscataquis County Sheriff's Office, the Milo police and the Brownville police at 9:15 a.m. on June 11, 2002 for the purpose of executing the search warrant. According to Dow, "I knocked on the door to the camp and opened it. I entered the camp and shouted, 'Sheriff's Office, Search Warrant!'"

Recommended Decision at 5. She further detailed her findings:

Based on the testimony presented, I find the following facts to be more likely than not the most accurate version of what occurred. Dow and Chief Lyford were on the porch and Young was a short distance away, off to the side of the porch. Dow knocked on the door, waited for several seconds (five being the outside maximum), turned the knob, found the door unlocked, crossed the threshold, and did so, announcing, "Sheriff's Department, search warrant!"

Id. at 6-7. She also specified what she did not find:

I do not affirmatively find that any other announcement of purpose and identity was made by any other officer prior to entry. The time that elapsed from the initial knock until Dow made his “announcement” inside the camp was very brief, no more than several seconds.

Id. at 7. In brief, Magistrate Judge Kravchuk found the three events took place in the following sequence: 1) knock; 2) entry several seconds (no more than five) after the knock; and, 3) announcement.¹

2. This Court’s November 12, 2004 Order

This Court performed a *de novo* review and issued its decision on November 12, 2004, rejecting in part the Magistrate Judge’s Recommended Decision and granting the Defendants’ motions to suppress. With one minor difference, this Court adopted the Magistrate Judge’s factual findings. *Order* at 5.

3. The Government’s Contention

In its motion, the Government highlights a contradiction between the Magistrate Judge’s findings adopted by this Court and a sentence in this Court’s Order. The sentence read: “The length of the delay: this Court has accepted the Magistrate Judge’s finding that the time that elapsed between announcement and entry was ‘several seconds (five being the outside maximum).’” *Order* at 14. This, the Government contends, confirms the following sequence: 1) knock; 2) announcement; and, 3) entry. The Government is not merely parsing sentences. It argues the testimony of each law enforcement witness and the contemporaneous report of Lt. Young compel this conclusion.

¹ This sequence is significant, because it “is not the act of knocking that is crucial, but rather conveying notice to the occupants of the house that it is the police who seek entry so that the occupants have an opportunity to comply with the law.” *United States v. Maher*, 185 F. Supp. 2d 826, 830 (W.D. Mich. 2001); *see also United States v. Spikes*, 158 F.3d 913, 925 (6th Cir. 1998).

4. Amended Order

After reviewing its November 12, 2004 Order, this Court concludes its use of the term, “announcement,” on page 14, line 13, was imprecise at best and erroneous at worst. This Court intended to adopt Magistrate Judge Kravchuk’s factual findings *in toto* (with one minor correction). It is true there is probative evidence from which this Court and Magistrate Judge Kravchuk could have concluded that the officers made their announcement before entering the camp. However, Magistrate Judge Kravchuk conducted an evidentiary hearing, where witnesses were examined and cross-examined, and evidence presented. She resolved issues of credibility in favor of Deputy Dow’s contemporaneous police report and this Court in performing its *de novo* review concurred with and affirmed her findings.

This Court amends page 14, line 13-15 of its Order dated November 12, 2004 to read: “The length of delay: this Court has accepted the Magistrate Judge’s finding that the time that elapsed between knock and entry was ‘several seconds (five being the outside maximum).’” Consistent with Magistrate Judge Kravchuk’s findings, the announcement came after entry.

B. The Timing

The Government argues in footnote 2 there is no evidentiary basis for the Magistrate Judge’s finding that several seconds meant five seconds at the maximum. *Govt.’s Mot.* at 2 n.2. The officers presented the following testimony:

1. Chief Lyford:

“We went up to the door. The door – they banged on the door. We announced that – the sheriff’s department, that there was a search warrant, waited five to seven seconds, and then entered the property.” *Transcript* at 30.

2. Lt. Robert Young:

June 2002 Police Report: “Upon arrival we knocked on the door, stated that we were the Sheriff’s Office and had a search warrant, waited several seconds and then opened the door.”

June 24, 2004 Testimony:

Q. And you indicated that after hearing sheriff’s department, search warrant, that there was a delay before the door was actually opened?

A. Yes

Q. Okay. Approximately how long a delay?

A. I think five to ten seconds.

Transcript at 13. Contrary to the Government’s argument, there is an evidentiary basis for the finding of a five second delay between knock and entry.

C. *United States v. Holmes*

In another footnote, the Government questions this Court’s reliance on *United States v. Holmes*, 175 F. Supp. 2d 62, 73 (D. Me. 2001), *aff’d* 183 F. Supp. 2d 108 (D. Me. 2002). The Government states: “Judge Carter relied upon Judge Singal’s opinion in *Sargent* in reaching the determination that the entry in *Holmes* was unreasonable. The First Circuit subsequently reversed Judge Singal’s decision.” *Govt.’s Mot.* at 4 n.3. See *United States v. Sargent*, 319 F.3d 4, 8 (1st Cir. 2003), *cert. denied*, 540 U.S. 1073 (2003). The brief answer is that Judge Carter did not cite *Sargent* as authority on grounds that were later reversed.²

IV. THE OFFICER SAFETY ARGUMENT

In its decision, this Court stated the Government had not made an officer safety argument. *Order* at 13, 18. The Government argues it had pressed the officer safety argument and, based on “the information available to the officers and their safety concerns in determining

² This Court was aware of the First Circuit’s reversal of *Sargent* and in fact cited the First Circuit opinion in its November 12, 2004 Order. *Order* at 19.

that the delay between announcing and entry was unreasonable,” the Government urges this Court to reconsider its conclusion. *Govt.’s Mot.* 5.

A. Waiver Issue

The transcript of the hearing, argument, and Recommended Decision confirm the Government is correct that it raised the exigent circumstances argument before the Magistrate Judge. In her Recommended Decision, Judge Kravchuk concluded the case “did not involve a risk of escape, a threatened destruction of evidence, or any articulated perceived threat to the officers.” *Recommended Decision* at 8. She quickly dispatched the Government’s argument that firearms in the camp justified an exigent circumstances search, because there was no evidence the officers knew prior to entry that the suspects were armed or particularly dangerous. *Id.* at 8 n.3. She distinguished *Sargent*, where the defendant was known prior to the search to be heavily armed, in possession of a quantity of easily disposable drugs, and possibly alerted to the presence of the police and concluded no “reasonable suspicion of exigency ripened before entry.” *Id.* at 9-10.

The Magistrate Judge’s discussion clarifies the Government had not waived the exigent circumstances issue in the proceeding before her. However, the Magistrate Judge had found against the Government on this issue, ruling in its favor only on the question of remedy. To contest her ruling on exigent circumstances, the Government was obligated to object to that part of her ruling.

The Defendants and the Government both objected to the Magistrate Judge’s Recommended Decision. In their objections, the Defendants argued the Magistrate Judge was correct that there were no exigent circumstances, but objected to her recommendation on remedy. *See Def. Rodrigue Obj.* at 6-9; *Def. Sherman Obj.* at 7-8. In response, the Government

failed to mention the Magistrate Judge’s conclusion on exigent circumstances.³ *Govt.’s Res. To Magistrate’s Recomm. Dec.* at 1-6. In their replies, the Defendants assumed, as did the Court, that the Government had no objection to the conclusions of the Magistrate Judge on the issue of exigency. *Def. Rodrigue Rep.* at 6 (“None of the factors indicating futility, escape, or risk to the officers present in *Banks* or *Sargent* were here....The government has objected to none of these factual findings.”); *Def. Sherman Rep.* at 6 (“In this case, the Magistrate finds that this case did not involve a risk of escape, a threatened destruction of evidence, or any articulated perceived threat to the officers. (citation omitted) The government did not object to these findings.”).

With this history, it is difficult to credit the Government’s argument that it preserved its objection to the Magistrate Judge’s findings on an absence of exigent circumstances. Under 28 U.S.C. § 636(b)(1)(C), a district judge must make a “*de novo* determination of those portions of the report or specified proposed findings or recommendations to which an objection is made.” The parties are entitled to a *de novo* review by the district “of those parts of the magistrate’s recommendation to which objection was made.” *United States v. Grady*, 894 F.2d 1307, 1315 (11th Cir. 1990). If the Government wished to object to the Magistrate Judge’s ruling on exigent circumstances, it had the statutory obligation to present its objection to this Court and place the Defendants on fair notice of the nature of its objection.⁴ It did not do so and the Government’s objection to the Magistrate Judge’s ruling on the officer safety argument was waived.

B. Officer Safety

For the sake of completeness, however, this Court will address the Government’s officer safety argument. In its Motion for Reconsideration, the Government points to the following

³ Instead, the Government argued that the Magistrate Judge erred in weighing the evidence against the testimony of the law enforcement officers and finding the announcement was made only after entry. *Gov. Res. To Magistrate’s Recomm.* at 1-6.

⁴ The Government’s failure to specify this ground in its objection caused the Defendants to omit any response in their Replies and this Court to omit substantive discussion of the issue in its decision.

facts: 1) the officers were “executing a search warrant for a large scale marijuana grow operation”; 2) they “were ‘flying blind’ as to who and what they were going to encounter inside the camp”; 3) they “knew nothing about the situation on the other side of the door other than this small camp (20 x 20) was associated with a large scale drug operation”; 4) they “did not know how many occupants they would encounter”; 5) they did not know “the history of these occupants”; 6) they did not know “whether the occupants had readily available weapons”; and, 7) what they did know is that “based on their training and experience is drug traffickers generally protect their operations.” *Govt.’s Mot.* at 5.

1. What the Police Knew

The Government says the police were aware of the following facts before they entered: 1) that this was a large scale marijuana operation; 2) that the camp was small (20 x 20); and, 3) that the drug traffickers generally protect their operations. The First Circuit recently noted that “[t]he fact the underlying crime involved drug distribution – while not itself conclusive – nonetheless tends to lessen the delay the officers reasonably were required to allow following their announcement and prior to their forced entry.” *United States v. Antrim*, 389 F.3d 276, 280 (1st Cir. 2004). However, *Antrim* was addressing a destruction of evidence argument involving easily disposable drugs. *Id.* (packages of heroin); *United States v. Spikes*, 158 F.3d 913, 926 (6th Cir. 1998); *United States v. Jones*, 133 F.3d 358, 362 (5th Cir. 1998) (“...where drug traffickers may so easily and quickly destroy the evidence of their illegal enterprise by simply flushing it down the drain, 15 to 20 seconds is certainly long enough for officers to wait before assuming the worst and making a forced entry.”).

Antrim also cited *United States v. Maher*, 185 F. Supp. 2d 826 (W.D. Mich. 2001), where the district court had noted the absence of such danger where police expect to seize large number

of marijuana plants. In *Maher*, granting a motion to suppress, Judge Quist pointed to the defendant's possession of over 100 marijuana plants "that could not be flushed down the toilet." *Id.* at 832. See also *United States v. Dice*, 200 F.3d 978, 981-82 (6th Cir. 2000) (1,900 marijuana plants). Here, the Government has not asserted a destruction of the evidence argument.

Rather, the Government's point is that because this was a large scale marijuana growing operation and drug traffickers as a group tend to protect their operations, the police were faced with exigent circumstances. This argument may have a certain ring of practicality, but it was rejected by the United States Supreme Court in *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). *Richards* declined to permit a "criminal-category exception to the knock-and-announce requirement." *Id.* at 393-94. Instead, the police "must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile..." *Id.* at 394. The Government's argument is grounded on the nature of the crime and, based on that, an assumption about the nature of the people inside the camp, not on specific facts about this drug operation or the specific individuals they expected to find inside.

The small size of the camp has some bearing. *Antrim*, 389 F.3d at 281; *Sargent*, 319 F.3d at 10; *United States v. Bonner*, 874 F.2d 822, 825 (D.C. Cir. 1989); but see *United States v. Banks*, 540 U.S. 31, 40 (2003) ("...it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter...there is...no reliable basis for giving the proprietor of a mansion a longer wait than the resident of a bungalow, or an apartment..."). But, from this Court's perspective, the small size of this camp is not sufficient without further pre-entry facts to justify the sequence and timing of the search in this case.

2. What the Police Did Not Know

The rest of the Government's argument is based on what the officers did not know, not what they did know.⁵ The Government cannot make a virtue of its ignorance. The law requires more. Under *Richards*, the police must have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile..." *Richards*, 520 U.S. at 394. If the Government had reason to believe the people inside the camp were dangerous, based on their criminal histories, the prior confirmed presence of firearms or knives, that they knew they were up and about, that an unusual number of persons were inside the camp, that there was an indication of activity during the delay, or a host of other factors, the analysis would be different. But, here, to state the obvious, the Government cannot sustain its burden based on inferences drawn from an absence of evidence.

V. THE INEVITABLE DISCOVERY EXCEPTION

The Government invokes the inevitable discovery exception to the exclusionary rule as a final basis for reconsideration.

A. Waiver

The Government does not claim it previously raised the inevitable discovery exception before either the Magistrate Judge or this Court. A review of the Government's previously filed memoranda and the transcript of the evidentiary hearing before the Magistrate Judge fails to reveal any such argument. *Borden v. Sec'y of Health and Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987) ("Parties must take before the magistrate, not only their 'best shot.' but all of their shots.")(quoting *Singh v. Superintending School Committee*, 593 F. Supp. 1315, 1318 (D. Me.

⁵ As earlier noted, the Government says the police were "flying blind", "knew nothing about the situation on the other side of the door", and did not know either the history of the people in the camp, or even the number of people inside.

1984). Magistrate Judge Kravchuk's Recommended Decision does not address it,⁶ nor does this Court's November 12, 2004 Order. In these circumstances, the Government waived any inevitable discovery argument.

B. The Merits

Again, however, in excess of caution, this Court will address the merits of the Government's argument. Evidable discovery applies "to any case in which the prosecution can show by a preponderance of the evidence that the government would have discovered the challenged evidence even had the constitutional violation to which the defendant objects never occurred." *United States v. Scott*, 270 F.3d 30, 42 (1st Cir. 2001), *cert. denied*, 535 U.S. 1007 (2002). To sustain an inevitable discovery argument, the Government must meet three "basic concerns": 1) whether the legal means are truly independent; 2) whether both the use of the legal means and the discovery by that means are truly inevitable; and, 3) whether the application of the inevitable discovery exception provides an incentive for police misconduct or significantly weakens fourth amendment protection. *United States v. Pardue*, 385 F.3d 101, 106 (1st Cir. 2004) (quoting *United States v. Silvestri*, 787 F.2d 736, 744 (1st Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988); *see also United States v. Scott*, 270 F.3d 30, 42 (1st Cir. 2001).

The Government takes the position that these three elements are met, because this Court accepted the Magistrate Judge's recommendation that probable cause existed to conduct the search. In support, the Government cites *United States v. Zapata*, 18 F.3d 971, 978 (1st Cir. 1994) and *United States v. Moscatiello*, 771 F.2d 589, 603-04 (1st Cir. 1985), *vacated on other grounds sub. nom. Carter v. United States*, 476 U.S. 1138 (1986). *Zapata*, however, involved the search of an automobile and the First Circuit concluded that because the *Zapata* vehicle was

⁶ It is of some significance that the Magistrate Judge did not mention the inevitable discovery issue, because, if she found it applies, it could have provided an alternate basis for her recommended remedy. *See Nov. 12, 2004 Order* at 19 n.13.

unregistered and unlicensed, the car could not be lawfully driven on a public highway and would have been subject to impoundment. *Zapata*, 18 F.3d at 978. As such, the police inevitably would have lawfully discovered the two large bags of cocaine in the trunk. *Id.* This case bears no factual or legal resemblance to the instant case.

In *Moscatiello*, the First Circuit addressed two separate searches of the same warehouse. *Moscatiello*, 771 F.2d at 595-96. The first illegal search was followed by a second legal search. The second search was pursuant to a search warrant, which had found probable cause based on information that had not mentioned the results of the first search. In those circumstances, *Moscatiello*, applying *Segura v. United States*, 468 U.S. 796, 815 (1984), concluded the evidence uncovered in the second, untainted search should not be suppressed. *Moscatiello*, 771 F.2d at 603. Again, *Moscatiello* has little bearing on the instant case.

Neither *Zapata* nor *Moscatiello* stands for the proposition that the police officers may violate the knock-and-announce rule with impunity, if they do so armed with a duly authorized search warrant, since the evidence would have been discovered inevitably. If this were the rule, there would effectively be no knock-and-announce requirement for warrant-based searches.

Even if the first two *Silvestri* criteria could be met, this Court has already ruled that the illegally seized evidence in this case cannot be admitted in the prosecutor's case-in-chief. For the reasons set forth in detail in its November 12, 2004 Order, this Court affirms its Order.

VI. CONCLUSION

The Government's Motion for Reconsideration is GRANTED; and, on such reconsideration, the Court's Order dated November 12, 2004, granting Defendant's Motion to Suppress, is AFFIRMED in its entirety, except the Order is amended on page 14, lines 13-15 to read: "The length of the delay: this Court has accepted the Magistrate Judge's finding that the

time that elapsed between knock and entry was ‘several seconds (five being the outside maximum).’”

SO ORDERED.

/s/John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 18th day of February, 2005.

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