IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JASON PROCKNOW

Defendant.

REPORT AND RECOMMENDATION

13-cr-53-wmc

REPORT

Before the court is defendant Jason Procknow's motion to suppress evidence that includes a request to dismiss the indictment for lack of admissible evidence after suppression is granted. *See* dkt. 23. For the reasons stated below, I am recommending that the court deny this motion. The court should not suppress any evidence and should not dismiss the indictment.

Alternatively, if the court finds a Fourth Amendment violation, then I am recommending that the court allow the government to proceed all but one charge in the superseding indictment.

The grand jury has charged Procknow in a 32-count superseding indictment with filing a series of false tax returns in order to and receive tax refunds to which he had no right. (dkt. 22). Procknow has filed a motion to suppress "all evidence in this case" as having derived from an illegal search of his suite at the Extended Stay America hotel in Eagan, Minnesota This would include all statements Procknow made to law enforcement authorities and the state and federal search warrants based on the illegal room search (and which also contained material misstatements and omissions in violation of *Franks v. Delaware*, 438 U.S. 154 (1978). *See* dkt. 23. Procknow also has filed a federal civil rights lawsuit in Minnesota against the Eagan police who searched his hotel room in that city, as well as hotel workers whom he alleges illegally

conspired with the police to violate his Fourth Amendment rights. Deposition transcripts from that lawsuit have been submitted as evidence relevant to Procknow's suppression motion.

Procknow also proffers that the IRS-CID (Criminal investigation Division) agent who originally investigated this case improperly used civil IRS subpoenas to obtain evidence to assist in his criminal investigation, which tainted subsequent grand jury subpoenas. *see* dkt. 23 at 19. Procknow then asks the court to dismiss the indictment because all of the government's evidence will have been suppressed. In his supplemental brief following the September 18, 2013 evidentiary hearing, Procknow relegates his IRS-CID civil subpoena argument to incorporating by reference his argument in the original motion, *see* dkt. 30 at 8. In its responsive brief, the government interprets Procknow to be requesting dismissal as a sanction for the IRS misusing its civil subpoena power, *see* dkt. 31 at 39 and argues in opposition, *id*. at 44-46; Procknow, in reply, sticks to his request for suppression of evidence so obtained, *See* dkt. 32 at 20-22.

The government opposes Procknow's suppression motion, contending that Procknow has no standing to contest the search of the hotel room; there was no Fourth Amendment violation here; but even if there was, all of the challenged evidence would have been inevitably discovered, either by the Eagan police when they would have retrieved Procknow's dog from his hotel room, or by the IRS, which would have conducted a parallel, untainted violation and obtained virtually the same evidence against Procknow. *See* dkt. 22.

Having found facts, having considered the parties' arguments, and having reviewed the applicable case law, I am recommending that the court deny Procknow's motion. As discussed below, it is questionable whether Procknow had an expectation of privacy in the searched hotel room, but even if he did, police entry into the room was justified. They entered at the request

of the hotel, which had a legitimate interest in assuring that there were no more people in the room from which it had properly and legally ejected the occupant(s), and to retrieve and attend to the dog that the officers knew was present. Once in the room, the officers saw in plain view enough evidence of fraud to support the subsequent-issued search warrants.

The government also argues that the IRS would have discovered all of this evidence about Procknow independently. If it were necessary to reach this argument, I conclude that the government has shown that the IRS-CID would have discovered the evidence underlying all of the false returns charged against Procknow except for one. Finally, I conclude that Procknow's allegation that the IRS misused its civil subpoena power to be a ground for any relief.

FACTS

On September 18, 2013, the court held an evidentiary hearing at which it saw and heard seven witnesses testify, and from which the court has made certain credibility determinations. A transcript of the hearing has been filed as dkt. 29. The court also has reviewed and considered the exhibits submitted by the parties, *see* dkt. 23, Def. Exhs. 1-18; dkt. 27, Gov. Exhs. 1-11; dkt. 28, Def. Hearing Exhs. 1 & 2; dkt. 31, Gov. Exhs. 13-15; dkt. 32, Exh. 1. I also have reviewed the pretrial services report to fill in narrative gaps leading to Procknow absconding from supervision. Although some of the evidence is hearsay–for instance, the tag-team police report and the transcripts of deposition testimony from Procknow's civil lawsuit–this evidence is admissible and the court may consider it in deciding Procknow's suppression motion, taking into account its hearsay nature. *See United States v. Raddatz*, 447 U.S. 667, 679 (1980).

Having considered all of this evidence, I make the findings of fact that follow solely for the purpose of deciding Procknow's motion to suppress:

(1) Procknow's relevant background

Because it is relevant to what the Eagan, Minnesota police officers knew and what they did, I briefly set forth Jason Procknow's criminal history. Procknow was born January 13, 1973. According to this court's pretrial service report (dkt. 8, under seal), in 1992, Procknow was charged with and convicted of first degree murder, possession of a switchblade, carrying a concealed weapon and impersonating a peace officer to commit a crime. Procknow reached his mandatory release date in 2001. In 2002 Procknow's parole was revoked and he also was sentenced for new convictions arising out of charges in 2002-03 in Eau Claire County, Chippewa County and Dunn County related to forgery, identity theft, and felony eluding officers in a motor vehicle. It is not clear when Procknow was released onto supervision, but his criminal history has no entries between June, 2002 and September 2010. Procknow was serving a term of supervised release in 2011, and Wisconsin Probation and Parole Officer Terry Lysaker was Procknow's supervising officer. Procknow absconded from supervision in April or May, 2011, and the Wisconsin Department of Corrections issued a warrant issued for his arrest.

(2) The investigation of suspicious tax returns prior to Procknow's arrest

In April 2011, Dairyland State Bank in Exeland Wisconsin alerted the FBI and authorities in Rusk and Sawyer Counties, Wisconsin, regarding suspicious activity in accounts held by Jason Procknow. According to the Bank, at least five different federal tax refunds in the names of three people: Lance Conway, De'Anna Henderson and Nathan Petit–had been

deposited into Procknow's account. The bank was aware of no link between these people and Procknow's bank account. Apparently, no active investigative activity occurred in the next four months.

(3) Procknow and VanKrevelen's presence at the Extend Stay America Hotel

On August 26, 2011, the internet booking company Priceline.com sent an email to JTPROCKNOW@gmail.com confirming a reservation for Jen Vankrevelen at Extended Stay America at 3384 Norwest Court, Eagan, MN from Friday, August 26,2011 to Sunday, August 28, 2011. This email confirmed that the reservation was made for two guests.

The registration card filled out at the Extended Stay America Hotel on August 28, 2011 states that the arrival date was 8/28/2011 with a departure date of 8/31/2011, the second date flanked by the handwritten initials "JVK." The assigned room number is 315, the guest name is Jen Vankrevelen (home address in Buffalo, MN), the number of adults listed is "2," the email address provided to the hotel is mariepoppy@yahoo.com, and the car associated with the room is a 2009 Pontiac with Minnesota plates. The registration document shows an advance deposit credit of $85.92 and three days of room charges (through the night of August 30, 2013) plus taxes that equal the prepayment. This is money that would have been paid directly to Priceline, not the Hotel.

The hotel's registration card contains several paragraphs of small print, including these:

> ESAH charges a non-refundable Pet Fee of $25 per day . . . for a pet kept in a guest room. Acceptance of small, domestic pets is based on the discretion of the hotel management.
>
> I (we) agree to the rate and above terms of my (our) reservation. I (we) am fully aware that I (we) will be held responsible for all

> room charges, incidentals and any damages to the room during my (our) stay. I (We) am fully aware that failure to adhere to Extended Stay America Hotels' (ESAH) policies or to meet my (our) payment obligations based on the above terms will result in immediate termination of my (our) stay.
>
> . . . I (we) am aware that failure to register all occupants and pets of the above room could result in immediate termination of my (our) stay.

There is a signature on the line for "Signature of Primary Guest," apparently Vankrevelen's. There is no signature on the line for "Signature of Secondary Guest." Procknow intentionally did not sign the form in order to avoid leaving a trail by which law enforcement officers could locate him. Procknow and Vankrevelen intentionally did not provide information on the form about the BMW in which they were traveling for the same reason, because it was registered in Procknow's name.[1] Although Procknow did not hide his physical presence from hotel employees, his failure to provide required registration information was a chosen tactic in his strategy of hiding in plain sight.[2]

Neither the registration card nor billing statement shows any payment for a pet or any other acknowledgment that a pet will be in the room with Vankrevelen.[3]

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[1] I find that these facts are fairly and logically inferable from the other facts I have found from the evidence in the record. *See, e.g., United States v. Natale*, 719 F.3d 719, 743 (7th Cir. 2013)(evidence presented at trial permitted jury to infer defendant's knowledge and willfulness); *Monroe v. Davis*, 712 F.3d 1106, 1121 (7th Cir. 2013)(other evidence permitted jury to infer that petitioner had agreed with codefendant to attack their victim, even though codefendant alone stabbed the victim).

[2] "Perhaps, as Edgar Allen Poe put it in *The Purloined Letter*, the best way to conceal something is to employ 'the comprehensive and sagacious expedient of not attempting to conceal it al all." *United States v. Gonzalez*, 328 F.3d 543, 548 (9th Cir. 2003).

[3] There is a suggestion in the record that Procknow claims he paid a hotel desk clerk–likely Christopher Schuelke–$20 on the side to keep a dog in the room without registering it (which would have cost $75 for three days), but this suggestion has not been backed up by any evidence. For instance, the government refers to Procknow's deposition testimony in his civil lawsuit, but I do not find this testimony in this court's record.

The Extended Stay Hotels Company publishes a brochure titled "Guest Information" that was available at the Eagan hotel. The hotel's policy is to leave a copy of this brochure on the bed of every guest room. The brochure covers predictable topics (guest laundry, quiet hours, *etc.*), including these advisals:

> **Illegal or Disruptive Activity**
> Guests involved in illegal activities or disrupting or threatening other guests, visitors or employees will be immediately removed from the premises in accordance with state law.
>
> * * *
>
> **Termination of Stays**
> Any failure to comply with the terms of your stay, including, without limitation, adhering to all Extended Stay Hotels policies, paying all charges in a timely fashion, failing to register all occupants and pets, and/or engaging in illegal or disruptive activity will result in immediate termination of your stay and your eviction from the room in accordance with applicable state law.
>
> **Additional Guests**
> There is an additional fee for more than one guest per room. . . . Our standard guest room is designed to comfortably accommodate a maximum of two adult guests. . . . Those exceeding the number of allowable guests in a room will be asked to vacate the room.
> **Pets**
> Pets are welcome at all Extended Stay Hotels locations. Prior to bringing a pet on site, you must register the pet, pay the non-refundable pet fee, meet the medium size and weight restrictions and agree to abide by the Extended Stay Hotels Pet Policy. For the safety of all our guests and staff, pets must be secured or removed from the room during housekeeping service and secured on a leash when walking on hotel property.

Prior to August 28, 2011, Hotel Manager Adam Scheler many times had dealt with guest disruptions at the hotel that required Scheler either directly to ask guests to leave, or if necessary, to call the police to ask for their assistance in getting guests to leave he hotel. Scheler characterized the hotel's enforcement of its policies as very strict.

Prior to August 28, 2011, guests at the hotel had abandoned pets and left pets unattended in guest rooms. Such conduct creates a problem for the hotel because the pet could damage or soil the room in which it has been left, unattended pet dogs could disturb other guests by barking, and any unattended or abandoned pet faced the risk of being deprived of sufficient food or water. It is hotel policy that hotel employees do not handle guest pets. The employees are not trained to do so and there is a risk of injury to the employee. Therefore, it is hotel policy to contact the appropriate public agency to have unattended or abandoned pets removed from the room. In Eagan, that ordinarily involves calling the general dispatch number. Scheler has called the police to remove pets from hotel rooms on previous occasions.

(4) Procknow's arrest on August 29, 2011

On or before August 29, 2011, Wisconsin Probation Officer Lysaker developed a detailed lead that Procknow had fled to Eagan, so on August 29, 2011, she called the Eagan Police Department (EPD). At about 5:45 p.m., that afternoon, PO Lysaker spoke with Eagan Police Sergeant Dan Mason on the telephone. PO Lysaker told Sgt. Mason that Procknow was serving a term of state probation and had absconded. Procknow had been charged with felony bail jumping and the Wisconsin Department of Corrections had issued a warrant for his arrest. A reliable source had informed PO Lysaker that Procknow and his girlfriend, Jennifer Vankrevelen, might be staying at the Extended Stay America hotel in Eagan. PO Lysaker asked that the Egan Police Department look for Procknow there. Lysaker described Procknow's vehicle as a 2004 black BMW and she emailed Sgt. Mason a photograph of Procknow. PO Lysaker warned Sgt. Mason that Procknow had a violent past, including a conviction for first degree murder, and that

there was a high risk that he would run from the police.[4] Sgt. Mason passed this information onto Sgt. Evans, who was to coordinate police efforts to locate and arrest Procknow at the Extend Stay hotel.

A squad of EPD officers, led by Sgt. Evans, drove to the Extended Stay America Hotel to investigate. Officers John Collins, Matthew Ondrey, and Brian Rundquist entered the hotel while others waited outside to watch the perimeter. The officers asked if Procknow was staying at the hotel; the desk clerk, Christopher Schuelke could not find him because he was not a registered guest. The officers asked about Jennifer VanKrevelen; Schuelke reported that she was staying in room 315. The three officers went up to room 315. They saw a magnetic sign on the door frame that announced "PET INSIDE". The officers stood outside the door and listened; they heard someone or something moving around inside the room. They knocked without announcing who there were; no one answered. Based on the sign and the lack of a response, the officers assumed that a pet or some sort of animal was inside the room.

The officers exited the hotel and headed toward their squad cars to depart. Some of the officers had driven away when Sgt. Evans radioed that he thought he had just seen Procknow's black BMW pulling into the hotel parking lot. He knew it was Procknow's car because he ran the Wisconsin license plate and it came back registered to Procknow.

By the time the other officers returned, the BMW was parked. A woman hovered nearby. Officers Collins and Rundquist walked toward the woman while Officer Ondrey headed back toward the hotel. The woman was keen on avoiding the officers. When asked, she declined to

[4] Although Sgt. Mason's entry in the EPD incident report could be read to imply that Procknow was on probation for murder in 2011, this was not the case, as set forth earlier in this report.

give her full name or where she was from; eventually she identified herself as Jennifer Vankrevelen from Buffalo, Minnesota.

As Officer Ondrey approached the hotel, he saw Procknow standing in the vestibule watching the other officers approach Vankrevelen. Officer Ondrey stepped into the vestibule, prepped for Procknow to flee. Officer Ondrey directed Procknow to come outside. Instead, Procknow fled. Officer Ondrey chased Procknow into the hotel lobby, yelling at him to stop. Procknow did not stop. Officer Ondrey caught up to Procknow, who physically resisted arrest, prompting Officer Ondrey to employ his taser to shock Procknow. Procknow pitched into a door and flopped face-first to the floor. Officers Rundquist and Hugh Curry hurried in to help handcuff the prostrate Procknow, who continued to resist as best he was able.

The officers rotated Procknow into a sitting position. He was bleeding from facial cuts and had broken some teeth. In a search incident to arrest, the officers recovered from Procknow a hotel room entry card, a cell phone, some receipts and a credit card in the name of "Trevor Coon." Officer Brian Rezney retrieved used his department-issued camera to photograph Procknow's condition. Paramedics were called, and they took Procknow in an ambulance to a hospital for treatment, accompanied by Officer Ondrey.

Officers arrested Vankrevelen for harboring a fugitive. They seized from her an entry card for Room 315. Officer Collins peered into the BMW to make sure no one was in it; all he noticed at that time was a scanner or a copier that seemed unimportant at the time. Then Officer Collins and the others reviewed the warrant from Wisconsin to confirm its validity; they learned that Procknow's conviction underlying the parole violation involved forgery.

(5) Police entry into Room 315

Officer Collins then approached the hotel's front desk service representative, Chris Schuelke.[5] No other hotel management employee was present at that time, nor did any other hotel management employee show up that evening.[6] Officer Collins, as a then-12 year veteran of EPD, had been called to the Extended Stay America on official business in the past, knew the hotel manager (Scheler) and knew that generally in incidents that end up in arrests, hotel management usually ended up asking the police to help eject or evict the occupants of the room.[7] So, Officer Collins advised Schuelke that the police had arrested both occupants of Room 315; what did Schuelke want done? Schuelke called Scheler, who was off premises but on call, to get an answer. Scheler told Schuelke that the registered guest and the unregistered person were no longer welcome at the hotel and that the hotel was terminating the stay. Scheler told Schuelke to convey this decision to the police.

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[5] At the evidentiary hearing, Officer Collins described Schuelke as "white male, brown hair, from my memory . . . light skin, I believe, younger, maybe mid 20s, not very confident." Schuelke, who testified at the evidentiary hearing, is African American and his skin tone is light brown. Despite Officer Collins's erroneous description, the court has no doubt that he was talking to Schuelke that afternoon at the hotel, as is recounted in his portion of the written police report; Schuelke testified that he was the only clerk on duty that evening and he is the hotel employee who initially dealt with the police.

[6] Schuelke testified that his boss, Adam Scheler, showed up later that evening and interacted directly with the police. Scheler testified at the evidentiary hearing that he was in telephone contact with Schuelke throughout the events at issue but that he did not come to the hotel that night. Having heard and seen all of the witnesses testify, having carefully considered all of the exhibits, and taking into account all of the officers' testimony about who was there, who they talked to, and what they were told, I find that Schuelke' testimony is incorrect on this point, as well as several other material points, as can be gleaned from the facts that I actually *have* found in this report, both *supra* and *infra*.

[7] "Ejection" and "eviction" are terms of art in this context; under Minnesota law, this would have constituted an ejection pursuant to Minn. Stat. Sec. 327.73, which is set forth in the analysis, *infra*. For a gloss of the difference between ejection of a hotel guest and eviction of a renter, *see Young v. Harrison*, 284 F.3d 863, 868 (8th Cir. 2002), citing Minnesota's law on hotel guest ejection.

In a subsequent phone call shortly thereafter, Schuelke asked Scheler what to do about the dog in the room. Scheler told Schuelke that the hotel wanted the dog removed: it was an unregistered pet, the hotel knew nothing about it, and now it was going to be unsupervised in the hotel. For staff safety, Scheler instructed Schuelke to ask the police to request police assistance in removing the dog. Schuelke told Officer Collins–and Sgt. Evans, who was a party to this conversation–that the hotel wanted the police to make sure that there were no other people in the room and to collect the dog, at which time hotel staff could follow its usual procedure for clearing out the room.[8]

Sgt. Evans went outside to be near the BMW until a tow truck arrived. He remained in cell phone contact with the other officers engaged in the investigation. (No one mentioned the 2009 Pontiac that Vankrevelen had registered with the hotel; a fair surmise would be that the car never had been present because Vankrevelen and Procknow had been traveling in his BMW.

By the time the officers re-approached Room 315, they knew, either from Schuelke or Vankrevelen, that there was a dog in the room, and they were under the impression that it was a pit bull or some other fierce breed. (Because the officers knew that the dog's name was "Spike" before they entered, they probably it probably was Vankrevelen who alerted them to the dog's presence in the room). Pursuant to EPD's standard operating procedure when officers are confronted with a dog left with no one to care for it, the plan was to secure the dog and take it to the city's animal control center. Because it was after normal business hours, there was no

[8] At the September 18, 2013 evidentiary hearing–and at a July 26, 2013 civil deposition–Schuelke testified that none of this happened. I have found his version of events implausible and unpersuasive. More on this in the analysis section, below.

animal control officer on duty to perform this task. But for securing the dog and perfecting the ejection, the police had no other plan or agenda that involved entering Room 315.

Officers Collins, Rezney and Rundquist went back to Room 315. Rezney was armed with an animal catch pole from his squad car, Collins may have grabbed the carbine rifle from his squad car. The officers knocked on the door and announced their presence. No one responded, so they used Vankrevelen's key card to open the door. The officers did not see any people but they saw a mid-sized dog walking about loose (*see* photo, exh. 5-4, dkt. 27-4; the hard copy is clearer than the computer image). Spike turned out to be friendly, so the officers did not need to noose him with the catch pole (or shoot him, as they apparently were prepared to do). Upon entering the room, for officer safety the officers walked all the way to the windows to ensure that there really were no people present (which was the second half of the hotel's request regarding ejection).

From where the officers stood in the room, they could see an electric typewriter, paperwork with other people's names on them, including application forms for a group called "PLEA" that apparently had been filled out by inmates (including Trevor Coon) various W-2 forms with several other peoples names on them (that is, not Procknow or Vankrevelen) and at least one credit card in someone else's name. Recalling that they had seen a copier in the BMW, the officers suspected that this might be evidence of some sort of fraud scheme. Officer Rezney photographed the scene and many of the documents with his camera. *See* Gov. Exhs. 5-1 through 5-19, dkt. 27. Officer Rezney's portion of the EPD incident report itemizes much of what the officers saw. *See* dkt. 23-1 at 16-19. The words on the documents and items and their nature was evident to the officers without moving anything. To the extent that Officer Rezney

touched or moved anything, he did not move any documents "in depth" to take pictures of them because he believed that would constitute a search, as opposed to a plain view. As Officer Rezney put it,

> We cleared the room. We found out there was nobody in there. We found out the dog was nice. And the all of a sudden you're kind of looking around and, I mean, the paperwork jumps out right at you. There's a typewriter right there. There's paperwork all over the place. It's not a standard kind of hotel room that I go into. And so you kind of look and you're, like, "whoa, there's information here!"
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> Sept. 18, 2013 transcript, dkt. 29, at 73.

The officers left the room without taking anything other than Spike and his leash. The officers telephoned Sgt. Evans in the parking lot to report what they had seen. Sgt. Evans decided to seal the room while the police decided what to do next. The three officers had been present in room 315 for several minutes before leaving and beginning to seal the door.

(6) Procknow's statements at the hospital

Meantime, at the hospital, Officer Ondrey provided Procknow with a *Miranda* advisal, obtained Procknow's waiver of rights, then questioned Procknow. At this time, Officer Ondrey did not have any information about what had happened back at the hotel. More specifically, Officer Ondrey was not even aware whether other officers had entered Room 315, let alone whether they had seen anything of evidentiary interest. In an exchange that sounds more like a conversation than an interrogation, Procknow admitted that he and Jennifer (Vankrevelen) had seen all the police activity in the parking lot and had decided to come out to reconnoiter. Officer Ondrey asked why he had left Wisconsin; Procknow explained that he had left

Wisconsin to get away because he knew he was in violation of his parole. Procknow said that wanted to get away for a while but then he planned on going back to set things straight.

Having just retrieved a credit card in the name of "Trevor Coon" from Procknow during the arrest, and finding it suspicious that someone with a criminal history of fraud would possess a card in someone else's name, Officer Ondrey asked Procknow who Coon was. Procknow explained that Coon was a buddy of his who had given Procknow permission, in writing, to obtain a line of credit for that credit card, but that he hadn't activated the card yet. Officer Ondrey asked Procknow where the paperwork would be; Procknow said it might be at home. Based on his training and experience, Officer Ondrey suspected that any paperwork regarding the Coon credit card could be in Room 315 back at the hotel. Officer Ondrey asked Procknow if officers would find any credit cards in other people's names, or any other fraudulent material; Procknow said no, and added that there were no illegal drugs in the room, either. Officer Ondrey put this information into his police report, which would have been immediately available to other officers, including Officer Maier who wrote the first search warrant application for Room 315. Later that evening, Procknow volunteered to his night-shift custodian (Officer Joseph Moseng) that within the past two weeks, he almost got pulled over by a Minnesota State Trooper. If the Trooper had attempted a traffic stop, Procknow had intended to flee, since he knew then that he had an outstanding warrant from Wisconsin. Procknow asserted that his BMW had a top speed of 165 MPH and he knew he could outrun anyone who would try to pull him over.

On August 30, 2011, P.O. Lysaker sent an email to EPD asking where Procknow's BMW was, because a car repossession company was looking for it.

(7) Spike is kenneled

On August 29, 2011Officer Rundquist took Spike to the animal hospital at which the city kenneled impounded dogs and filled out a "City of Eagan Animal Impound Report," indicating that at 1800 hrs. on August 29, 2011,[9] an adult male dog named "Spike" was picked up for safekeeping at the Extended Stay Hotel because "owner went to jail." On August 30, 2011, EPD Animal Control Officer (Karen Grimm) sent Procknow a letter at an address in Exeland, Wisconsin, informing Procknow that

> When you were arrested on 8/29/11, officers found a black and white Labrador mix dog in you hotel room. As the dog would be left without care due to your arrest, the dog was taken into custody.

Officer Grimm advised Procknow that he owed an impound and boarding fees, and that he had a week to pick up Spike or "the dog will be release[d] for disposition."

(8) The search warrants for the room and the car

On August 30, 2011, at about noon, EPD Detective Paul Maier applied for and obtained a search warrant for Room 315 and the BMW from Dakota County, MN District Court. The warrant affidavit speaks for itself, *see* dkt. 23-3, but by way of synopsis, Det. Maier described the property to be seized as items that were not in Procknow or Vankrevelen's names, such as drivers' licenses, credit cards, financial documents, ID cards, and other documents typically

[9] The form says "6-29-11" but this is an obvious typo. The form also estimates Spike's weight at 10-25 pounds; just from the silhouette of Spike hovering near the bed in Room 315, it is clear that Spike is in the next higher weight category.

involved in identity theft. For his probable cause showing, Detective Maier offered five terse paragraphs:

First, EPD officers went to the Extended Stay America Hotel as the request of the Wisconsin Department of Corrections to arrest and hold Procknow who was wanted for a parole violation resulting from a forgery conviction. Officers were advised that Procknw was staying in Room 315 with Vankrevelen, and that Procknow was very street-smart, that he recently had bee released from prison for first degree murder and and that if he saw police in the area he would fell.

Second, officers saw a BMW with Wisconsin plates pull into the hotel parking lot. They ran the plates and learned the car was registered to Procknow. The officers saw Procknow enter the hotel; when he saw them, he ran. Officers tasered Procknow, arrested him and took from him a credit card that did not belong to him.

Third, hotel management wanted the occupants of the room evicted, due to the circumstances, and asked officers to clear the room and retrieve Procknow's dog. Upon retrieving the dog and clearing the room, officers saw numerous items in plain view that appeared related to fraud, forgery and identity theft: an electronic [*sic*] typewriter, a thumb drive, miscellaneous items of paperwork containing various names of people, including a Citibank application, various W-2 statements, and numerous credit cards.

Fourth, in the impounded BMW officers saw in plain view an all-in-one copier/scanner/ fax/printer and a purse. In Detective Maier's training and experience, suspects involved in fraud and forgery often use this type of machine to create fraudulent documents. Fifth, Procknow's

criminal history includes convictions for murder, offering worthless check(s), burglary, identity theft and forgery.

(9) The IRS investigation after Procknow's arrest

At some point in the Fall of 2011, the IRS took over this investigation from the FBI. Thereafter, EPD Detective Maier met with IRS-CID Special Agent Steven Kunstman, assigned to the IRS's St. Paul office, and turned over all of the documents and other evidence seized from Room 315 at the Extended Stay America Hotel. At some point, Agent Kunstman also obtained account records from the Dairyland Bank regarding the matters initially flagged by the bank to law enforcement.

On November 7, 2011,IRS-CID Special Agent Steven Kunstman applied to and received from the U.S. District Court for the District of Minnesota a search warrant for all mail and other documents associated with Box 205 at the UPS Store at 40 South 7th Street (Suite 212) in Minneapolis. In support of his warrant request, Agent Kunstman provided a 27 paragraph affidavit. The affidavit speaks for itself (*see* dkt. 23-5), but by way of synopsis, Agent Kunstman reports that he personally became involved in the Procknow investigation three weeks earlier, and that the FBI had become aware in early September, 2011 that Procknow had been arrested by EPD officers on a probation warrant. Agent Kunstman had telephoned Detective Maier, who reported the results of the police search of Room 315 pursuant to the state court search warrant. Detective Maier turned over his the seized documents to Agent Kunstman. Among the documents seized were blank IRS W-2 Forms, blank and partially completed IRS tax forms, lists of businesses and their IRS EINs, 21 debits cards (of the sort issued for tax refunds) in the

names of different people, plus completed and blank application forms for an organization calling itself PLEA.[10]

Three completed PLEA forms were from inmates at a Minnesota correctional facility (Gregory Smith, Jeffrey Alan and Hobart Johnson). Smith, Alan and Johnson thought the PLEA applications were related to an inmate assistant organization; however, the completed forms were tied to tax forms and refund requests. Some of these documents had the UPS box number listed as an address (sometimes as "Apt. 205"). Also taken from Room 315 was application and payment information for box 205. Agent Kunstman further averred that envelopes delivered to box 205 included mail from the U.S. Department of the Treasury and from financial institutions, in the names of people who had filled out PLEA applications. Agent Kunstman reported that a man named Paul Watters had opened the box on June 22, 2011, using letterhead for PLEA that listed as directors and board members some of the inmates who had filled out PLEA applications. The court issued the warrant and the IRS seized 21 letters addressed to nine different people, including Gregory Smith and "Trevor Coon."

On December 1, 2011, IRS-CID Special Agent Robert Martin sought and obtained a search warrant from this district court to seize all mail held at the Rice Lake UPS P.O. box rented by Procknow.

On May 10, 2012, Agent Kunstman sent an IRS civil summons to the Dairyland State Bank seeking information relevant to the Procknow investigation; the return date was June 6, 2012. The bank complied with the summons. On May 21, 2012, Agent Kunstman sent a civil

[10] An acronym for "Professional Legal and Economic Associates." The applications ask for, among other things, the applicant's full name, DOB, SSN driver's license number and prison release date.

summons to FIA Card Services in Phoenix for its information relevant to the Procknow investigation. FIA complied with the summons.[11]

On June 7, 2012, the grand jury sent a subpoena to the Dairyland State Bank returnable on July 11, 2012, requesting all account information for Jason Procknow.

On June 12, 2012, Agent Kunstman wrote to the Dairyland State Bank to advise that the IRS was withdrawing its civil summons issued to the bank and returning the unopened package of documents previously provided by the bank in response to the summons. Agent Kunstman reported that "these documents have not been inspected or copied in any way." On June 20, 2012, Agent Kunstman sent an identical letter to FIA Card Services, returning the documents without inspecting or copying them.

On June 15, 2012, the U.S. Attorney's Office for this district wrote to the IRS-CID's Special Agent in Charge of the St. Paul office to request assignment of an IRS Special Agent to handle the Procknow investigation and to start a grand jury investigation. On July 23, 2012, The IRS responded by agreeing to the request.

On February 1, 2013, the IRS sent a letter to the U.S. Attorney in this district, transmitting its SIRF investigation against Procknow for prosecution.

[11] In his motion to suppress, Procknow lists a number of other entities that received summons that later were withdrawn, replaced by grand jury subpoenas seeking the same information. *See* dkt. 23 at 12. Although there is no evidence in the record to back up this proffer, the government does not contest it and there is no other reason to doubt it.

(10) The hypothetical IRS investigation in the absence of Procknow's arrest

At the September 18, 2013 evidentiary hearing in this court, Special Agent Michael Miller of the IRS-CID explained how the IRS would have conducted its investigation if the police in Eagan had not arrested Procknow, and the IRS only had the April, 2011 suspicious activity report from the Dairyland Bank. According to Agent Miller, such activity–namely so many refunds for so many different people deposited into one bank account–fits into the category labeled "*stolen identify refund fraud*" (SIRF). When investing possible SIRF, after looking for surface similarities between the tax returns that generated the returns, Agent Miller will dig deeper to see if there are links to other tax returns.

The five returns flagged by Dairyland Bank all had the same address, a UPS mailbox in Rice Lake, Wisconsin. So, Agent Miller would have run a query through IRS data bases to see if there were more returns using this address. That said, a person engaging in SIRF often uses more than one mailing address for his returns. So, Agent Miller will look for other similarities by cross-referencing other information, such as a claim for earned income credits or the American Opportunities Education Credit (which are intended by the SIRFer to generate a refund beyond the taxes allegedly paid into the IRS), or overlapping information on W-2s, for example, to see if patterns develop. Agent Miller used as an exemplar one of the five flagged refunds and returns, in the name of "Lance Conway." The W-2 attached to the Conway return–from "Zimmer Trucking"– appeared to be fraudulent because there was no withholding claimed and other important information regarding Medicare wages, Medicare tax withholding was missing. So Agent Miller would have pulled other tax returns for which Zimmer Trucking was the employer. This would have led him to a return filed by "Alvin Williams," who listed his address

in Minneapolis as "40 S. 7TH ST STE-212 APT 205" in Minneapolis. (This address actually is the same P.O. Box at the UPS store for which IRS Agent Kunstman obtained a search warrant in November 2011 by using the information provided by EPD Detective Maier, *see supra* at 16).

Continuing with Agent Miller's hypothetical investigation, discovery of this mailbox would have led Agent Miller to check IRS data bases for other returns in which the filer also had used this Minneapolis address. Then Agent Miller would have determined who had rented the P.O. boxes in Rice Lake and in Minneapolis, used on the suspected returns he was reviewing. The Rice Lake P.O. Box was rented by Procknow directly; the Minneapolis P.O. box had been rented by a homeless man named Paul Watters, whom Agent Miller would have tracked down and interviewed. As it turns out, he was found and interviewed and he identified Procknow as the man (along with a woman) who recruited him to open the P.O. box. Agent Miller would have known who Vankrevelen was by virtue of her arrest in Eagan, which is not a subject of Procknow's pending suppression motion.

Agent Miller also would have connected Vankrevelen to this scheme because of her inquiries to the Green Dot / Synovus company, a business that issues the prepaid debit cards representing the tax refunds issued by the IRS. Agent Miller automatically would have sought from Synovus any records it had regarding the five returns flagged by Dairyland Bank; it turns out the a person claiming to be Jennifer Vankrevelen inquired of Synovus as to why her tax refund was deposited into Avery Johnson's account.

Also, the PLEA applications filled out by inmates were being returned to the P.O. boxes controlled by Procknow, which would have provided another avenue of investigation separate from any information obtained or derived from the search of Room 315.

Eventually, Agent Miller would have exhausted his leads, at which point he would have sorted and categorized the information. In Agent Miller's investigation of Procknow, he prepared a chart of 22 false tax returns that he believes Procknow falsely generated. Agent Miller charted the information on those 22 returns in Gov. Exh. 10, dkt. 27-9.

ANALYSIS

I. A general observation about credibility and the court's findings of fact

A thorough review of all the testimony and exhibits submitted to this court reveals differences in recollections, failures of memory, inconsistencies, and downright contradictions. Each side dabbles at this evidentiary smorgasbord, serving up the portions it favors, rejecting the portions it disfavors, and in the end presenting to the court a version of events that suits its view of the appropriate outcome on the suppression motion. Procknow, by counsel, goes so far as to argue that the government cannot meet its evidentiary burden of proving that the warrantless entry into Room 315 was justified "when its witnesses were materially inconsistent, provided false testimony and failed to recall events of critical importance." Reply Brief, dkt. 32 at 5.

But, as we all know, fact-finders play a different role in the adversarial process than the lawyers, whose role is to advocate zealously for their clients. Fact finders are to use their common sense in weighing the evidence and are to consider the evidence in light of everyday experience, drawing reasonable inferences, avoiding witness counting, and instead determining how truthful and how accurate each witness was, and how much weight the fact finder thinks the witness deserves, taking into account the witness's opportunity to see hear or know things, his/her intelligence, memory, demeanor, bias, inconsistencies, and how this testimony corresponds or

fails to correspond with other evidence. *See generally* Seventh Circuit Pattern Criminal Jury Instructions 2.02, 2.03, 2.04 3.01, 3.03; *see also United States v. Ghiassi*, 729 F.3d 690, 696-97 (7th Cir. 2013)(district court was thus presented with a classic choice of whom to believe; having heard and seen each of the three witnesses whose knowledge and credibility was determinative, and having obtained additional information, "the court was therefore uniquely and well-situated to assess the credibility of these witnesses"); *United States v. Vaughn*, 722 F.3d 918, 929-30 (7th Cir. 2013)(jurors, who have the opportunity to observe the verbal and nonverbal behavior of witnesses, and having been apprised of reasons to reject certain testimony, nonetheless may accept the testimony as credible and base their verdict on it);*See also United States v. Jones*, 713 336, 340 (7th Cir. 2013) (each step in inferential chain must be supported by evidence that allows the fact finder to draw reasonable inferences from basic facts to ultimate facts; although the fact finder may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation.)

So it is here. Having presided over 100+ suppression hearings in 21 years as this court's magistrate judge, I have heard and seen all manners of testimony. When the evidence so militates, I will reject law enforcement testimony, even when the defendant chooses not to testify. *See, e.g., United States v. Edwards*, 13-cr-56-bbc, Sept. 10, 2013 Report and Recommendation, dkt. 22 at 16-17 (police sergeant's claim that he was conducting an inventory search of defendant's car was incredible, so the court rejected this testimony and recommended suppression); *United States v. Ballmer & Hochstetler*, 11-cr-91-bbc, May 25, 2012 Report and Recommendation at 20 (another case involving a dog {"Ralph"}, warrantless entry, plain view and the same AUSA).

In the instant case, I have heard and seen over a half-dozen witnesses testify in person, and I have read every exhibit, incident report and deposition transcript and looked at every photograph submitted by the parties. Having carefully considered all relevant factors and considering them in their totality–looking at the *gestalt* of the situation– I have no doubt that Schuelke conveyed to the police Scheler's request that the police assist in ejecting Vankrevelen (and Procknow) from Room 315 and that they remove the dog from the room, which the police had learned was present. True, the police officer witnesses did not remember everything and they got some things wrong, but it's been over two years, and not all of the details–for instance, Officer Collins incorrectly recalling Schuelke's race but recalling his lack of confidence–are critical, either to the narrative or to the officers' joint or several credibility. Contrary to Procknow's argument, I conclude that the officers did not fabricate or embellish their testimony. The heart of their current testimony is corroborated by the incident report they prepared at the time, when events still were fresh in their minds.

Perforce, I have rejected virtually all of Schuelke's testimony. Neither his testimony at this court's evidentiary hearing or at his July 26, 2013 deposition in Procknow's tort lawsuit is credible or thorough. Some things he got correct, some things he got incorrect, some things he claimed not to remember. On virtually every material issue, Schuelke's version of events was the outlier. I will not speculate as to why this is so because the reasons don't matter. What matters, for the purposes of addressing the parties' legal arguments, is that I have set forth in the Fact section of this report those facts that I have found to be sufficiently established.

II. Procknow did not have a reasonable expectation of privacy in the hotel room

(A) Procknow never had a reasonable expectation of privacy in Room 315

> Does the Fourth Amendment protect those who wish to hide in plain sight? Under the circumstances presented in this appeal, we conclude that it does not and affirm the district court's denial of the defendant's suppression motion.
>
> *United States v. Gonzalez*, 328 F.3d at 545.[12]

The government's first response to Procknow's suppression motion is that he doesn't have standing to make it because he did not have a reasonable expectation of privacy in Room 315 at the Extended Stay America Hotel. The parties agree that Fourth Amendment rights are personal and cannot be asserted vicariously, so that a defendant cannot claim a violation of his own rights if evidence is obtained against him by means of the search of a third party's premises. *Rakas v. Illinois*, 439 U.S. 128, 133-34. In order to challenge a search, a defendant must show that he had an actual (subjective) expectation of privacy in the premises searched and then show that society is prepared to recognize this subjective expectation of privacy as reasonable. *United States v. Carlisle*, 614 F.3d 750, 756-57 (7th Cir. 2010). In *Carlisle*, the court gleaned "five key factors" from circuit precedent: whether the defendant: (1) had a possessory interest in the place searched; (2) had the right to exclude others from that place; (3) exhibited a subjective expectation that it would remain free from governmental invasion; (4) took normal precautions to maintain his privacy; and (5) *was legitimately on the premises*. 614 F.3d 759, emphasis added.

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[12] The facts in *Gonzalez* are distinguishable. There, the defendant moved to suppress a security camera video showing him handling a package of drugs in the open mailroom of the hospital where he worked. *Id.* at 546. The court accused defendant of advocating "a theory of the Fourth Amendment akin to J.K. Rowling's Invisibility Cloak." *Id.* at 548.

The government asserts that Procknow, having failed to register, violated Minnesota Stat. 327.10, which requires every hotel within the state to register each guest upon arrival, and "every person, if any with the guest as a member of the party," and to register all guest motor vehicles by make and license number; § 327.11, and which requires the *guest* provide this information to the hotel, upon penalty of not being accommodated until the information is provided. Section 327.12 provides that these required records shall be open to the inspection of all Minnesota law enforcement officers. Section 327.13 makes violation of the three preceding sections a misdemeanor. The government also cites to *United States v. Dorais*, 241 F.3d 1124, 1128 (9th Cir. 2001), in which the court upheld the denial of a suppression motion filed by two hotel guests. There, one guest had actually checked out of the motel, the other still was in the room past the hotel's announced noon checkout time. The court hewed to its holding in *United States v. Huffhines*, 967 F.2d 314, 318 (1992) "that a defendant has *no* reasonable expectation of privacy in a hotel room when the rental period has expired and the hotel has taken affirmative steps to repossess the room." (Emphasis in original). Acknowledging that other cases had reached other conclusions, the court noted that it was relevant to determine the relationship between the hotel and the guest, and whether the hotel had generally lax practices in enforcing its checkout time.

Procknow responds that he *does* have standing to challenge the police entry into Room 315 because he was a legitimate guest of the hotel with an expectation of privacy in the room. Procknow is incorrect. Procknow was not a legitimate guest at the hotel because he intentionally avoided making known his presence, or his car's presence at the hotel. (Although it is not clear on the record, it seems that Vankrevelen registered her Pontiac with the hotel instead of the

BMW as part of the misdirection scheme). The fact that Procknow or Vankrevelen may have used his credit card to book the room (in her name alone) from some other location while cloaked with the relative anonymity of the internet did nothing to tip his hand to his probation officer, to law enforcement officers who might be looking for him, or to the hotel itself. The fact that the online reservation was made for "2 adults" meant nothing when only one adult actually signed into the room.

Procknow claims that the hotel "knew" he was there, citing as proof his attorney's cross-examination of Scheler, the manager:

> Q: Now, the day before August 29th, which would have obviously been August 28th, you were actually in Mr. Procknow's room assisting him with his television, weren't you?
>
> A: I don't recall.
>
> Q: You don't recall being in his room assisting him with a converter box?
>
> A: It's possible. I'm in a lot of the hotel rooms in a given day.
>
> Q: You saw him in your hotel previously, didn't you?
>
> A: Yes.
>
> Q: So you knew he was there?
>
> A: I did not know that he was not a registered guest.
>
> Q: You could have checked?
>
> A: I could have checked, but I –
>
> Q: You're the hotel manager; you run the place?
>
> A: Correct.
>
> Q: So you didn't check?

A: I was not the person – the individual who checked him in.

Q: But you knew he was there and you could have checked to see if he was registered, right?

Gov't: Object. Asked and answered.

Court: Right. Move on, please.

Q: You didn't evict him?

A: I did not know he was an unregistered guest at that point.

Q: You didn't ask him?

A: The registration cards aren't – my day-to-day business is not–

Q: Your answer is yes or no. Did you ask him if he was a registered guest or not?

A: No. I didn't ask him if he was registered.

Hearing Transcript, dkt. 29 at 104-06.

If this exchange establishes anything, it establishes that if Scheler had known that Procknow had not registered at the hotel, then Scheler would have ejected–not "evicted"–Procknow from the hotel, as Scheler was authorized to do under Minnesota law. Procknow's contrary view is that, if a hotel manager does not interrogate every person he encounters on site as to whether that person has properly registered–regardless of the nature of their encounter, and in the absence of any reason to think that the person has failed to comply with the hotel's clear written directives– then that guest is legally on the premises with the blessing of Extended Stay America. This argument is simply an extension of Procknow's chutzpah-fueled strategy of hiding in plain sight. It is illogical and unpersuasive.

The bottom line is that the fugitive Procknow *never* had a reasonable expectation of privacy in Room 315 because *he* never checked into it. Procknow's failures to sign the registry, to report his car's presence, and failure to make his identity known to anyone at the hotel all were deliberate omissions calculated by him to hide his location from any law enforcement officers who might be searching for him as a knowing absconder from Wisconsin state supervision. Further, it's fair to infer that Procknow also wanted to shield his prized BMW from the repo men who were on his trail. As a result, Procknow has no legal right to complain about the police entry into Room 315. So long as the police did not pry open closed containers such as suitcases or briefcases, they were free to look about the room and review documents and other items laying about. Their discovery, in plain view,[13] of myriad documents and implements smacking of identity theft was legal, and nothing subsequently learned from these documents is tainted. This is enough, by itself, to deny Procknow's motion to suppress.

(B) If Procknow had any expectation of privacy in Room 315, it was extinguished when he was ejected from the hotel

Even if we assume, *arguendo*, that an absconder who hides out in his girlfriend's hotel room has some expectation of privacy in that *room* (as opposed to his personal effects that might be in closed containers inside the room), this assumption avails Procknow nothing because Scheler ejected him from the room before the police entered it. Minn. Stat. § 327.73 provides:

[13] The plain view doctrine provides that the warrantless seizure of an object is justified if (1) the officer was lawfully present in the place whence he viewed the items; the items were in plain view; and (3) their incriminating nature was immediately apparent, that is, the viewing officer had probable cause to believe that the items were contraband or otherwise linked to criminal activity. *United States v. Schmidt*, 700 F.3d 938-39 (7th Cir. 2012).

Undesirable guests; ejection of, and refusal to admit

Subdivision 1. Innkeeper's right to eject. (A) An innkeeper may remove or cause to be removed from a hotel a guest or other person who:

* * *

(2) while on the premises of the hotel acts in an obviously . . .disorderly manner . . . or causes or threatens to cause a disturbance;

* * *

(5) violates any federal, state, or local laws, ordinances, or rules relating to the hotel; or

(6) violates a rule of the hotel that is clearly and conspicuously posted at or near the front desk and on the inside of the entrance door of every guest room.

(B) if the guest has paid in advance, the innkeeper shall tender to the guest any unused portion of the advance payment at the time of removal.

The Court of Appeals for the Eighth Circuit had occasion to consider the effect of this statute on a warrantless room search in *United v. Rambo*, 789 F.2d 1289 (8th Cir. 1986). There, the defendant (Rambo) started the evening as a paid guest in room 769 of the Curtis Hotel in Minneapolis. A hotel security officer was called to investigate complaints that "a guest was running naked through the halls, screaming." Eventually, the security officer and the assistant manager confronted the naked, bruised and agitated Rambo at the doorway of his room; Rambo brushed them off and slammed his room door in their faces. The assistant manager instructed his security officer to call the police to have Rambo removed from the hotel. Two Minneapolis police officers arrived, obtained a signed misdemeanor complaint from the assistant manager, then knocked on the door of Room 769. Rambo answered; the officers advised him that the assistant manger wanted him out of the hotel because of the disturbance he had created. Rambo refused to leave and tried to slam the door. The officers chased him into the room to subdue

and handcuff him. An inventory search of the room uncovered 10 ounces of cocaine and $29,814 in currency. 789 F.2d at 1292.

In upholding the denial of Rambo's suppression motion, the court held that

> We do not doubt that the protections against warrantless intrusion int the home announced in *Payton v. New York*, 445 U.S. 573 (1980) apply with equal force to a properly rented hotel room during the rental period. In the present case, however, Rambo was asked to leave the hotel by the officers, acting at the request of and on behalf of the hotel manager, because of his disorderly behavior. Thus, Rambo was justifiably ejected from the hotel under Minnesota law, *see* § 327.73 subd. 1, and the rental period therefore had terminated. At that time, control over the hotel room reverted to the management. Rambo no longer had a reasonable expectation of privacy in the hotel room, and therefore is now without standing to contest the officers' entry into the hotel room. Rambo cannot assert an expectation of being free from police intrusion upon his solitude and privacy in a place from which he has been justifiably expelled.
>
> 789 F.2d at 1295-96, citations and footnoted omitted.

Cf. Finsel v. Cruppenink, 326 F.3d 903, 907 (7th Cir. 2003)(in *dicta:* although innkeeper cannot consent to police search of a guest's room, if the tenancy is terminated for legitimate reasons, then the constitutional protection may vanish, citing *Rambo*).

As it was with Rambo, so it is with Procknow and VanKrevelen: they both lost any expectation of privacy in Room 315 upon Scheler's pronouncement, following their lawful arrests, that the hotel was ejecting them forthwith. Minnesota law allowed Scheler to do this notwithstanding Vankrevelen's prepayment of an additional night at the hotel. Procknow and VanKrevelen, in contravention of Minn. Stat. 327.73(1)(A)(2), (5) and (6), had violated the criminal law, had violated known hotel rules and Procknow had created a dangerous disturbance when he had attempted to flee from the police. As the court put it in *United States v. Cunag*, 386

F.3d 888, 895 (9th Cir. 2004), "a justifiable affirmative act of repossession by the lessor is the factor that finally obliterates any cognizable expectation of privacy a lessee might have." The Seventh Circuit's discussion in *Finsel*, 326 F.3d 903, does not lead to a contrary conclusion; in *Finsel*, the police responded to an innkeeper's request for assistance convincing a recalcitrant, but law-abiding guest to move his truck by kicking in his room door; the court found that any reasonable officer should have known that instead of breaking down the guest's room door to enter forcibly, he should have just called a tow truck. *Id.* at 908.

Upon the hotel's lawful ejection of Vankrevelen and Procknow (assuming that he needed to be ejected at all), it became irrelevant for Fourth Amendment purposes whether Scheler asked the police to assist with clearing the room and retrieving the dog. Having lost any valid expectation of privacy in Room 315, Procknow now has no basis to object to the police entry into it. This is a stand-alone reason to deny Procknow's motion to suppress evidence.

III. The police could enter the hotel room to retrieve "Spike" and ensure staff safety

If it were to matter, the police had two valid reasons to go into room 315 in the face of any residual expectation of privacy that Procknow might have had in the premises following his arrest. The police could assist the hotel in perfecting its ejectment by assuring that there were no other people in the room, and they could retrieving the dog to save it from neglect. As Eighth Circuit case law makes clear, police are allowed to provide such assistance to innkeepers without running afoul of the Fourth Amendment. This analysis is developed above, but it bears at least brief discussion whether the result would be the same in the face of any reasonable expectation of privacy in Room 315 by Procknow.

This is where the "community caretaking" function of the police, mentioned in *Finsel*, 326 F.3d at 907-08, comes into play. The question is whether this policy would have allowed the police to enter Room 315 as they did for at the request of hotel staff in order to verify that Room 315 did not harbor any more unregistered guests, and in order to remove the dog known to be in the room. As the Supreme Court noted in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 406 (2006), regardless of the subjective intent of the police–which the instant case was pure–the question is whether they had an objectively reasonable basis for believing that their intercession was needed to prevent violence and "restore order." This last phrase sounds widely-encompassing, but the facts of *Brigham City* are more alarming than what confronts this court: the police felt compelled to enter a private home to break up a loud, drunken brawl, fearing that failure to intervene could result in people getting injured.

Closer on the facts–but still not that close–are *United States v. Venters*, 539 F.3d 801 (7th Cir. 2008) and *United States v. Arch*, 7 F.3d 1300 (7th Cir. 1993). In *Venters*, the court found that it was reasonable for the police to enter defendant's house without a warrant because they had probable cause to believe that the defendants criminally neglecting their children by allowing them to live in a cluttered, feces-encrusted environment; further, the children were deemed to be in imminent danger from this filthy environment, the toxic fumes from their father's meth use, and the overall lack of adult supervision. 539 F.3d at 807-08. The court emphasized the narrowness of its decision, undoubtedly to prevent the caretaker exception from swallowing the rule against warrantless entry into a home. *Id.* at 808-09.

In *Arch*, the police arrested the defendant (Arch), in the lobby of the motel where he was staying following his highly erratic and assaultive behavior. The motel's security guard, having

seen a bloody rag on the floor of Arch's room, asked the police to come with him to see if there was an injured person in the room. The officers entered and performed a protective sweep. No one was in the room, but in the bathroom they saw a suitcase full of cocaine. The court found that the concern that an injured person might be present justified entry into Arch's motel room, even though Arch had been arrested in the lobby and no one else had been seen with him. The court found that the concern was sufficiently reasonable on the facts presented to justify entry. 7 F.3d at 1304-05.

So, where does this leave the Eagan police officers? Following Procknow and Vankrevelen's arrests, no one seemed to be sure whether or not there was anyone else in Room 315. Although there was no evidence of a third person in the party, the hotel did not want to take a chance with its employees, not after a man with a murder conviction had just violently resisted arrest in the lobby, leading to taser use, broken teeth and puddles of blood. The hotel *did* know that there was a dog in the room–"Spike"–and the dope on Spike was that he was big and mean. The hotel did not want its employees messing with Spike, for all the commonsensical reasons.

Spike's presence in the room also introduces an administrative thread to the analysis. The Eagan Police Department had issued General Order #16.8, Animal Control Enforcement and Procedures. *See* Gov. Exh. 3, dkt. 27-2. This order stated as its policy that:

> It is the duty and responsibility of this department to provide animal control services to the citizens of Eagan. This includes enforcing animal violations and assisting citizens with animal control issues.

More generally, Minn. Stats. § 343.29 provides:

> **Exposure of animals; duty of officers**
>
> **Subdivision 1. Delivery to shelter.** Any peace officer, [or] animal control officer, may remove, shelter, and care for any animal not properly fed and watered, or provided with suitable food and drink in circumstances that threaten the life of the animal.

Additionally, Minn. Stat. § 343.21 provides:

> **Overworking or mistreating animals; penalty**
>
> **Subdivision 1. Torture.** No person shall . . . neglect any animal, whether it belongs to that person or to another person
>
> **Subdivision 2. Nourishment; shelter.** No person shall deprive any animal over which the person has charge or control of necessary food, water, or shelter.
>
> * * *
>
> **Subdivision Five. Abandonment**. No person shall abandon any animal.
>
> **Subdivision 9. Penalty** (a) Except as otherwise provided in this subdivision, a person who fails to comply with any provision of this section is guilty of a misdemeanor.

In other words, the police had a statutory and departmental duty to retrieve Spike out of Room 315 for his own well-being, in addition to assuring the safety of hotel staff.

Therefore, it was reasonable for the police, under the rubric of public safety, to ensure that there were no additional people lurking in Room 315 so that hotel staff could enter safely to perform their duties as employees of the hotel. Under the same rubric it was reasonable for the police to remove the dog from the room. Further, as community caretakers and in fulfillment of their administrative policy and state statute, the police were justified entering Room 315 to remove, shelter and care for Spike in the absence of his owner(s). EPD Animal

Control Officer Grimm's August 30, 2011 letter to Procknow seems to endorse the patrol officers' decision to take custody of Spike the night before.

Procknow disputes every fact and every legal argument on this point. First, he claims that for all anyone knew at the time, the "PET INSIDE" Room 315 was a "goldfish." This is an odd argument coming from a man who seems to have testified at his civil deposition that he slipped Schuelke twenty bucks on the QT to keep Spike in the room without paying the hotel's daily maintenance charge. In any event, it was clear from the testimony at the evidentiary hearing that the officers were quite certain that there was a dog in Room 315, and they were concerned enough about his size and temperament to equip themselves with a catch pole and a carbine before they would open the door to the room.

Procknow then throws Spike under the wheels of the jurisprudential bus by arguing that no court has ever held that the "community caretaker" function performed by police allows them to enter a private location to "check[ ] animal welfare." Reply Brief, dkt. 32 at 10. Procknow is correct: neither the parties nor this court has found a case in which the community caretaker exception to the warrant requirement was invoked to retrieve an abandoned dog out of a hotel room or a residence. Procknow insists that the police were required to wait for an animal control officer to come back on duty the next morning before anyone attempted to retrieve Spike. This, he hypothesizes, would not have led to the plain view discovery of the documents now being used against him because an animal control officer would not have recognized the incriminating nature of the documents. I'm not sure that this is an accurate assessment of what would have happened, but it's not Procknow's burden to prove the warrantless entry was improper, it's the government's burden to prove that it was proper.

Procknow is correct that an otherwise healthy dog will not starve to death overnight and it won't die of thirst if deprived of water for 17 hours while sitting in a hotel room; perhaps Spike had access to water from the toilet if its lid was raised. On the other hand, it was August, and no one knew when Spike had last been provided food or water, or if he had access to water overnight. Is a risk of death to a domestic house pet the threshold for police entry into a hotel room from which the guests have been removed?[14] But as just noted, Minnesota law requires that animals not suffer from neglect, and EPD policy required the police to help the community deal with animal control issues. Maybe it's a stretch to find that on these facts, the police were justified entering Room 315 to ensure hotel staff safety and to care for the unattended dog, but it doesn't seem like a stretch. Perhaps this one could go either way, but my recommendation is that, if the analysis gets this far, the court find that police entry into Room 315 was justified by a combination of exigent circumstances and the police community caretaker function.[15] Once in the room, the documents Procknow seeks to suppress were in plain view and therefore subject to Det. Maier's use when seeking a search warrant for the room.

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[14] Nobody talks about the issue of damage to the hotel room by soiling, scratching or chewing by a dog left alone overnight. It would seem that any such relatively inexpensive and easily repaired damage to the room would not outweigh the dog owner's expectation of privacy in the hotel room, assuming the dog owner still had such an interest.

[15] Given the lawsuit Procknow already has filed, it is natural ask: if the police *had* left Spike to fend for himself overnight in Room 315, would Procknow have filed a lawsuit against them for intentionally neglecting his pet in violation of Minnesota law? Were the police allowed to consider this possibility when deciding to act? On the evidence presented, these questions must be viewed as rhetorical.

IV. Suppression would not be an appropriate sanction for any constitutional violation or violation of IRS rules

(A) Suppression as a sanction for violation of Procknow's Fourth Amendment Rights

The government's final defense of the actual search of Room 315 is that the officers were operating in good faith. As the court has noted,

> Exclusionary rules, which protect the guilty, are no longer favored. Suppression of evidence has always been our last resort, not our first impulse. The exclusionary rule generates substantial social costs which sometimes include setting the guilty free and the dangerous at large.
>
> *United States v. Williams*, 698 F.3d 374, 382 (7th Cir.2012), citations omitted.

Here's the current rule on exclusion:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the judicial system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.
>
> *Herring v. United States*, 555 U.S. 135, 126 S.Ct. 695, 702 (2009).

At this point, 39 pages into the analysis, given the facts that the court has found–over Procknow's fervid advocacy of a diametric narrative–there is no basis to find that the Eagan police engaged in any deliberate, reckless or grossly negligent conduct toward Procknow. With apologies to Spike, the Eagan police didn't have a dog in this fight; they were just doing a favor for the Wisconsin DOC, trying to pick up an unapologetic absconder. Their entry into Room 315 was at the request of hotel management, which was assiduously exercising its right of ejectment under Minnesota law. The entry served to ensure the safety of hotel staff and assure the well-being of Procknow's now-abandoned dog. Notwithstanding Procknow's strident claims

to the contrary, the Eagan police officers at all times acted professionally and, to their knowledge, lawfully. If for some reason this court were to determine otherwise, then suppression of the evidence would be a disproportionate and unnecessary sanction.

(B) Suppression as a Sanction for violation of IRS internal procedures

Procknow contends that all of the documentary evidence the government obtained through its use of grand jury subpoenas must be suppressed because the civil summonses issued by Agent Kunstman were improper. According to Procknow, because the IRS was investigating Procknow for possible criminal prosecution, 26 U.S.C. 7602 prohibited his use of civil summonses. Acknowledging that Kunstman returned the documents obtained by the summonses, Procknow argues that it stretches credulity to believe that he did not first inspect the documents, which let the pat out of the bag; perforce, the subsequent use of grand jury subpoenas to obtain the same documents was "tainted," so that the documents must be suppressed. Dkt. 23 at 19-20.

Although this entire argument seems to be a non sequitur, the government has responded in vigorous opposition, disputing every aspect of this argument, starting with Procknow's gloss of § 7206, which prohibits the IRS's use of a summons "if a Justice Department referral is in effect." The "bright line" is the actual referral; it is not improper to use a summons during an investigation into criminal activity. *United States v. Powell*, 379 U.S. 48, 57 (1964). Congress's amendment of the statute in 1982 was intended to clarify exactly this point. And a "Justice Department referral" is a term of art, defined in § 7602(d)(2)(A). That said, the *en banc* Seventh Circuit waffled on this issue in *United States v. Michaud*, 907 F.2d 750, 752, n.2 (7th Cir. 1990(en

banc) with a four-judge dissent suggesting that pre-"referral, "the IRS is free to use its summons procedure to investigate potential criminal liability." *Id.* At 757 (Posner, Easterbrook, Ripple and Manion, JJ,, dissenting.

It seems that this is an accurate reading of the statute and it would be a valid basis to deny Procknow's motion, but this court doesn't even have to get that far: the IRS withdrew its summonses and returned the documents. Even the majority opinion in *Michaud* said that the remedy for an improperly issued IRS summons was to not enforce it. 907 F.2d at 752. The IRS obtained no information from the summonses. It switched to grand jury subpoenas, which Procknow cannot challenge in isolation. Procknow's skepticism about how this all devolved is irrelevant and unsupported by any evidence in the record. If Procknow had wanted to prove up any *actual* misuse of information *actually* obtained from the summonses, then he could have subpoenaed Agent Kunstman to the evidentiary hearing. He didn't. It probably would not have resulted in the testimony he would hope for, but the point is, that when all is said and done, there was misconduct of any sort here. Even if there was, suppression would not be the remedy. *See United States v. Caceres*, 440 U.S. 741, 754-44; *United States v. Kontny*, 238 F.3d 815, 818-19 (7th Cir. 2001).

III. The Government's assertion of inevitable discovery is valid, with minor exceptions

Next, the government argues that, even if this court were to find that the police entry into Room 315 was unlawful and that any evidence derived therefrom should be suppressed, the government still would have inevitably discovered all of its evidence against Procknow by virtue of an independent IRS investigation. Assuming that the court gets to this step in the analysis,

we must presume that this is a case where the government learned new information during an illegal search, and based on that information, took investigatory steps that they would not have otherwise take. *See United States v. Marrocco*, 578 F.3d 627, 638 (7th Cir. 2009). However, The inevitable discovery doctrine permits the government to introduce evidence seized in violation of the Fourth Amendment if the government can prove, by a preponderance of the evidence, that the officers ultimately or inevitably would have discovered the challenged evidence by lawful means. To meet this burden, the government must demonstrate both: (1) that it had or would have obtained, an independent, legal justification for conducting the investigation that would have led to the discovery of the evidence and (2) that it would have conducted this investigation absent the challenged conduct. *United States v. Howard* 729 F.3d 655, 663 (7th Cir. 2013). "In other words, the government must show not only that it *could* have obtained a warrant, but also that it *would* have obtained a warrant. What makes a discovery 'inevitable' is not probable cause alone, but probable cause plus a chain of events that would have led to a warrant independent of the search." *United States v. Pelletier*, 700 F.3d 1109, 1116 (7th Cir. 2012) emphasis in original, citations omitted. "The inevitable discovery rule applies where investigating officers undoubtedly would have followed routine, established steps resulting in the issuance of a warrant." *Id.* at 1117.

As set forth in the fact section above, Agent Miller explained in detail what investigative steps the IRS would have taken to investigate the suspected SIRF scheme brought to the government's attention by Dairyland Bank. Agent Miller's methodology involved several different investigative steps, but each was a logical and incremental advance from that which had

preceded it. These three known victims all had "home addresses" at Procknow's Rice Lake P.O. Box; a review of other returns using that P.O. Box as a home address.

As for the Minneapolis P.O. Box, Agent Miller testified that known victim Lance Conway had presented a highly suspect W-2 form from "Zimmer Trucking." Agent Miller's review of Zimmer Trucking's records led him to another "employee named "Alvin Williams" who listed his address in Minneapolis as "40 S. 7TH ST STE-212 APT 205" in Minneapolis. This would have led Agent Miller to *that* Post Office Box, which opened up the rest of the victims who had used this address on their tax returns. Contrary to Procknow's assertion, it was not necessary for the government to find pieces of mail in the boxes to identify who was using them; this was information available to them by running an address search on tax returns.

The outlier is "Robert Hill" (Line 19 on Exh. 10), who had a home address of 905 Lincoln Avenue, 54835. Absent any specific testimony as to how Hill was located, this court has no obligation to parse the exhibits to figure out steps in that sequence. Therefore, the government has failed to establish that it inevitably would have uncovered "Hill;" as a result, Count 14 of t he indictment, in which he is the claimed victim, would have to be dismissed.

Procknow also challenges whether the government would have located Watters, the homeless man who claims that Procknow used him as a straw man to open the P.O. Box in Minneapolis. That's a valid point. Unless the government can show some method by which it would have located Watters at some other time (he was in jail when initially contacted), the court should consider suppressing Watters' testimony at trial. Procknow also mentions Vankrevelen; it is not clear how she fits into all of this; is she now a government witness? It so,

then the government probably should connect the dots as to how it would have recruited her absent the room search.

Other than Hill, however, no speculation is required to see how the investigation would have proceeded from Dairyland Bank to the indictment, *See United States v. Jones*, 713 336, 340 (7th Cir. 2013) (each step in inferential chain must be supported by evidence that allows the fact finder to draw reasonable inferences from basic facts to ultimate facts; although the fact finder may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation.) To borrow from a Title VII case, Agent Miller's outline of the routine steps he would have taken constructed a 'convincing mosaic" that allows this court to infer that the IRS would have uncovered its evidence of this SIRF scheme quite apart from the information obtained from the Eagan Police Department. *See Perez v. Thorntons, Inc.*, ___ F.3d ___, 2013 WL 5420979 (7th Cir., Sept. 30, 2013).

In sum, the government's assertion of inevitable discovery, with the noted exceptions, is well taken. Of course, the court only gets to this point if it otherwise determines that Procknow has presented valid grounds to suppress evidence obtained from Room 315. My recommendation is that the court should deny the motion to suppress on its merits, so that the question of inevitable discovery does not have to answered.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that defendant Jason Procknow's motion to suppress evidence be denied.

Entered this 5th day of November, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Madison, Wisconsin 53703

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

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November 5, 2013

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Re: United States v. Jason Procknow
Case No. 13-cr-53-wmc

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before November 18, 2013, at noon by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by November 18, 2013 at noon, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Susan Vogel for Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed

findings of fact and all proposed conclusions of law to which the party objects and must set forth with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**