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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JASON PROCKNOW,

Defendant.

OPINION & ORDER

13-cr-053-wmc

Defendant Jason Procknow is charged with filing a series of tax returns falsely claiming refunds to which he knew he had no right in violation of 18 U.S.C. § 287; 18 U.S.C. § 641; and 18 U.S.C. § 1028A(a)(1). (*See* Superseding Indictment (dkt. #22).) The indictment is based on evidence obtained by police officers after entering a suite at the Extended Stay America hotel in Eagan, Minnesota without a warrant. The defendant moved to suppress "all evidence in this case," including paperwork found in the hotel room, other evidence obtained by the officers after their warrantless entry into the hotel room, and all subsequent statements Procknow made to law enforcement authorities, as well as all evidence obtained thereafter via use of search warrants, which allegedly contained either material misstatements or omissions of fact. (*See* Def.'s Mot. to Suppress (dkt. #23) 1.) For the reasons set forth below, the court will deny defendant's motion.

OBJECTIONS

On September 18, 2013, Magistrate Judge Stephen Crocker held an evidentiary hearing on the motion to suppress. In a report and recommendation issued on November 5, 2013, Judge Crocker provided (1) a detailed summary of the facts he found were sufficiently

established and (2) a recommendation that the court deny the motion in its entirety. (*See* Report & Recommendation (dkt. #67).) Judge Crocker found that:

- Procknow had no reasonable expectation of privacy in the hotel room;
- if he did have such a reasonable expectation of privacy, it was extinguished when hotel management "ejected" him from the hotel;[1]
- the police had valid reason to enter the hotel room without a warrant;
- suppression would be an inappropriate sanction even if a Fourth Amendment violation *did* occur; and
- the evidence Procknow seeks to suppress would have been inevitably discovered, with the exception of evidence related to Robert Hill, an acquaintance and a non-inmate victim of stolen identity return fraud.[2]

The government objects to two items in Judge Crocker's report. The first notes typographical errors, which alter the meaning of particular sentences. The second is more substantive, challenging Judge Crocker's conclusion that should the court find a Fourth Amendment violation, it should consider suppressing evidence related to Robert Hill and the testimony of Paul Watters and Jennifer Van Krevelen. (*See* Pl.'s Objections (dkt. #88).)

In contrast, the defendant objects to a number of factual matters and nearly every legal conclusion in Judge Crocker's report. (*See* Def.'s Objections (dkt. #87).) His objections to various factual findings include that Procknow had been ejected from the hotel room, which in turn is tied to what defendant refers to as Judge Crocker's "nearly wholesale

[1] As Judge Crocker noted, the terms "evicted" and "ejected" have specific application under Minnesota law; apparently, the former is used for renters and the latter for hotel guests.
[2] Judge Crocker also found that the IRS did not misuse its summons power and, even if it did, suppression was not an appropriate sanction, which is addressed in this opinion as well. (*See id.*)

rejection" of testimony from hotel clerk Christopher Schuelke and his reliance on the testimony of hotel manager Adam Scheler and the police officers.[3] Additionally, the defendant objects to the following legal conclusions: (1) that he lacked a reasonable expectation of privacy in the hotel room; (2) that the community caretaker exception to the Fourth Amendment applied; (3) that the inevitable discovery doctrine applied; (4) that the IRS did not improperly use its summons power; and (5) that suppression was not an appropriate remedy.

Pursuant to 28 U.S.C. § 636(b)(1), the court makes a de novo determination of those findings or recommendations to which objection is made. Because the resolution of a motion to suppress is a fact-specific inquiry, however, the court gives deference as appropriate to factual findings and credibility determinations made by Judge Crocker, who had the opportunity to listen to testimony and observe the witnesses at the suppression hearing. *United States v. Hendrix*, 509 F.3d 362, 373 (7th Cir. 2007).

SUMMARY OF FACTS[4]

In April 2011, Dairyland State Bank alerted the FBI and Wisconsin authorities to suspicious activity in accounts held by Jason Procknow. At least five tax refunds (in the

[3] *Some* of the factual findings Judge Crocker made do in fact appear to be erroneous, though also largely immaterial. For example, Judge Crocker relied on a pretrial service report in finding that Procknow had been convicted of first degree murder, while, as Procknow points out, the conviction was for *attempted* first degree murder. (*See* Def.'s Objections Exh. 1 (dkt. #87-1) 1.) While this error is duly noted, it does not affect the court's decision on the motion to suppress.

[4] Judge Crocker's Report and Recommendation contains detailed findings of fact, which the court adopts in large part, but will not repeat. The following provides a brief summary of the facts relevant to the defendant's motion to suppress and challenge to Judge Crocker's recommended denial of that motion.

names of three individuals unrelated to Procknow) had been deposited into Procknow's account.

In April or May, 2011, Procknow, who was then subject to state criminal supervision, absconded, and the Wisconsin Department of Corrections issued a warrant for his arrest. Procknow and his girlfriend at the time, Jen Van Krevelen, booked a hotel reservation via Priceline.com at Extended Stay America in Eagan, Minnesota on August 26, 2011. The reservation was for two guests and extended from Friday, August 26, 2011, until Sunday, August 28, 2011.

The registration card filled out at the Extended Stay America Hotel ("ESAH") stated that the arrival date was 8/28/2011, with a departure date of 8/31/2011, flanked by the handwritten initials "JVK." The assigned room number was 315 and the listed guest name read "Jen Van Krevelen." While the card listed "2" adult guests, only Van Krevelen signed the card; the line for "signature of secondary guest" remained blank. As part of a plan to evade law enforcement, who they knew would be looking for Procknow, Van Krevelen and he consciously chose neither to register Procknow as her guest, nor to register Procknow's BMW as being in the hotel parking lot. The card also contained several paragraphs stating, among other things, that (1) ESAH charged a non-refundable pet fee; (2) failure to adhere to any ESAH policies would result in immediate termination of the stay; and (3) failure to register all occupants and pets could result in immediate termination of the stay. Based on testimony of hotel personnel, Judge Crocker found that these policies were generally enforced strictly.[5]

[5] The fact that Van Krevelen reserved her room for two guests and acknowledged having two adult guests on the registration card would seem to undermine the motion of strict

ESAH also publishes a brochure titled "Guest Information," which they leave on the bed of every room. The brochure reiterates the requirement that pets must be registered and that guests must pay the pet fee; it also states that "[g]uests 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." In the past, guests had abandoned pets at the hotel or left them unattended. Hotel policy does not allow for hotel employees to handle guest pets; rather, the hotel ordinarily calls a general dispatch number to remove pets from hotel rooms.

On or about August 29, 2011, Wisconsin Probation Officer Lysaker developed a lead that Procknow had fled to Eagan. She then called the Eagan police, and a squad of officers was dispatched to ESAH to investigate. The officers asked the desk clerk, Christopher Schuelke, if Procknow was staying there. Schuelke could not locate him because he was not registered, but after prompting did note that Van Krevelen was registered in room 315. The officers went to that room, saw a magnet that read "PET INSIDE" and knocked. No one answered.

While the officers were exiting the hotel to depart, they spotted Procknow's BMW pulling into the parking lot. Officer Matthew Ondrey approached the hotel again, saw Procknow standing in the vestibule and asked him to come outside. Procknow then fled. Officer Ondrey chased him, yelling for him to stop. Eventually Officer Ondrey caught up to Procknow and, when he resisted, tased him. After Procknow fell into a door, the officers

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enforcement of the third requirement, except that Judge Crocker was in the best position to assess the hotel employees' credibility on this subject. The hotel may have allowed even overnight "guests" as long as they did not share control of or responsibility to pay for the room with the "occupant(s)."

handcuffed and arrested him, obtaining (among other things) a credit card in the name of "Trevor Coon." Because Procknow was bleeding and had broken some teeth, the officers also called paramedics. At that time, Van Krevelen was also arrested for harboring a fugitive.

After escorting Procknow to the hospital, Officer Ondrey advised him of his *Miranda* rights and obtained a statement from him to the effect that (1) he had violated parole and (2) the credit card belonged to a "friend," who had given him permission to establish a line of credit.

Officer Collins, who remained behind with Officer Brian Rezny and Sergeant Rich Evans, peered into the BMW to ensure no one else was in it, noticed a scanner or copier that seemed unimportant at the time, and then approached Schuelke again, advising him that the police had arrested both occupants of Room 315 and asking him what the hotel wanted done. In turn, Schuelke called the hotel manager at the time, Adam Scheler, who told him that neither guest was welcome at the hotel anymore and that the hotel was terminating their stay. In a subsequent call, Schuelke also asked Scheler what to do about the dog in the room. Scheler instructed Schuelke to ask the police for assistance in removing it as well. Accordingly, Schuelke told Officer Collins, as well as Sergeant Evans, that the hotel wanted the police to ensure there were no other people in the room and to collect the dog.

Armed with a carbine rifle and an animal catch pole, Officers Rezny, Collins and Rundquist then re-approached Room 315, knocked and announced their presence. When no one answered, they used a key card taken from Van Krevelen to enter the room. In plain sight upon entering were an electric typewriter, paperwork bearing other people's names

(including application forms from inmates for a group called PLEA and various W-2 forms), and at least one credit card in someone else's name. Suspecting some kind of fraud scheme, Officer Rezney photographed the scene and many of the documents. Taking only the dog, the officers then sealed the room and left.

On August 30, 2011, Detective Paul Maier applied for and obtained a search warrant for Room 315 and Procknow's BMW, describing the property to be seized as items not in Procknow or Van Krevelen's names, including driver's licenses, credit cards, financial documents, ID cards and other documentation typically employed in identity theft. In the fall of 2011, Maier met with IRS-CID Special Agent Steven Kunstman and turned over all the documents and evidence seized from Room 315 pursuant to the search warrant. In the spring of 2012, Kunstman sent IRS civil summonses to various parties seeking information about Procknow. On June 12, 2012, a few days after a grand jury subpoenaed the Dairyland State Bank, Kunstman withdrew the IRS civil summons and returned the package of documents. He did the same thing with the other civil summonses. On June 15, 2012, the U.S. Attorney's Office requested assignment of an IRS Special Agent to handle the Procknow investigation and start a grand jury investigation. On July 23, 2012, the IRS agreed.

OPINION

I. WARRENTLESS ENTRY INTO ROOM 315

A. Expectations of Privacy as an Unregistered Hotel Guest

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *United*

States v. Jackson, 598 F.3d 390, 346 (7th Cir. 2011) (quoting U.S. Const. amend. IV). "No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled" to the protections of the Fourth Amendment, *Stoner v. California*, 376 U.S. 483, 490 (1964), but these rights cannot be asserted vicariously. *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978); *United States v. Mendoza*, 438 F.3d 792, 795 (7th Cir. 2006). Thus, "a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas*, 439 U.S. at 134.

To have standing to challenge a search, a defendant must, therefore, show that he had a reasonable expectation of privacy in the searched premises. *Mendoza,* 438 F.3d at 795. A reasonable expectation of privacy exists when: "(1) the defendant exhibits an actual or subjective expectation of privacy, and (2) the expectation is one that society is prepared to recognize as reasonable." *United States v. Amaral-Estrada*, 509 F.3d 820, 827 (7th Cir. 2007). On the facts here, Procknow can claim no *reasonable* expectation of privacy in the hotel room.

Procknow objects to Judge Crocker's finding that he lacked standing to assert a Fourth Amendment violation as an unregistered guest in ESAH Room 315. Most fundamentally, at issue is (1) whether Procknow exhibited an actual or subjective expectation of privacy in the hotel room, and (2) whether society "is prepared to recognize [this expectation] as reasonable." The government argued, and Judge Crocker found, that "Procknow was not a legitimate guest … because he intentionally avoided making known his presence, or his car's presence" at the hotel. (Report & Recommendation (dkt. #67)

27.) At least technically, the failure to register Procknow contravenes Minnesota law, which requires that hotels register the name and home address not only of every guest, but also "every person, if any, with the guest as a member of the party," as well as register the make, registration number and license plate number of their vehicle. Minn. Stat. § 327.10. Section 327.11 also requires that "[e]very person" furnish to the hotel operator or attendant "the registration information necessary to complete the registration in accordance with the requirements of section 327.10." Finally, section 327.13 states that "[e]very person who shall violate any of the provisions of sections 327.10 to 327.12 shall be guilty of a misdemeanor." Judge Crocker also found that because *Procknow* "never checked into" Room 315, a decision that was part of a "calculated" plan "to hide his location from law enforcement," he had "no legal right to complain about the police entry." (Report & Recommendation (dkt. #67) 30.)

In response, Procknow argues that his failure to register as a guest should not be dispositive. Specifically, Procknow argues that even though he himself was not registered, he was the overnight guest of Van Krevelen, who *was* registered. In support, Procknow cites (1) *Minnesota v. Olson*, 495 U.S. 91, 98 (1990), in which the United States Supreme Court held that an overnight guest has a legitimate expectation of privacy in his host's home, and (2) *State of Minnesota v. Sletten*, 664 N.W.2d 870 (Minn. App. 2003), which he contends held that an unregistered hotel guest is entitled to Fourth Amendment protections as a social or overnight guest of the registered occupant.

Although not controlling, *Sletten* is somewhat equivocal on the question of whether an unregistered guest at a hotel enjoys Fourth Amendment protection; indeed, the court held that Sletten did *not* have such protection and "underscore[d] the fact that while

[defendant] may have legitimately been on the premises, as previously mentioned, he was not a registered guest in the hotel room." *Sletten*, 664 N.W.2d at 877. Still, the *Sletten* court did note that overnight guests, or those with long-standing ties to the premises in question, are entitled to Fourth Amendment protection in a way that "a guest who is merely permitted on the premises" is not. *Id.* at 876. Ultimately, *Sletten* neither categorically extends nor categorically denies Fourth Amendment protections to unregistered hotel guests, nor does it analyze the effect of the Minnesota statutes criminalizing that behavior. In fact, contrary to Procknow's assertion that *Sletten* "dealt with" those statutes, they are not mentioned in the case at all.

Still, this court is not convinced that Procknow's failure to register should be determinative, at least by itself. There does not seem to be any doubt that he was a repeat overnight guest of Van Krevelen, with whom he had the "cognizable relationship" lacking in *Sletten. See id.* at 877. As the United States Supreme Court observed in *Olson,* "society recognizes that a[n overnight] houseguest has a legitimate expectation of privacy in his host's home." *Olson*, 495 U.S. at 98. It would seem no great stretch to find an overnight guest would have a similar legitimate expectation of privacy in the hotel room of his or her host.

Of course, as Judge Crocker found, the entirety of the situation here establishes rather definitively that Procknow was no ordinary "overnight guest." Indeed, Van Krevelen's and Procknow's decision not to register him or his car was part of a scheme to evade law enforcement officers, who he knew were looking for him pursuant to a warrant issued after he absconded from state supervision, along with a man looking to repossess his car. While relying principally upon Procknow's violation of Minnesota law in failing to

register, Judge Crocker also appears to have relied on Procknow's strategic decision *not* to register (as opposed to an innocent or inadvertent failure to do so), particularly for the purposes of avoiding detection by law enforcement, to find (1) Procknow had no actual or subjective expectation of privacy and (2) society would not recognize Procknow's expectation of privacy under these circumstances in any event.

This court wholeheartedly adopts the Magistrate Judge's findings in both respects. The first of these two factors may be considered factual in nature, and subject to at least some deference to the extent it was based on credibility determinations, although Procknow never took the stand and many of the findings as to Procknow's expectations seem to depend on the application of legal doctrine, rather than fact. (Report & Recommendation (dkt. #67) 26-28 (rejecting Procknow's claim to a reasonable expectation of privacy based on his never having "legitimately" checked into the hotel room).) Although premised on similar factual findings, the second factor -- whether society is prepared to recognize Procknow's claimed expectation as reasonable -- is subject to even less deference as essentially a legal, finding. Society is no more likely than most courts to find reasonable a fugitive parolee's claimed expectation of privacy while hiding out in his girlfriend's hotel room. As the Seventh Circuit recently observed, the "Supreme Court has recognized that a search of a probationer's home, for example, is permissible when the search is designed to ensure compliance with the conditions placed on his freedom, or else is supported by reasonable suspicion of criminal activities." *United States v. Huart*, No. 13-2075, slip. op. at 5 (7th Cir. November 22, 2013). While the Seventh Circuit went on to acknowledge that the Supreme Court has not endorsed general, suspiciousless searches of probationers, *id.*, here, Procknow absconded from supervision, reportedly engaged in new criminal activity

and hid out in a hotel room -- a far cry from a "suspicionless search." In short, whatever an average person's subjective expectations of privacy as an unregistered guest in another's hotel room, Procknow as a fleeing felon should have had little or none; nor does society recognize as reasonable such an expectation.

B. Ejection From Hotel Room

Even if the court presumes that Procknow had a reasonable expectation of privacy as an unregistered guest in Room 315 at some point, the evidence also shows that he lost any right to such an expectation following his arrest and ejection from the room. The parties agree, and case law indicates, that a party's privacy interest in a hotel room expires when the rental period ends. *See, e.g.*, *United States v. Kitchens*, 114 F.3d 29, 31-32 (4th Cir. 1997) (collecting cases); *United States v. Rambo*, 789 F.2d 1289, 1295-96 (8th Cir. 1986) (where defendant was "justifiably ejected from the hotel under Minnesota law," he "no longer had a reasonable expectation of privacy in the hotel room"). On this point, the parties' disagreement is not legal but factual: Procknow maintains that he had not yet been ejected from Room 315 when the police entered it, while the government contends, and Judge Crocker found, that he had.

At the suppression hearing, the government presented the testimony of four police officers who were present at the ESAH on that day, as well as the testimony of Adam Scheler, the hotel manager at the time. The officers testified that Schuelke, who was the only employee working at the time, asked them for assistance in removing the dog from the room. Scheler testified that he spoke to Schuelke on the phone that night and told him that Procknow and Van Krevelen "would no longer be welcome at the hotel," that the hotel

"would be terminating their stay," and that he should advise the police of the same. Upon learning there was also a dog in the room, he "instructed [Schuelke] to request the police's assistance" in removing it. (Tr. of Mot. Hr'g (dkt. #29) 96-97.) In rebuttal, Procknow presented the testimony of Schuelke himself, who denied that Scheler told him to eject Procknow and Van Krevelen, denied speaking to Scheler about a dog and denied asking the police for help removing a dog. (*Id.* at 161-62.)

In considering these two, conflicting versions of the same conversation, Judge Crocker found that Schuelke's testimony was neither "credible nor thorough." (Report & Recommendation (dkt. #67) 25.) He found that "[o]n virtually every material issue, Schuelke's version of events was the outlier." (*Id.*) He recognized that the "police officer witnesses did not remember everything and they got some things wrong," but found that those errors in detail were not "critical, either to the narrative or to the officers' joint or several credibility." (*Id.*) Ultimately, after viewing the evidence and weighing the testimony, Judge Crocker "ha[d] no doubt that Schuelke conveyed to the police Scheler's request that the police assist in ejecting Van Krevelen (and Procknow) from Room 315 and that they remove the dog from the room." (*Id.*)

Procknow objects that Judge Crocker erred in rejecting Schuelke's testimony, but his arguments do not convince this court. He argues that "because the government carries the burden of proof, resolution of the inconsistencies in testimony must be resolved in favor of the defendant" (Def.'s Objections (dkt. #87) 3), but he cites no authority for this odd proposition, and the court is unaware of any. Procknow also argues that Scheler is the "*only* hotel employee to claim he ejected Mr. Procknow from the hotel," making *his* testimony the "outlier." (*Id.* at 4.) But the police officers' testimony generally corroborates Scheler's,

while none of Procknow's citations to the deposition of Mark Klawitter, the district manager of Homestead Village Management and Scheler's boss at the time, establishes that Judge Crocker's findings were erroneous.[6] Klawitter testified that no one "*evicted*" Van Krevelen or Procknow, but clarified that eviction requires a tenancy of thirty consecutive days. (Klawitter Dep. (dkt. #28-1) 28.) He acknowledged, however, that he did not know whether Van Krevelen or Procknow were "*ejected*," but stated that the disturbances they caused and the fact that Procknow was unregistered would be enough to justify such an ejection. (*Id.* at 28-30.) This is not inconsistent with Scheler's testimony, nor does it do much, if anything, to corroborate Schuelke's.

Procknow also lists a number of alleged "inconsistencies" that he argues necessitate rejecting Scheler's testimony. The court finds these arguments -- many of which rely on out-of-context mischaracterizations of the record -- unconvincing at best. For instance, Procknow argues that Scheler's testimony is not credible because, if he strictly enforced the policy of ejecting unregistered guests, "he would have been actively on the lookout for registration miscreants." (Def.'s Objections (dkt. #87) 5.) Without any reason to suspect Procknow was unregistered, the court agrees with Judge Crocker's opinion that there would be no reason for Scheler to ask Procknow who he was or in what room he was staying, nor to check hotel records to see if he was truly a registered guest. Likewise, Procknow's contention that Klawitter "did not know about" the ejection policy Scheler delineated is a mischaracterization of Klawitter's deposition testimony, in which he simply acknowledges being unaware of any "*written procedures* for the ejection of guests," but also testified that

[6] "At a suppression hearing the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial." *United States v. Raddatz*, 447 U.S. 667, 679 (1980).

"[c]ausing disturbances, significant police activity" and "not registering all guests" would be enough to ask someone to leave the premises. (Klawitter Dep. (dkt. #28-1) 30 (emphasis added).)

Procknow also argues that the police officers' testimony was "inconsistent" with the officers' written reports made at or around the same time as the event itself, but those alleged inconsistencies have little bearing on the central issue of whether an ejection occurred. Indeed, the incident reports themselves corroborate the officers' testimony at the evidentiary hearing that hotel staff had requested police assistance in clearing the room pursuant to an ejection. (*See* Incident Report (dkt. #23-1) 7 (report of Officer Rundquist, noting that "[h]otel management wanted the occupants of the room evicted"); *id.* at 15 (report of Sergeant Evans, noting that "hotel staff said they wanted the room to be evicted").) At most, the noted inconsistencies (to the extent Procknow points to things that *are* inconsistent) would have some small bearing on the officers' credibility, but the court sees nothing in the record suggesting that Judge Crocker's decision to credit Scheler and the police officers' testimony, to the exclusion of Schuelke's, was incorrect, and his determination that "[t]he heart of [the officers'] current testimony is corroborated by the incident report they prepared at the time, when events still were fresh in their minds."[7]

[7] The court briefly reviews the other "inconsistencies" to which Procknow points here. First, he argues that if the police had simply wanted to arrest Procknow, they would not have thereafter approached Schuelke to see what he wanted done. This argument does not present any "inconsistency," nor does it strike the court as suspicious that police would check in with hotel personnel after arresting a hotel guest in the hotel lobby. Second, he cites to Officer Rundquist's report, which says three "other" officers checked the room, but argues Judge Crocker erroneously found that Collins, Ondrey and Rundquist himself checked the room. In context, the report makes clear that "other" refers to officers "other" than those stationed outside, not "other" than Rundquist himself. Third, Procknow argues that none of the police reports suggest that any of the officers heard a noise in Room 315.

Based on these facts, the court finds that even if Procknow had a reasonable expectation of privacy in the hotel room despite being an unregistered guest, that expectation was extinguished when the hotel staff determined that Procknow and Van Krevelen were no longer welcome and terminated their stay. Procknow's citation to *Stoner*, 376 U.S. at 486-91 & n.4, does not undermine this conclusion. *Stoner* held that a hotel proprietor may not consent to the search of a guest's hotel room *prior* to any ejection, while here the hotel *had* terminated Procknow's stay, such that he no longer had any Fourth Amendment interest in the room at all. Moreover, the hotel had the right to eject Procknow and Van Krevelen pursuant to Minnesota Statute section 327.73, which allows for the removal of any guest who "causes or threatens to cause a disturbance," "violates any federal, state, or local laws, ordinances, or rules relating to the hotel," or "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." Minn. Stat. § 327.73(A)(2), (5), (6). As in *Rambo*, that ejection ended any Fourth Amendment privacy interest Procknow even arguably had in Room 315.[8] *Cf. Rambo*, 789 F.2d at 1296 ("Rambo cannot assert an

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While true, this is not *inconsistent* with their testimony at the hearing in a way that suggests it was embellished or untruthful. And finally, Procknow argues that "the police completely misidentified the individual from whom they received the ejection request." It is true that Officer Collins incorrectly recalled Schuelke's race. Judge Crocker considered this factor but nevertheless found that "the officers did not fabricate or embellish their testimony." (Report & Recommendation (dkt. #67) 25.) Overall, this court sees nothing in any of Procknow's arguments that undermines that overall credibility determination.

[8] This also resolves Procknow's objections as to the propriety of the search warrants themselves, since that objection presumed that Schuelke did *not* request police assistance with ejecting Procknow. (*See* Mot. to Suppress (dkt. #23) 16-18.) Since the court adopts Judge Crocker's finding that Procknow and Van Krevelen *were* ejected and that Schuelke *did* ask police to help in clearing the room, these arguments fail. Procknow also raised a number of other objections to the Report and Recommendation. Because this court has found that both Van Krevelen and Procknow were properly ejected from the room and thus

expectation of being free from police intrusion upon his solitude and privacy in a place from which he has been justifiably expelled.").

II. IRS CIVIL SUMMONSES

Procknow also argues in his motion to suppress that all evidence obtained through grand jury subpoenas must be suppressed as "tainted" due to the IRS's improper use of civil summonses in a criminal investigation. Judge Crocker found, on the other hand, that 26 U.S.C. § 7602(b) suggests that the IRS is free to use civil summonses to investigate potential criminal liability before referring a matter to the Justice Department, but that the court did not need to reach that question because the IRS withdrew its summonses, returned the documents and switched to grand jury subpoenas to acquire its information.

In *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978), the Supreme Court held that the IRS may not use its civil summons power after referring a matter to the Justice Department for criminal prosection, nor may it delay in such a referral when there is an institutional commitment to make the referral and the IRS is merely gathering additional evidence for the prosecution. *Id.* at 316-17. A statutory provision added to § 7602 in 1982, however, notes that "[t]he purposes for which [the IRS may issue and execute a tax-investigation summons] include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws." 26 U.S.C. § 7602(b). Subsequently, the Seventh Circuit considered this question in *United States v. Michaud*, 907

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had no Fourth Amendment expectation of privacy at the time the police entered, it need not reach the issue of the community caretaker or exigent circumstances exceptions to the Fourth Amendment, nor need it reach the question of inevitable discovery, thought *at least* the latter would appear to have substantial merit.

F.2d 750 (7th Cir. 1990) (en banc), recognizing that "[t]here is some debate as to whether this 'solely criminal purpose' ground discussed in *LaSalle* survived the 1982 amendments to § 7602, and specifically the addition of § 7602(b) as quoted above." *Id.* at 752 n.2. Because the Seventh Circuit found the district court's order ambiguous on this issue, requiring additional findings, it declined to resolve that debate in *Michaud*. *Id.*

The court agrees with Judge Crocker that it need not attempt to resolve the question left open in *Michaud* as to whether the holding of *LaSalle* has continuing vitality in the face of § 7602 as amended. Even were this court to presume both that *LaSalle* remains in effect post-amendment and that the IRS *had* entirely abandoned its civil purpose in issuing the summonses in question, suppression would be unwarranted because the summonses were returned and replaced by grand jury subpoenas. As a result, Procknow did not (and cannot) prove any actual misuse of information obtained from these summonses. (Report & Recommendation (dkt. #67) 41.) Indeed, the record indicates that the summonses were withdrawn and information obtained from them, if any, destroyed. (*See* Pl.'s Resp. Exh. 3 (dkt. #31-3).)

Procknow nevertheless argues that "[i]t stretches credulity to believe that the documents had not already been inspected," and because "the cat [was] already out of the bag," any evidence subsequently obtained in response to a grand jury subpoena "is tainted by [this] earlier abuse." (Def.'s Mot. to Suppress (dkt. #23) 20.) In support, defendant cites to *United States v. Utecht*, 238 F.3d 882 (7th Cir. 2001), which states, "if the IRS uses civil subpoenas without establishing the probable cause necessary for criminal cases after having made an institutional commitment to recommend prosecution of the defendant, evidence obtained through these subpoenas possibly could be suppressed at a criminal trial."

Id. at 887. While the court agrees that *Utecht* contemplates the *possibility* of suppression, Procknow has failed to show that in light of the withdrawal of the summonses and the return or destruction of the evidence obtained from them, his constitutional rights have been violated, much less that suppression of evidence would be the appropriate remedy.[9]

ORDER

IT IS ORDERED that the court MODIFIES IN PART and ADOPTS IN PART the Report and Recommendation (dkt. #67), as set forth in the above opinion, and that defendant's motion to suppress evidence and/or dismiss the indictment (dkt. #23) is, therefore, DENIED.

Entered this 20th day of December, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge

[9] Even Procknow acknowledges that, absent some implication of constitutional rights, "the federal exclusionary rule, which forbids the use of evidence obtained in violation of the Fourth or Fifth Amendment rights, does not extend to violations of statutes and regulations." (Def.'s Objections (dkt. #87) 32 (quoting *United States v. Kontny*, 238 F.[3]d 815, 818 (7th Cir. 2001)).)