IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	ID No. 1511011944
	)	
JA-SHAWN J. PALMER,	)	
	)	
Defendant.	)	
	)	
	)	

Submitted: April 15, 2016
Decided: May 16, 2016

Upon Defendant Ja-Shawn J. Palmer's Motions to Suppress Evidence
DENIED

Julie Finocchiaro, Esquire, Deputy Attorney General, and Amanda DiLiberto, Department of Justice, Wilmington, Delaware, *Attorneys for the State of Delaware.*

Natalie S. Woloshin, Esquire, Woloshin, Lynch & Natalie, P.A. Wilmington, Delaware, *Attorney for Defendant.*

DAVIS, J.

This is a criminal action. On December 21, 2015, the State of Delaware obtained an indictment against Defendant Ja-Shawn J. Palmer charging him with two counts of Possession of a Firearm By a Person Prohibited.

Mr. Palmer filed two motions to suppress on March 3, 2016—Mr. Palmer captioned both motions as "Motion to Suppress" (collectively, the "Motions"). On April 5, 2016, the State of Delaware opposed the Motions and filed its Response to Motion to Suppress (Protective Sweep) and its Response to Motion to Suppress (Cell Phones) (collectively, the "Responses"). The Court held a hearing (the "Hearing") on the Motions and the Responses on April 8, 2016. During the Hearing, the Court heard testimony from Detective Peter Stewart of the New Castle County Police Department and Mr. Palmer's girlfriend, Duanna Johnson. The parties then

presented their legal arguments. During the legal arguments, the Court raised certain issues that had not been addressed in the Motions or the Responses. The Court then ordered supplemental briefing and concluded the Hearing. Mr. Palmer submitted his supplemental briefing by a letter, dated April 15, 2016, from Natalie Woloshin, Esq. to the Honorable Eric M. Davis (the "April 15 Letter"). The State provided its supplemental briefing by way of the State's Supplemental Briefing on the Issue of Whether a Cell Phone Qualified as a Filing Cabinet and the State's Supplemental Briefing on the Issue of Whether to Dress Defendant Justified the Protective Sweep (collectively, the "State's Supplemental Briefs") filed by the State on April 15, 2016. The Court then took the matter under advisement.

Upon consideration of the papers submitted by the parties, the evidence presented at the Hearing and the record of this criminal action, the Motions are **DENIED** for the reasons set forth below.

FACTUAL BACKGROUND[1]

On or about November 18, 2015, the Federal Bureau of Investigation's Violent Crimes Task Force, the New Castle County Police Department, and Pennsylvania law enforcement (collectively, the "Police") obtained arrest warrants and were seeking eight members of a heroin trafficking ring. Two of the eight members—including Mr. Palmer—were Delaware residents. The Police believed Mr. Palmer was the "gun guy" of the ring. The Police sought to execute arrest warrants on all eight members at about the same time. The Commonwealth of Pennsylvania warrant for Mr. Palmer was for Possession with Intent to Deliver Heroin.[2] It was based on telephone intercepts showing narcotics trafficking.[3]

[1] Unless otherwise noted, the facts are derived from the testimony of Detective Peter Stewart at the Hearing and from the Motions and the Responses.
[2] Response to Motion to Suppress (Cell Phones), Exhibit B.
[3] *Id.*

The first attempt to execute an arrest took place in Pennsylvania. The Police were unsuccessful in apprehending the target of the arrest warrant and ended up in a high-speed pursuit. During the high-speed pursuit, the Police lost the suspect. The second arrest successfully took place in Delaware. Five other arrests were taking place in Pennsylvania when the Police went to Mr. Palmer's home.

Mr. Palmer lives with Ms. Johnson at Apartment 8-I, 550 S. DuPont Highway, New Castle, Delaware (the "Apartment"). The Police arrived at the Apartment around ten o'clock in the morning on November 19, 2015. After arriving and getting into position, the Police knocked at the door, waited, and then saw someone appear at the peephole in the door. The Police announced themselves three times. Ms. Johnson finally answered the door. Ms. Johnson called into the Apartment "Ja-Shawn." The Police ordered Ms. Johnson to step out of the home. The Police called into the Apartment, commanding that Mr. Palmer come out with his hands up.

Mr. Palmer emerged from the master bedroom in the back of the Apartment. Mr. Palmer was only wearing boxers and an undershirt. The Police took Mr. Palmer into custody while he was standing in the doorway. During the Hearing, Detective Stewart testified that if Mr. Palmer had been fully dressed, the officers would have left without conducting a protective sweep. Detective Stewart stated that it was the policy of the New Castle County Police Department not to take an arrestee to a detention facility while the arrestee is just wearing underwear. Detective Stewart testified that the police also do not want to detain an arrestee in just the person's underwear out of common decency. Detective Stewart said that another reason for getting the arrestee dressed before taking him or her to a detention facility is to minimize the risk of injury to the arrestee and possible liability to New Castle County for any personal injuries. Finally,

Detective Stewart noted that Mr. Palmer's arrest took place in November—one of the later Fall months.

After securing Mr. Palmer, the Police moved into the Apartment to get clothing for him—shoes, socks, and street clothes. The Police entered the Apartment with their weapons drawn and conducted a protective sweep. Detective Stewart testified that the Police did a protective sweep of the Apartment due to the facts and circumstances surrounding the various arrests. First, the Police were conducting multiple arrests and Detective Stewart did not know the status of all of those arrests. Second, Detective Stewart did know that one suspect had escaped during an attempted arrest and was still at large. Third, the Police were dealing with persons that were known to be involved in dangerous activities—drug dealing and firearm possession. Fourth, Mr. Palmer's arrest involved some delay in a response to the initial knocking on the door and in Mr. Palmer's appearance from the back of the Apartment. As such, Detective Stewart stated that the protective sweep done in connection with obtaining the shoes and clothing was done for officer safety by ensuring that no one with a firearm was still in the Apartment.

While engaging in the protective sweep of the Apartment, certain of the Police went to the master bedroom. There, the Police looked around the room and under the bed. The Police saw a black semi-automatic handgun on the floor under the right side of the bed next to several pairs of men's shoes. At the Hearing, Detective Stewart stated that the bed was on a platform approximately 6-8 inches off the ground. As part of Mr. Palmer's presentation, Ms. Johnson testified that the bed was not even 3 inches from the floor and that a person could not fit under there. Defense counsel provided the Court with photos of the bed that showed the open space between the floor and the bed. After reviewing the photos, the Court notes that the exact space

cannot be determined, but the open space between the floor and the ground is not 3 inches and is more likely 6-8 inches.

The Police knew that Mr. Palmer was a person prohibited from possessing a firearm due to a May 1, 2013 felony conviction for Possession with the Intent to Deliver a Narcotic.

The Police also saw a large amount of United States currency in small denominations and Mr. Palmer's Park Players' Card on top of the dresser in the master bedroom.

The Police got a search warrant for the Apartment on November 19, 2015 (the "First Warrant"). The First Warrant described the items to be searched for and seized: "black semiautomatic handgun, any other firearm, ammunition associated with the firearm, documentation/receipts related to the purchase, possession, sale, or transfer of firearms and/or ammunition."[4] The First Warrant listed the relevant violation as Possession of a Firearm by a Person Prohibited.

In the affidavit establishing probable cause for the First Warrant, Detective Stewart attested that the Police entered the Apartment to conduct a protective sweep because they thought that Mr. Palmer was trying to conceal something or someone inside the Apartment.[5] Detective Stewart did not state that the Police conducted a protective sweep of the Apartment so that they could enter to get clothes and shoes for Mr. Palmer.

In the master bedroom, the Police seized the firearm under the bed, which was a Ruger model #325-09737 loaded with six rounds of ammunition. On the dresser in the master bedroom, the Police recovered $2,700 in $10, $20, and $50 bills. Under the dresser, the Police found a lock box with $6,000 in sixty $100 bills. On the nightstand on the right side of the bed,

[4] Response to Motion to Suppress (Cell Phones), Exhibit A.
[5] *Id.*

the Police found an Apple iPhone with Mr. Palmer's Pennsylvania Driver's License and medical card inside of the phone case attached to the iPhone.

In a closet next to the kitchen, the Police found a box of 9mm ammunition. In the kitchen, the Police found two Pennsylvania identification cards for Mr. Palmer. In the second bedroom and the living room, the Police recovered a few cell phones that were not smart phones and some letters addressed to Mr. Palmer.

Ms. Johnson claimed that the money, the gun, and the iPhone belonged to her. Ms. Johnson said that she did not know how much money was on the dresser but stated it was "about $1,000." At first, Ms. Johnson told the Police about the money and claimed it came from her job where she earned $2,000 in the past five months. After the Police informed Ms. Johnson that the math did not up when taking into consideration rent and living expenses, Ms. Johnson then changed her story and told the Police that she had been saving money since she was young.

The Police also questioned Ms. Johnson about the firearm. Ms. Johnson told them that she owned the firearm and that it was under her side of the bed. Ms. Johnson said that she did not know that Mr. Palmer was a person prohibited but that Mr. Palmer would handle her firearm on occasion, for example, to put it away when someone came to the apartment. At the Hearing, Ms. Johnson brought a copy of the gun's license and registration that shows that she is the registered owner of the firearm.

The Police then talked to Ms. Johnson about the iPhone. Despite claiming ownership, Ms. Johnson could not successfully enter a passcode to the iPhone upon request from the Police. Although Ms. Johnson did not know the passcode for the iPhone, Mr. Palmer did know it. Detective Stewart testified that Mr. Palmer provided a passcode to the Police that allowed the Police to successfully unlock the iPhone. At the Hearing, Ms. Johnson said that Mr. Palmer had

changed the passcode on the iPhone after they argued about her use of the phone. Ms. Johnson also stated that the iPhone was in her name.

After the seizure of the iPhone, the State obtained a second warrant on November 30, 2015 (the "Second Warrant"). The Second Warrant authorized the State to conduct a forensic examination of, and obtain digital information from the iPhone. The Second Warrant described the relevant violation as Drug Dealing. In the affidavit establishing probable cause, Detective Stewart listed the items the Police found during the protective sweep and the search conducted under the First Warrant, specifically identifying the United States currency in small denominations and the gun. Detective Stewart also provided the case number for the Commonwealth of Pennsylvania's case against Mr. Palmer for Possession with Intent to Deliver Heroin and explained that Pennsylvania's case centered on telephone intercepts showing drug trafficking.

THE PARTIES CONTENTIONS

A. MR. PALMER

Mr. Palmer filed the Motions and the April 15 Letter, arguing that a gun under his bed should be suppressed because the Police conducted an improper protective sweep of Mr. Palmer's home. Mr. Palmer further argues that the evidence found on the iPhone should be suppressed as the iPhone was not specifically listed in the First Warrant.[6]

B. THE STATE

The State opposes the Motions. In the Response and the State's Supplemental Briefs, the State argues that the Police were allowed to enter the residence without a warrant to get Mr. Palmer—who was wearing boxers and an undershirt at the time of his arrest—some appropriate

[6] Mr. Palmer is not seeking to suppress the digital information on the iPhone. Mr. Palmer moves to suppress the existence of the iPhone.

clothing and shoes and were allowed to conduct a protective sweep of the residence before looking for the clothing. The State also argues that the seizure of the iPhone was appropriate because the warrant lists "documentation/receipts" related to the firearm and the iPhone could have contained digital information relating to ownership or possession of the firearm, like photographs of Mr. Palmer with the firearm or emails and/or text messages about the firearm. The State further argues that the iPhone seizure was proper because Mr. Palmer stored his identification and medical cards in the iPhone's case on the right bedside table; this places Mr. Palmer in the master bedroom on the right side of the bed at the same time the firearm was there.

ANALYSIS

A. The Clothing Exigency

The Fourth Amendment permits an unconsented, warrantless entry into someone's home only if "the police can show that it falls within one of a carefully defined set of exceptions" to the warrant requirement.[7] The Courts normally refer to these "carefully defined set of exceptions" as exigent circumstances.[8] At the Hearing and in the State's Supplemental Briefs, the State argues that exigent circumstances existed to enter the Apartment to get Mr. Palmer clothes after arresting him as Mr. Palmer was wearing insufficient clothing under the circumstances. The State then contends that the Police's protective sweep was appropriate to ensure officer safety.

The general rule is that the police may only enter a residence after an arrest to get clothing items for an arrestee if the arrestee asks for clothing.[9] It appears that the majority of

[7] *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971).
[8] *Id.*
[9] *United States v. Gwinn*, 46 F. Supp. 2d 479 (S.D.W. Va. 1999), *aff'd*, 219 F.3d 326 (4th Cir. 2000), *cert. denied* 531 U.S. 1025 (2000); *see also United States v. Mason*, 523 F.2d 1122 (D.C. Cir. 1975) (holding that the police properly conducted a protective sweep when the police and the defendant got the defendant's jacket from the coat closet upon the defendant's request after his arrest).

Federal courts have recognized an exception to this rule, called the clothing exigency.[10] These courts have held that the police have a duty to make sure an arrestee has adequate clothing and shoes before taking the arrestee to a police station, a jail, or a court.[11] Other courts have rejected the clothing exigency, holding that the police should only enter the defendant's home to retrieve clothing if the defendant requests clothing first.[12]

The Court has not found, or been made aware of, any decisions issued by the United States Supreme Court, the United States Court of Appeals for the Third Circuit or the Delaware Supreme Court that address the clothing exigency.[13] After considering the arguments and testimony at the Hearing, reviewing of the parties' supplemental briefing on this issue, and thoroughly reviewing the relevant jurisprudence, the Court will adopt and apply the clothing exigency in this case.

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[10] *See, e.g.*, *Gwinn*, 219 F.3d 326.

[11] Other sources have also commented on the existence of the clothing exigency and Fourth Amendment searches:

> If the defendant is placed under arrest at a particular place in the premises, even at the front door, the circumstances may be such that he will be allowed to move about the premised prior to departure for the police station. Although this may occur for other reasons as well, it occurs with greatest frequency when the defendant needs to change his clothes or put on additional clothing before departing. Often the defendant will ask that he be allowed to do this, although on some occasions it appears that the police have been the motivating force in causing the defendant to seek out other clothing. In either event, the courts have had little hesitancy in holding admissible evidence discovered by the police as a consequence. . . . Assuming a lawful arrest at the defendant's residence, it does not seem at all unreasonable for the police to require the defendant to don street clothing, without regard to his wishes.

Wayne R. LaFave, 3 Search and Seizure: A Treatise on the Fourth Amendment § 6.4(a) (5th ed. 2012).

[12] *See, e.g.*, *United States v. Whitten*, 706 F.2d 1000 (9th Cir. 1983), *aff'd*, 465 U.S. 1100 (1984), *overruled on other grounds by United States v. Rodriguez-Rodriguez*, 441 F.3d 767 (9th Cir. 2006).

[13] In *United States v. Snard*, the Third Circuit ruled on a case that was similar but had key differences. 497 Fed. App'x 228 (3d Cir. 2012). Police officers arrested the defendant in his underwear at his hotel room door. *Id.* The defendant asked to enter his hotel room for his pants. *Id.* The officers conducted a protective sweep, finding drugs and weapons, before letting the defendant gather his clothing and dress. *Id.* The Third Circuit held that the officers were permissibly in the hotel room because the defendant asked for his clothing. *Id.* The police could conduct a protective sweep to protect themselves. *Id.* This case has differs from this present case for two reasons: (i) the *Snard* defendant asked for his clothing after his arrest, unlike Mr. Palmer, and (ii) the *Snard* defendant went back into his hotel room escorted by the officers.

The Court first notes that what exactly constitutes a clothing exigency is fact-specific and varies on the time of the arrest, the weather conditions, and the level of dishabille. The First Circuit explained:

> When police encounter and arrest a partially clothed individual in his home, the need to dress him may constitute an exigency justifying the officers in entering another room in order to obtain needed clothing. Generalizations are hazardous because one can imagine infinitely variable fact patterns.[14]

In some cases, it is clear that there was a clothing exigency. For example, the Second Circuit found that the police "were bound to find some clothing" for a completely naked man arrested on a December night.[15] Other cases are close calls. The Second Circuit found there was a clothing exigency when a woman was arrested in her nightgown and bathrobe in the middle of the night in June.[16] In contrast, the Tenth Circuit held that there was no clothing exigency when a man was arrested while wearing a bathing suit outside of his hotel room.[17]

Similarly, courts have disagreed on whether the defendant not wearing shoes is a clothing exigency. The Fifth Circuit held that the police have a duty to find an arrestee shoes.[18] In contrast, the Tenth Circuit held that the police had a duty to find an arrestee shoes only because there was broken glass in the area where the arrestee would be walking.[19] The broken glass was "a legitimate and significant threat to the health and safety of the arrestee."[20] The Fifth Circuit later rejected the Tenth Circuit's narrow approach, holding that even if the arrestee is not "surrounded by broken glass in a trailer park," "the hazards of public sidewalks and streets pose

[14] *United States v. Nascimento*, 491 F.3d 25, 50 (1st Cir. 2007), *cert. denied*, 552 U.S. 1297 (2008).
[15] *United States v. Titus*, 445 F.2d 577 (2d Cir. 1971), *cert. denied*, 404 U.S. 957 (1971).
[16] *United State v. Di Stefano*, 555 F.2d 1094, 1097 (2d Cir. 1977).
[17] *United States v. Anthon*, 648 F.2d 669, 674-75 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982).
[18] *United States v. Clay*, 408 F.3d 214, 218 (5th Cir. 2005).
[19] *United States v. Butler*, 980 F.2d 619, 621 (10th Cir. 1992).
[20] *Id.* at 622.

a threat of injury to the feet and other exposed areas of the body."[21] The Fourth Circuit came to the same conclusion as the Fifth Circuit.[22]

Several courts have found a clothing exigency when the arrestee was only wearing underwear or pants. The First Circuit found a clothing exigency when the police arrested a man in underwear.[23] The Court noted that "both human dignity and the New England climate counseled here in favor of a more complete wardrobe."[24] Further, the police did not seem to be using the clothing exigency as an excuse to conduct an impermissible search.[25] The Fourth Circuit made the same decision regarding a man who was only wearing jeans, holding that it was "the troopers' duty to look after the reasonable safety requirements of persons in their custody" by "requiring [the arrestee] to put on shoes and a shirt."[26] In addition, the Fifth Circuit held that, regardless of "common decency," the police have a duty to "obtain appropriate clothing" because the arrestee was only wearing boxer shorts.[27]

The Sixth and Ninth Circuits have rejected the clothing exigency. The Sixth Circuit held that the police were not allowed to enter an arrestee's residence because the arrestee did not request permission to get clothing from the residence and did not consent to the entry.[28] In that case, the police stated they entered to let the arrestee finish getting dressed and to avoid a crowd that had gathered outside of the house.[29] The police said that the arrestee was not fully clothed because he had not finished dressing—more specifically, his shirt was unbuttoned.[30]

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[21] *United States v. Wilson*, 306 F.3d 231 (5th Cir. 2002), *cert. denied*, 306 F.3d 231 (2003).
[22] *United States v. Gwinn*, 219 F.3d 326, 333 (4th Cir. 2000), *cert. denied* 531 U.S. 1025 (2000) ("[The arrestee] would face the substantial hazards of sustaining cuts or other injuries to his feet . . . .").
[23] *United States v. Nascimento*, 491 F.3d 25, 49-51 (1st Cir. 2007), *cert. denied*, 552 U.S. 1297 (2008).
[24] *Id.* at 50.
[25] *Id.*
[26] *Gwinn*, 219 F.3d at 333.
[27] *United States v. Wilson*, 306 F.3d 231, 240-41 (5th Cir. 2002), *cert. denied*, 306 F.3d 231 (2003).
[28] *United States v. Kinney*, 638 F.2d 941, 944 (6th Cir. 1981), *cert. denied*, 452 U.S. 918 (1981).
[29] *Id.* at 943.
[30] *Id.* at 943-45.

The Ninth Circuit rejected the clothing exigency for the same reasons as the Sixth Circuit.[31] In that case, the police arrested the arrestee in the doorway of his hotel room and then took the arrestee into the room, where he was handcuffed and placed in a chair.[32] The police searched the room, looking for a weapon.[33] The arrestee, who was wearing only underwear, asked if he could get dressed before going to jail.[34] The Ninth Circuit held that the police entry into the hotel room was illegal because the arrestee did not ask to dress before the police entered his room and because the arrestee did not consent to a police entry.[35]

Though the Sixth and Ninth Circuits clearly rejected the clothing exigency, it is important to note that those courts recognizing the clothing exigency may have come to the same conclusion in those cases applying the fact-specific analysis required under the clothing exigency. The arrestee in the Sixth Circuit may have been wearing enough clothing for other courts to find there was no exigency. In the Ninth Circuit, the police did not enter because the defendant was only wearing underwear. Instead, the police entered the residence to look for a weapon and later let the defendant dress upon his request. A court may have found that the police entry in the Ninth Circuit had little to do with the arrestee's clothing and declined to apply the clothing exigency.

As stated above, the Court believes the more well-reasoned approach is the one that applies a clothing exigency exception to the Fourth Amendment and allows for a warrantless entry into a defendant's residence. The clothing exigency is a narrow exception to the Fourth Amendment and one that provides for the police to protect the person who has been placed into

[31] *United States v. Whitten*, 706 F.2d 1000 (9th Cir. 1983), *aff'd*, 465 U.S. 1100 (1984), *overruled on other grounds by United States v. Rodriguez-Rodriguez*, 441 F.3d 767 (9th Cir. 2006).
[32] *Id.* at 1015.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 1016.

custody. This is no "blank check for intrusion upon the privacy of the sloppily dressed."[36] Rather, the court is to apply a fact-specific analysis to determine whether the warrantless entry is based upon the clothing exigency.

Here, the Police had Mr. Palmer in their custody. Mr. Palmer, at 10:00 a.m., was only wearing an undershirt and boxers on a mid-November morning. The sensible thing for the Police to do was to make sure that Mr. Palmer was adequately clothed and shod. In fact, Detective Stewart stated that it was the policy of the New Castle County Police Department not to transport a detainee who was not properly dressed and wearing shoes. The facts demonstrate that the Police did not enter the home using the clothing exigency as a pretext to conduct a warrantless search. Detective Stewart testified that the Police would not have entered the Apartment if Mr. Palmer had been dressed and wearing shoes. Moreover, Mr. Palmer created the exigency and not the Police. Mr. Palmer, who did not immediately respond to the Police, chose to come out from the master bedroom wearing only a t-shirt and underwear. The Court finds Detective Stewart to be very credible. The Court believes Detective Stewart when he stated that he got clothing for Mr. Palmer because it was policy not to take people to the station in underwear to avoid liability for harm done in such a situation and because of common decency.

Defense counsel argues in the April 15 Letter that the temperatures were warm enough on November 19, 2015 that Mr. Palmer would not have faced extreme temperatures in his

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[36] *United States v. Butler*, 980 F.2d 619, 621 (10th Cir. 1992). The police must still act reasonably in a clothing exigency protective sweep:

> If the police are . . . to require the defendant to move about the premises for the purpose of acquiring necessary attire, they should not be allowed to maneuver the defendant's movements in a particular way in order to gain access to certain areas. . . . And surely the particular request or needs of the arrestee requiring the entry in the first place must be reasonably construed by the police. For example, a general request for personal items somewhere in the house does not itself justify a 'leap of inferences' supporting a police search inside a suitcase.

LAFAVE, *supra* note 11.

underwear.[37] The Court is unpersuaded by this argument. First, November weather can change, especially as the day progresses. Second, it was possible that Mr. Palmer would be sitting in a police station or holding cell for a long period of time after his arrest, which has little to do with the day's weather forecast. Third, cold temperatures are not the only potential dangers to an uncovered body. For example, walking on a sidewalk, street, or even in a police station without shoes might be hazardous. If Mr. Palmer had been injured by exposure to the cold or had hurt his feet by walking in a police station without shoes, then this Court might have been hearing a civil case brought on by Mr. Palmer against the New Castle County Police Department.

Mr. Palmer argued at the Hearing that the Police could have found other ways to ensure that Mr. Palmer was dressed without the police entering his home.[38] First, Mr. Palmer suggested that Ms. Johnson could have retrieved his clothing. The District Court for the Southern District of New York addressed a similar suggestion in *United States v. Rudaj*:

> The agents were under a duty to provide [the defendant] with clothing, but they were under no duty to let him or his family go upstairs unaccompanied to get the clothing. Moreover, they would have been constitutionally permitted to, and indeed foolish not to, accompany whoever went upstairs to ensure that she did not destroy evidence while there or return downstairs with a weapon.[39]

As in *Rudaj*, the Police could not risk letting Ms. Johnson enter the Apartment alone in case she tampered with evidence or returned with a weapon. Further, the Police did not know who else was in the building, so Ms. Johnson could have been in danger entering the home alone.

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[37] Defense Counsel attached copies of the weather reports from November 19, 2015 from the websites Weather Source and Weather Underground. Letter, dated April 15, 2016, from Natalie Woloshin, Esq. to the Honorable Eric M. Davis, Exhibit A. The reports indicate that the temperature that day was between the high fifties and the low sixties. *Id.*

[38] "A variety of factors may influence the choice of one alternative over another, and one alternative is not inherently more intrusive than another, and thus courts are not inclined to assess critically the choice made by the officers on the scene." 3 Wayne R. LaFave, Search and Seizure § 6.4(a) (2012) (footnotes omitted).

[39] *United States v. Rudaj*, 390 F. Supp. 2d 395 (S.D.N.Y. 2005), *aff'd sub nom. U.S. v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009), *cert. denied*, 559 U.S. 998 (2010).

Mr. Palmer also suggested that the Police should have looked in a hypothetical coat closet by the door and/or given Mr. Palmer the first item of clothing that would fit his body. This alternative would still require the police to conduct a protective sweep because they would still be entering a residence. At best, it would have limited the amount of the Apartment where the Police looked for clothes for Mr. Palmer. It also may create confusion for the Police if they needed to determine whether to dress Mr. Palmer with the first articles of clothing found. If the Police first find a bathrobe and a roommate's shoes, must Mr. Palmer wear those? If the police are obtaining clothing for a defendant being taken to a police station, jail, or court, it makes the most sense for the police to take the shoes and clothing that fit the defendant and belong to the defendant.

Finally, Mr. Palmer suggested that the Police could have made sure Mr. Palmer was dressed before arresting him. This, too, is an unreasonable and unworkable alternative. The Police would have had to somehow tell Mr. Palmer to open the door fully dressed when they first knocked and announced themselves; or, once Ms. Johnson answered the door, the Police would have had to call into Mr. Palmer and tell him to dress before coming out. In those situations, Mr. Palmer could have used the time to destroy evidence, to escape, or to find a weapon.

Mr. Palmer was arrested at the Apartment at approximately 10:00 a.m. on November 19, 2015. Mr. Palmer exited the master bedroom wearing only a t-shirt, underwear, and no shoes. The desire of the Police to have Mr. Palmer more adequately dressed was more than the desire of law enforcement to complete his wardrobe. The Police were looking after the reasonable safety requirements of a defendant in their custody. Wherever Mr. Palmer might walk after being arrested, Mr. Palmer would face the hazards of sustaining cuts or other injuries to his feet, as well as the weather conditions of a mid-November day and subsequent detention center or

holding facility. Under these circumstances, the Police should be able to take reasonable steps to address the safety of Mr. Palmer. Accordingly, the Court finds that the Police were justified in entering the Apartment without a warrant under the clothing exigency to retrieve clothing reasonably calculated to lessen the risk of injury to Mr. Palmer.

B. The Protective Sweep

1. The Validity of the Protective Sweep

A protective sweep is "a cursory inspection, basically one where a person may be found."[40] The Court wrote:

> [I]f the arrest occurs outside the residence, a protective sweep would only be legal if the officers have articulable facts which, taken with the logical implications therefrom, would lead a reasonably prudent officer to believe the area to be searched harbors a person or persons that posed danger to those on the arrest scene.[41]

In *State v. Hedley*, the Court looked at the police's lack of fear, lack of weapons, and delayed sweep to determine that no protective sweep was necessary. The Court distinguished that case from cases in which a protective sweep *was* necessary by explaining that the other cases had "known major traffickers in narcotics" and "persons the police reasonably believed had violent tendencies and/or were potentially armed."[42]

Here, the Police entered the Apartment to get Mr. Palmer clothing. The Police needed to know whether anyone was hiding inside the Apartment who could have posed a danger to the Police. The Court understands that the Police felt that they were in danger. For one thing, the Police acted as if they believed they were in danger as they entered the Apartment with their weapons drawn. Further, the Police took care to arrest Mr. Palmer as he stood in the doorway in a way to protect themselves from any shooters inside. Mr. Palmer also was a "known major

[40] *State v. Hedley*, 593 A.2d 576, 581 (Del. Super. 1990).
[41] *Id.*
[42] *Id.*

trafficker in narcotics" and the "gun guy" in the drug ring.[43] In addition, Mr. Palmer and Ms. Johnson took a long time to answer the door and acted hesitantly. Lastly, the Police knew that one of the other drug ring members had fled from arrest earlier that day and was still at large. The Police believed it was possible that this person could have been armed and hiding in the Apartment. Therefore, the Court finds that the potential dangers of entering Mr. Palmer's home justified the Police's protective sweep.

2. The Search Under the Bed

Mr. Palmer argues that the search under the bed was illegal because no one could have been hiding under the bed. The Court disagrees with Mr. Palmer's argument. Even if it is known in hindsight that no one could have fit under the bed, the question would still be whether the Police's belief that someone could be under the bed was objectively reasonable.[44]

Here, the photographs introduced into evidence and the testimony of Detective Stewart convince the Court that it was reasonable for the Police to believe that someone could have been under the bed. Moreover, the Court did not find Ms. Johnson's testimony that the bed was no more than three inches from the floor to be credible after viewing the photographs. Under these circumstances, the Court holds that it was appropriate for the Police to look under the bed when conducting the protective sweep.

C. The Cell Phone Seizure

The next question is whether the Police were allowed to physically seize Mr. Palmer's iPhone. Mr. Palmer argues that the warrant did not allow the Police to seize the iPhone because "cell phone" was not specifically listed in the search warrant. Mr. Palmer further argues that the Police were only allowed to seize "instrumentalities or fruits of a crime" and not "objects which

[43] *Id.*

[44] 497 Fed. App'x 228, 232 (3d Cir. 2012) ("[T]he *Buie* inquiry of whether a space can hold a person is judged from the *ex ante* perspective of an objectively reasonable officer.").

are merely evidentiary" under *Warden, Maryland Penitentiary v. Hayden.*[45] The State argues that the iPhone was within the scope of the warrant.

1. The Mere Evidence Rule

In *Hayden*, the United States Supreme Court reviewed the validity of the "Mere Evidence Rule."[46] The Mere Evidence Rule was a search and seizure rule that provided that the police could seize the instrumentalities of a crime but not objects that only have evidentiary value.[47] In *Hayden*, the police were conducting a warrantless but legal search of a defendant's home while seeking the defendant and/or any weapons he used in an alleged crime.[48] The police seized weapons, ammunition, and clothing that matched the description of what the defendant had worn.[49] The United States Supreme Court upheld the trial court's decision not to suppress the items seized and to admit the clothing into evidence.[50]

Mr. Palmer is correct that the Court drew a distinction between evidentiary objects and instrumentalities of crime in the very first paragraph of the decision.[51] The Court did *not* hold that "under the Fourth Amendment, objects which are merely evidentiary materials may not be seized during a search warrant."[52] Mr. Palmer seems to have missed that the Court *overturned* the Mere Evidence Rule in *Hayden*.[53] The Court held that "there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits,

[45] Response to Motion to Suppress (Cell Phones) ¶ 4.
[46] *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 295-97 (1967).
[47] *Id.* at 300-02.
[48] *Id.* at 297-98.
[49] *Id.* at 298.
[50] *Id.* at 297.
[51] *Id.* at 295-96.
[52] Response to Motion to Suppress (Cell Phones) ¶ 4.
[53] *Id.* at 310.

instrumentalities, or contraband."[54] The Court clarified that the State must still meet the Fourth Amendment requirements of probable cause and particularity and must get a warrant.[55]

Since *Hayden*, the Delaware Superior Court has held that the police may use some discretion to seize items that are not described in a warrant.[56] The police may seize such items when "those objects were in the 'plain view' of an officer who was lawfully in a position to have that view and the officer has probable cause to believe that there was a nexus between the object seized and criminal behavior."[57]

Through Detective Stewart's testimony at the Hearing, the State established that the iPhone was in plain view of the Police during their legal search of Mr. Palmer's Apartment because it was on the bedside table. The question then is whether there was a nexus between the iPhone and the crime of Possession of a Firearm By a Person Prohibited—not drug dealing, which was the basis of the Second Warrant. In the First Warrant, Detective Stewart swore that he knew from his training and experience that "documentation and/or receipts" are provided to a purchaser of firearms and ammunition and that people possessing firearms may photograph themselves with the firearm.[58] Detective Stewart testified similarly at the Hearing. This established a nexus between the iPhone and the crime because either documentation or photographs could be on the iPhone.

In addition, the location of the iPhone established that the iPhone user slept in the bedroom where the gun was and, more specifically, that the iPhone user slept on the right side of the bed. The fact that Mr. Palmer's identification and medical cards were in the iPhone suggests

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[54] *Id.*
[55] *Id.* at 309.
[56] *State v. Phillips*, 366 A.2d 1203, 1207 (Del. Super. 1976).
[57] *Id.* at 1208; *see also State v. MacDonald*, No. IN90-10-1063, 1992 WL 68941, at *2 (Del. Super. Feb. 24, 1992) ("In the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular conviction. . . . And, such evidence must have been within the plain view of the officers.").
[58] Response to Motion to Suppress (Cell Phones), Exhibit A.

that the iPhone was used by Mr. Palmer, regardless of anything the Police later learned about Ms. Johnson's purchase of the phone. Further, if the Police were seizing the identification and medical card as evidence that Mr. Palmer slept on the right side of the bed, then it would make sense for them to take the entire iPhone case, phone and all.

2. The Warrant's Scope

Mr. Palmer also argues that the iPhone seizure exceeds the scope of the warrant. The State argues that the iPhone was included in the warrant because the warrant described "documentation." The State relied on the United States Supreme Court's decision in *Riley v. California* to show that people store documents (photographs, receipts, etc.) on their smart phones:

> The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.[59]

The Delaware Supreme Court used the same language in *Wheeler v. State*, a case about obtaining a search warrant to search the digital content on a laptop computer.[60] An important distinction between the *Riley* and *Wheeler* cases and the case at hand is that Mr. Palmer is not objecting to the search of digital content on a technological device. Mr. Palmer objects to the Police seizing his iPhone.

The Court agrees with the State. The United States Supreme Court's description of the modern "cell phone" acknowledges that an iPhone may have a variety of documents on it. In the past, the Police could have used its warrant to search papers found in Mr. Palmer's home—in desk drawers, filing cabinets, and boxes in the closet—to find documents relating to the gun.

[59] *Riley v. California*, 134 S.Ct. 2473, 2489 (2014).
[60] No. 205, 2015, 2016 WL 825395, at *14 n.79 (Del. Jan. 20, 2016).

Now many of those documents are paperless and are stored electronically on computers and smart phones. The Supreme Courts of the United States and of Delaware have strengthened the warrant requirements for technological devices precisely because the devices contain so much documentation about their owners' lives. If so many documents are stored on smart phones, then the police should be allowed to seize a smart phone when they are looking for documents specified in a warrant.[61] Notably here, the Police merely seized the iPhone and did not look at the digital content until they obtained the Second Warrant.

This rationale is supported by several pre-*Riley* cases. In *United States v. Reyes*, police had a warrant for drug trafficking records and seized a cassette tape with drug trafficking recordings on it.[62] When the defendant moved to suppress the tape as being outside of the scope of the warrant, the Tenth Circuit held that "in the age of modern technology and commercial availability of various forms of items, the warrant could not be expected to describe with exactitude the precise form the records would take."[63]

The Ninth Circuit used the same approach in *United States v. Giberson*.[64] In that case, the police had a warrant that described particular documents but did not describe a computer or digital documents.[65] When the police found a computer during the search, they seized the computer and copied the hard drive.[66] Before searching the hard drive copy, the police obtained a new warrant.[67] The defendant moved to suppress the evidence from the hard drive.[68] The

[61] The Supreme Court recognized that there is a difference between seizing a phone and actually searching it. In *Riley*, the defendants conceded that the police officers who searched the digital contents of their phones during a search incident to arrest could have "seized and secured their cell phones to prevent destruction of evidence while seeking a warrant." *Riley*, 134 S. Ct. at 2486.
[62] 798 F.2d 380, 383 (10th Cir. 1986).
[63] *Id.*
[64] 527 F.3d 882, 886-87 (9th Cir. 2008).
[65] *Id.* at 884.
[66] *Id.* at 885.
[67] *Id.*
[68] *Id.* at 886.

Ninth Circuit stated that "a search warrant authorizing the seizure of materials also authorizes the search of objects that could contain those materials."[69] The Court compared finding a computer during a search to finding a locked briefcase during a search because both could be "repositories for documents and records."[70] The Ninth Circuit declined to rule on "whether computers are an exception to the general principle that a warrant authorizing the seizure of particular documents also authorizes the search of a container likely to contain those documents," but the Court did hold that "where there was ample evidence that the document authorized in the warrant could be found on [the defendant's] computer, the officers did not exceed the scope of the warrant when they *seized* the computer."[71]

The Ninth Circuit addressed the issue again in *United States v. Payton*.[72] In the case, the police had a warrant that described drugs, drug paraphernalia, and drug dealing records but did not mention computers.[73] During the search, the police found no evidence of drug dealing but found a computer that could be immediacy accessed.[74] A police officer opened a file and found child pornography.[75] The defendant was charged with possessing child pornography and then moved to suppress the files found on his computer.[76] The Ninth Circuit agreed with the defendant and clarified its holding from *Giberson*.[77] The Court ruled that the police do not get to search a computer without a warrant just because the police found the computer during a legal

[69] *Id.*
[70] *Id.* at 887.
[71] *Id.* (emphasis added).
[72] 573 F.3d 859 (9th Cir. 2009).
[73] *Id.* at 860.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 864.

search for documents.[78] There must be some "evidence pointing to the computer as a repository for the evidence sought in the search."[79]

The Delaware Supreme Court cited to *Reyes* and *Giberson* in *Bradley v. State*.[80] In that case, the police had a warrant that described particular documents and stated that this included paper and computer files.[81] Police seized "all of the computers, digital storage devices, and recording equipment."[82] The defendant sought to suppress evidence by arguing that the seizures exceeded the bounds of the warrant.[83] The Delaware Supreme Court held: "A search warrant authorizing the seizure of specific items permits the seizure of objects that could reasonably contain those items. Here, the computers and digital storage devices could reasonably contain the patient files described in the warrant, whether in text or image form."[84]

In this case, the First Warrant described the documentation for which the Police were looking. As discussed in the preceding section, Detective Stewart stated in the warrant that he knew from his training and experience that "documentation and/or receipts" are provided to a purchaser of firearms and ammunition and that people possessing firearms may photograph themselves with the firearm. These documents could have been found on a computer or smart phone. In fact, it is much more likely in the year 2015 that photographs would be stored digitally on an iPhone—and posted on social media pages or sent via text or email—rather than being available in print in Mr. Palmer's apartment. Gun purchase receipts and licenses, too, might have been stored in an application on the iPhone. Therefore, there was ample reason to believe that the documentation described in the warrant could be found on the iPhone.

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[78] *Id.*
[79] *Id.*
[80] 51 A.3d 423 (Del. 2012)
[81] *Id.* at 428.
[82] *Id.* at 435.
[83] *Id.*
[84] *Id.*

The result is the same regardless of whether the Court finds that the iPhone was in the scope of the warrant. Because the warrant described documentation, the Court holds that the Police were permitted to seize the iPhone and get a second warrant to look at the digital information. Even if the iPhone was outside of the scope of the First Warrant, the Police were still allowed to seize the iPhone because it was in plain view and there was a nexus between the iPhone and the crime given its location and the documents attached to the iPhone.

CONCLUSION

For the above reasons, the Court will deny the Motions to Suppress.

IT IS HEREBY ORDERED that the Motions to Suppress are **DENIED**.

Dated: May 16, 2016
Wilmington, Delaware

/s/ *Eric M. Davis*
Eric M. Davis, Judge