THIRTY-FIFTH ANNUAL
DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 19–2417

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

--against--

STEPHANIE SILVER,
Respondent.

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

RECORD ON APPEAL

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA

- against -

GEORGE HOYT, also known as "Remy," and STEPHANIE SILVER,

Defendants.
----------X

I N D I C T M E N T

Cr. No. 18-3023
(T. 18, U.S.C. § 2332f(a)(1), (a)(2), 2, 3551 et seq.)

THE GRAND JURY CHARGES:

INTRODUCTION

At all times relevant to this Indictment, unless otherwise indicated:

1) The defendant GEORGE HOYT, also known as "Remy," was a foreign national and a citizen of the country of Remsen, residing in the United States at 594 Atlantic Place, Boerum City, Boerum.

2) The defendant STEPHANIE SILVER was a resident of Boerum City, Boerum.

3) The Anti-Consumerist Brigade ("ACB") is an organization dedicated to spreading awareness of its anti-consumerism ideology, an ideology opposed to the continual buying and consuming of material goods. The ACB has its headquarters at 594 Atlantic Place, Boerum City, Boerum.

4) The defendant GEORGE HOYT is the professed leader of the ACB.

5) On or about August 25, 2018, the defendants GEORGE HOYT and STEPHANIE SILVER, together with others, attended a meeting at 594 Atlantic Place, Boerum City, Boerum.

6) The annual Boerum Street Fair was scheduled to take place on August 25, 2018 in the Joralemon Historical Village, located in the center of Boerum, beginning at 12:00 p.m.

7) On or about August 25, 2018, at approximately 3:00 p.m., a bomb exploded in the Boerum Municipal Fountain, destroying the fountain and the World War II Veterans Memorial statue. No persons were injured in the blast.

COUNT ONE

(Conspiracy to Bomb a Place of Public Use)

8) The allegations contained in paragraphs 1 through 7 are realleged and incorporated as if fully set forth in this paragraph.

9) In or about and between January 12, 2018 and August 25, 2018, both dates being approximate and inclusive, within the Eastern District of Boerum, the defendants GEORGE HOYT, also known as "Remy," a national of another state or stateless person, and STEPHANIE SILVER, together with others, did knowingly and intentionally conspire to deliver, place, discharge, or detonate an explosive or other lethal device in, into or against a place of public use, a state or governmental facility, a public transportation system, or an infrastructure facility (A) with the intent to cause death or serious bodily injury, or (B) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss, in violation of Title 18, United States Code, Section 2332f(a)(1) and 3551 et seq.

In furtherance of this conspiracy, and to effect its objects, the defendants GEORGE HOYT, and STEPHANIE SILVER, together with others, committed and caused to be committed, among others, the following:

OVERT ACTS

a. In or about August 25, 2018, the defendant GEORGE HOYT assisted in the preparation of an explosive device for use in an attack on the Boerum Street Fair.

b. In or about August 25, 2018, the defendant STEPHANIE SILVER delivered, placed, discharged, and detonated an explosive or other lethal device in the Boerum Municipal Fountain.

(Title 18, United States Code, Sections 2332f(a)(2) and 3551 et seq.)

COUNT TWO

(Attempted Bombing of a Place of Public Use)

10) The allegations contained in paragraphs 1 through 7 are realleged and incorporated as if fully set forth in this paragraph.

11) In or about August 25, 2018, within the Eastern District of Boerum, the defendants GEORGE HOYT, also known as "Remy," and STEPHANIE SILVER, together with others, did knowingly and intentionally attempt to deliver, place, discharge, or detonate an explosive or other lethal device in, into or against a place of public use, a state or governmental facility, a public transportation system, or an infrastructure facility (A) with the intent to cause death or serious bodily injury, or (B) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss,

in violation of Title 18, United States Code, Section 2332f(a)(1) and 3551 et seq.

(Title 18, United States Code, Sections 2332f(a)(2), 2 and 3551 et seq.)

A TRUE BILL

Lionel Hutz

LIONEL HUTZ
UNITED STATES ATTORNEY
EASTERN DISTRICT OF BOERUM

Mitchell Gabbard

GRAND JURY FOREPERSON
September 4, 2018

FEDERAL BUREAU OF INVESTIGATION
302 - INVESTIGATIVE REPORT

JANUARY 18, 2018

FEDERAL BUREAU OF INVESTIGATION 302 - INVESTIGATIVE REPORT

On January 2, 2018, Anti-Consumerist Brigade ("ACB") member Sidney Aitken contacted me to provide information about the ACB. Ms. Aitken attends bi-weekly ACB meetings and speaks with other members on a regular basis. At the most recent meeting on December 27, 2017, the ACB elected as its new leader, George Hoyt, who lives at 594 Atlantic Place, Boerum City, Boerum. Ms. Aitken described Hoyt as a taller man with a goatee. According to Ms. Aitken, the organization is planning a demonstration to raise public awareness about its anti-consumerist ideology. During the same meeting, the organization discussed and began researching home-made explosive devices. Although the group did not discuss specific targets or timing, Hoyt discussed building and using an explosive device to make a statement sometime in the near future.

Ms. Aitken stated that the ACB has changed direction from when she first joined, that she does not want to be a part of a violent organization, and that she "just wanted to participate in peaceful protests." Ms. Aitken did not identify or provide a description of any ACB members other than Hoyt. Nor did she identify which members researched explosives. I attempted to recruit her as an informant, but she refused. Following the initial meeting, I attempted to contact Ms. Aitken several times but have since lost contact.

Melanie Montague
SA Melanie Montague
FBI Special Agent
January 18, 2018

FEDERAL BUREAU OF INVESTIGATION
302 - INVESTIGATIVE REPORT

JANUARY 23, 2018

FEDERAL BUREAU OF INVESTIGATION 302 - INVESTIGATIVE REPORT

On January 19, 2018, pursuant to a lead that the Anti-Consumerist Brigade ("ACB") was planning a potentially violent demonstration, I coordinated with a local utility company, Pro Ed, to install a pole camera to monitor the house located at 594 Atlantic Place, Boerum, City, Boerum. Three days later, on January 22, Pro Ed installed the pole camera across the street from the house, on a telephone pole adjacent to the house located at 591 Atlantic Place, Boerum City, Boerum. Pro Ed placed the pole camera to face the entryway of 594 Atlantic Place, which is surrounded by a decorative three-foot split rail fence. A large tree partially obstructs the view of the front door.

The pole camera can be remotely controlled and can pan slightly from side-to-side and zoom in on the entryway. The camera's zoom feature allows us to view license plates of cars belonging to visitors to the premises. The pole camera provides a twenty-four-hour live feed of surveillance, which can be accessed remotely at the station and through software installed on mobile electronic devices.

The pole camera can record video only; it cannot make audio recordings of conversations. Nor can it peer inside the home, even if the windows or door are left open. Additionally, depending on lighting conditions at night, the camera may not always clearly capture all activity within its view.

Melanie Montague
SA Melanie Montague
FBI Special Agent
January 23, 2018

FEDERAL BUREAU OF INVESTIGATION
302 - INVESTIGATIVE REPORT

AUGUST 25, 2018

FEDERAL BUREAU OF INVESTIGATION 302 - INVESTIGATIVE REPORT

On August 25, 2018, at 3:00 p.m., the Bureau received a report that a bomb had partially detonated in the Boerum Municipal Fountain during the Boerum Street Fair. In response to concerns that a terrorist organization may have detonated the bomb, the Director of the Federal Bureau of Investigation, Nicholas Wall, assigned the FBI Joint Task Force, composed of FBI agents and members of the Boerum City police force, to secure and investigate the scene. Janet Smith, a Boerum City police officer assigned to the 88th Precinct, and I patrolled the Fair and the surrounding area, questioning individuals we encountered about suspicious activity they may have witnessed.

At around 5:00 p.m., Officer Smith and I returned to our vehicle and proceeded to drive around the area, looking for suspicious activity. We noticed suspect Stephanie Silver, who wore a dark colored, hooded sweatshirt, walking rapidly away from the center of the Fair, with her head down and the hood pulled over her head. As she approached our vehicle, I pulled the car in front of Silver and into the driveway of the house Silver was about to pass. Officer Smith and I exited the vehicle, and I called out to Silver, "Hey wait." Officer Smith asked, "Are you coming from the block party?" Silver responded, "Yes." Officer Smith then asked, "Can we ask you some questions?" Silver responded, "About what?" I replied, "The bombing that occurred earlier." Silver stated, "I don't know anything about that" and immediately turned and ran in the opposite direction from where we had stopped our vehicle. Officer Smith and I pursued Silver on foot. As she was running away, I observed her toss a flip-phone from her sweatshirt pocket into the bushes along the sidewalk. The phone flipped open when it hit the ground. The entire interaction, before Silver fled, lasted about one minute.

I caught up to Silver, tackled her to the ground, and placed her under arrest. While I was cuffing Silver, Officer Smith retrieved from the bushes the abandoned flip-phone, which had flipped open to the "Recent Outgoing Calls" screen, displaying a 3-second phone call to an "unknown" phone number, placed at 2:59 p.m. Officer Smith inventoried the phone and placed it

in a sealed plastic bag. We then transported Silver to the FBI Task Force offices where Agent Melanie Montague took over the investigation. Silver remains in FBI custody awaiting arraignment.

Eric Johnson
SA Eric Johnson
August 25, 2018

FEDERAL BUREAU OF INVESTIGATION
302 - INVESTIGATIVE REPORT

August 26, 2018

Following the arrest of Stephanie Silver, who has distinctive blue hair, in connection with the bombing yesterday, and after Silver's statement that she lived at 594 Atlantic Place, in Boerum City, Boerum, I obtained and reviewed the surveillance footage from the pole camera outside 594 Atlantic Place. Since late January 2018, I had been leading an investigation of the Anti-Consumerist Brigade ("ACB") based on a tip from a former ACB member that the ACB may have been planning a violent demonstration and that some of its members were researching home-made explosive devices. As part of the investigation, a pole camera was used to surveil the residence of ACB leader George Hoyt, located at 594 Atlantic Place. Throughout the course of the investigation, I regularly reviewed footage taken from the pole camera. However, prior to August 26, I had not yet reviewed the footage taken on the day of the bombing.

Surveillance footage showed that at 7:25 a.m. on the morning of August 25, 2018, several individuals previously seen on earlier surveillance footage approached 594 Atlantic Place. Two of these individuals had been observed attending "meetings" at 594 Atlantic Place on multiple prior occasions. A blond-haired male with glasses, previously identified as Artie Edelman through DMV records connected with a white sedan bearing license plate number C54-X12, arrived with a previously observed blue-haired female in the same white sedan.

After parking the car directly in front of the residence and exiting the vehicle, both individuals walked around the car and opened its truck. Because of the pole camera's position, I could not see the contents of the trunk. After closing the trunk, both individuals walked toward the gate, each carrying what appeared to be dark, paper bags. I attempted to zoom in and sharpen the focus, but the camera could not capture the bags' contents. The blue-haired female reached into her pocket and pulled out a key, which she used to open the gate in front of the residence. After the two proceeded down the walkway, a male answered the door, and all three individuals disappeared from the camera's view. Four more individuals entered the house intermittently within the next thirty minutes. None carried anything.

At 7:55 a.m., four individuals exited the home and conversed outside the front door but still behind the gate. A few minutes later, a male with a goatee, previously identified as George Hoyt, exited the house, along with Edelman and the blue-haired female. Edelman and the blue-haired female each carried a backpack. Although this activity occurred behind the gate and was difficult to see, I zoomed in to capture Hoyt, who reached into his pocket and pulled out a small rectangular device. After pausing the frame and zooming in, I recognized the device as a flip-phone. Hoyt handed the device to the blue-haired female, who took the device, turned it over, held it for a few seconds, and then placed it in her pocket. After conversing for a few more minutes, the group exited the gate. At 8:00 a.m., all four individuals walked down one side of the street. Hoyt, Edelman, and the female with blue hair walked over to the white sedan and placed all their backpacks in the trunk.

At 8:02 a.m., Hoyt and Edelman appeared to say goodbye to the blue-haired female, after which they began walking down the street away from the center of town. The blue-haired female walked around to the driver's side of the sedan, entered the vehicle, and drove away.

Melanie Montague
SA Melanie Montague
FBI Special Agent
August 26, 2018

FEDERAL BUREAU OF INVESTIGATION
302 - INVESTIGATIVE REPORT

AUGUST 26, 2018

FEDERAL BUREAU OF INVESTIGATION 302 - INVESTIGATIVE REPORT

On August 26, 2018, Special Agents with the Federal Bureau of Investigations arrested and interviewed George Hoyt, the alleged leader of the Anti-Consumerist Brigade ("ACB"), about his involvement in the Boerum Street Fair bombing. Hoyt's arrest followed the arrest of Stephanie Silver, an alleged ACB member, also charged in connection with the bombing. Silver, who has distinct blue hair, matches the description of an individual captured in video footage from a pole camera previously installed by the FBI in connection with a separate investigation of the ACB. On August 25, 2018, the arresting Task Force officers recovered a flip-phone that had been abandoned by Silver moments before the officers seized and arrested her. The phone displayed a 3-second outgoing call made within minutes of the bombing. Surveillance from the pole camera on August 25, 2018 shows Hoyt handing Silver an object, which appears to be the flip-phone secured during Silver's arrest. A forensic examination of the remains of the bomb recovered from the Boerum Municipal Fountain determined that it had been activated remotely using a mobile phone.

On August 26, 2018, after concluding that Hoyt conspired with Silver to plant and detonate the bomb at the Boreum Street Fair, FBI Director Nicholas Wall ordered Special Agents Eric Johnson and Michael Clinton to arrest Hoyt. When Special Agent Johnson and Special Agent Clinton arrived at Hoyt's home, at 594 Atlantic Place, Boerum City, Boerum, they found Hoyt sitting in the kitchen reading on his laptop a Boerum Gazette online article that recapped the events of the bombing. The agents identified themselves as FBI agents and, after observing twisted wires, extra burner phones, and empty battery packs on the kitchen table, they arrested Hoyt and administered *Miranda* warnings. Hoyt, who agreed to speak without counsel present, admitted that he is an ACB participant, that his home is the primary meeting place for ACB members, and that he organized the August 25th bombing.

Melanie Montague
SA Melanie Montague
August 26, 2018

POLE CAMERA VIDEO LOG

Name:	**Melanie Montague**	**Dates:**	1/23/18 – 08/25/18
Title:	**Special Agent with Federal Bureau of Investigation**	**Address:**	594 Atlantic Place, Boerum, NY 11201

Date	Time In	Time Out	Description	Agent Initials
01/23/2018			- On January 22, 2018, I coordinated with Pro Ed to install a pole camera located at 591 Atlantic Place, Boerum, NY 11201 facing the entryway at 594 Atlantic Place ("Subject Premises") - The Subject Premises has a decorative three-foot split rail fence with a gate and a large tree that partially obstructs the entryway	*MM*
02/03/2018	15:34	18:08	- At 15:34, observed a man with a goatee using a key to open both the gate and the front door of the Subject Premises for several unidentified individuals - At 15:50, a white sedan, license plate number C54-X12 ("white sedan") driven by an unidentified blonde-haired male with glasses ("UBHM"), arrived at the Subject Premises - An unidentified blue-haired female ("UBHF") also emerged from the passenger side of the white sedan - Seven other unidentified individuals, four males and three females, arrived at the Subject Premises beginning at 16:34 - The individuals were admitted into the house by the man with the goatee. They remained inside the house for approximately two hours, with the same seven unidentified individuals departing the house between 17:50 to 18:08 - Although the area was dimly lit, the UBHM and UBHF who arrived in the white sedan, were the last to leave the house at 18:08	*MM*
02/21/2018	19:45	23:55	- Since the initial footage, we have confirmed through records that the man with the goatee is George Hoyt. County Clerk's Office records indicate that the Subject Premises is owned by Jacob Leser. Utilities and phone records are registered to George Hoyt. From Hoyt's photograph on file with the DMV, the man with the goatee is Hoyt and he appears to be renting the house at this time	*MM*

			- We also determined through DMV records, that the white sedan driven by the UBHM in the previous footage on February 2, 2018 is registered to Artie Edelman - At 19:45, both Artie Edelman and the UBHF arrived in the white sedan - UBHF was carrying a dark brown crossbody duffle bag - At 20:15, four males and three females sharing similar characteristics as the individuals recorded in footage from February 2, 2018 arrived at the house - At 22:45, the four males and three females exited the residence - At 22:05, Artie Edelman exited the home and drove away in the white sedan - The UBHF was not observed leaving the house	
02/22/2018	7:55	9:20	- At 7:55 a.m., I observed the UBHF leaving the residence	*M.M.*
03/03/2018			- No significant activity	*M.M.*
03/06/2018	17:00	17:03	- The UBHF was seen walking into the camera's view carrying large shopping bags - I was able to identify one bag as having a large green logo with white writing labeled "MARKET" - Also, a large loaf of bread stuck out from one of the bags - The UBHF pulled out a key and opened the gate in front of the Subject Premises - The UBHF walked down the pathway and entered the residence	*M.M.*
03/10/2018	14:38	17:09	- At 14:38, the white sedan arrived at the Subject Premises and parked in front of the house - Artie Edelman exited from the driver's side of the car and the UBHF exited from the passenger's side - Between 14:46 and 17:09, five more unidentified individuals, two females and three males, arrived at the house - At 17:09, all seven individuals exited the home - Four of the individuals, including Artie Edelman and the UBHF, left the Subject Premises together in the white sedan - The other three individuals parted ways, walking out of the camera's frame	*M.M.*

03/23/2018	17:20	17:22	- At 17:20, the UBHF pulled out a key and opened the gate in front of the house, walked up to the entryway to the front door of the house, and knocked on the door and/or rang the doorbell - George Hoyt opened the door and stepped onto the porch, holding a small, green drawstring bag - Although the camera was partially blocked by the tree, Hoyt was seen handing the green bag to the UBHF who then left the Subject Premises at 17:22 and walked out of the camera's frame, heading toward the intersection of Atlantic Place and Baltic Road	*M.M.*
04/04/2018	16:22	20:04	- At 16:22, the UBHF arrived at the Subject Premises in the white sedan driven by Artie Edelman - The pair entered the house at 16:23 - The pair was seen leaving the house together in the white sedan at 19:49	*M.M.*
04/13/2018	17:05	22:50	- At 17:05, three individuals appeared in the camera's line of sight - Each of these individuals was carrying polypropylene letter sized folders in an assortment of colors - When two of the individuals stepped directly in front of the camera, I observed the folders were clear and had various charts in them facing outwards - I attempted to adjust the camera and zoom in to identify the words written on the charts, but could not make out the words - At 19:10, the same white sedan arrived outside of the Subject Premises - Artie Edelman and the UBHF exited the vehicle and entered the house - At 20:10, Artie Edelman exited the home, entered the white sedan, and drove away - At 22:50, three unidentified individuals left the Subject Premises, two of whom were carrying several folders each - The UBHF remained in the Subject Premises	*M.M.*
04/19/2018	8:55	9:15	- At 8:55 a.m., I observed the UBHF leaving the house wearing a dark sweatshirt that appeared to be several sizes too large - No other significant activity	*M.M.*

04/30/2018	14:45	18:20	- No significant activity	*MM*
5/01/2018	16:25	16:28	- At 16:25, I observed the UBHF holding an umbrella in one hand above her head - In the UBHF's other hand, I identified her holding a shopping bag with a logo reading "MARKET"	*MM*
05/05/2018	17:15	18:55	- At 17:15, four individuals arrived in the white sedan at the Subject Premises including the UBHF, Artie Edelman, and two passengers seated in the back of the vehicle. All four individuals exited from the car and walked around to the back where Artie Edelman opened the trunk and began passing large boxes to the other individuals - The three large cardboard boxes were approximately 12 inches wide by 17 inches long by 10 inches high in unidentifiable packaging - Each individual gripped the bottom of the boxes to lift them and pass them to one another - Because of the way they grabbed hold of the boxes, they appeared to be heavy and filled - All boxes were closed shut and I could not identify any contents - The four individuals walked through the open gate and down the walkway into the house - They all exited the house at approximately 18:55, entered the white sedan, and left the area. They did not have the large boxes with them when they left.	*MM*
05/18/2018			- No significant activity	*MM*
05/30/2018	20:15	22:20	- At 20:15, Artie Edelman and the UBHF arrived in the white sedan and entered the house. - Within five minutes, three other individuals arrived - All of them, including Artie Edelman and the UBHF, were wearing dark t-shirts, possibly dark green - Although the t-shirts appeared to have logos or printing, I was unable to read what they said either because the individuals were facing away from the camera or were wearing open jackets that obscured the logos on their clothing - All of the individuals entered the home and left at the same time at approximately 22:13. They	*MM*

			proceeded to walk down Atlantic Place toward Baltic Road. - Artie Edelman and UBHF also left the Subject Premises in the white sedan	
06/05/2018	21:05	23:00	- At 21:05, the UBHF arrived at the Subject Premises carrying a dark brown crossbody duffle bag - She was not observed leaving.	*M.M.*
06/18/2018	8:05	9:55	- At 8:05 a.m., I observed the UBHF leaving the house and entering what appeared to be an Uber as identified by the "T" as the first letter of the license plate and the large taped sign on the car	*M.M.*
06/22/2018	16:30	17:45	- At 16:30, I observed a large crowd of individuals congregating outside of the Subject Premises' fence where they stood speaking with one another for approximately 5 minutes - During this time, many of them exchanged papers and observed each other's notepads - At one point, an unidentified male individual passed his notepad to the UBHF who proceeded to scribble some notes on the pad before returning it back to the male. - At 16:40, George Hoyt appeared, used a key to open the gate, and let all of the individuals into the house - Between 17:26 and 17:41, all of the individuals except for Hoyt exited the house	*M.M.*
07/05/2018			- No significant activity	*M.M.*
07/18/2018	19:00	21:10	- At 19:00, five individuals arrived at the Subject Premises - At 19:15, Artie Edelman and UBHF arrived in the white sedan. All seven individuals were wearing dark green t-shirts with different colored writings and expressions - One individual standing directly in front of the camera was wearing a shirt that read "STOP BEING A CUSTOMER. BE A HUMAN" - The UBHF was wearing a shirt with large white font that read "YOU ARE NOT WHAT YOU OWN" - I could not make out the rest of the specific quotes, but I identified them as being different sized fonts and lengths	*M.M.*

			- The UBHF pulled out a key and opened the gate in front of the house. The other individual entered after her - At 20:54, three individuals exited the house, walking out of the cameras frame - At 21:05, the remaining four individuals, including Artie Edelman and UBHF, exited the home and drove away in the white sedan	
07/30/2018	19:00	21:38	- At 19:00, five individuals arrived at the Subject Premises - Three of these individuals were observed carrying draw string bags - At 19:15, Artie Edelman and UBHF arrived in the white sedan - The UBHF removed a backpack from the trunk, put it on her back, pulled out a key from her pocket, and used the key to open the gate in front of the residence - At 20:51, two individuals exited the home and headed in a direction away from the center of town - At 21:38, the remaining five individuals, including Artie Edelman and the UBHF, exited the house and got into the white sedan	*MM*
08/12/2018	17:10	21:45	- At 17:10, I observed Artie Edelman and UBHF arriving at the Subject Premises in the white sedan - Artie Edelman grabbed what appeared to be a box of pencils and a package of paper from the trunk - While Artie Edelman was facing the vehicle out of the sight line of the camera, the UBHF unraveled a large rolled up piece of paper to reveal a blueprint or map of a location - Although I could not observe many details from the video, from a distance the blueprint showed what looked like large buildings, and a large circle around one spot towards the top right of the map - The UBHF pulled out a key and opened the gate in front of the Subject Premises - Both individuals entered the house carrying large bags - Artie Edelman left the house at 20:55. The UBHF was not observed leaving	*MM*
08/13/2018	10:02	11:00	- At 10:02 a.m., the UBHF left the house carrying a small box. She entered what I observed to be	*MM*

			an Uber as identified by the "T" as the first letter of the license plate and the large taped sign on the car	
8/24/2018	9:00	13:00	- At 9:00 a.m., Artie Edelman and the UBHF arrived at the Subject Premises in a white sedan - Each individual exited the vehicle carrying dark paper bags - The UBHF reached into her pocket, pulled out a key, and opened the Gate to the Subject Premises - At 9:45 a.m., four other individuals arrived at the Subject Premises - Each individual arrived carrying similar dark paper bags - George Hoyt opened the gate and led the four individuals through the front door - At 12:55, all individuals exited the Subject Premises empty handed - Artie Edelman and the UBHF left in the white sedan - A black sedan arrived at 12:58 - The four other individuals entered a black sedan and left the scene	*MM*
08/25/2018	7:25	8:00	- At 7:25 a.m., Artie Edelman and the UBHF exited the white sedan, which was parked directly in front of the house - Both individuals walked around the car and opened the trunk. Based on the pole camera's position, I could not see inside the trunk - After closing the trunk, they walked towards the gate each carrying dark paper bags - I attempted to zoom in and sharpen the clarity of the recording, but the camera did not capture the contents of the bags - The UBHF reached into her pocket, pulled out a key, and opened the gate to the Subject Premises - After walking down the walkway, an unidentified male came to the door and the individuals disappeared from the camera's view - Between 7:30 and 7:45 a.m., four more individuals entered the house. They carried nothing with them - At 7:55 a.m., while still behind the gate, the same four individuals exited the house and engaged in conversation with George Hoyt. Artie Edelman and the UBHF exited the	*MM*

			Subject Premises. Both Artie Edelman and the UBHF were carrying backpacks - Still behind the gate and difficult to see, I zoomed in. On the video, George Hoyt can be seen reaching into his pocket and pulling out a small rectangular device. I paused the frame, zoomed in and recognized this as a flip-phone - He then handed the device to the UBHF, who took it, turned it over, held it for a few seconds, then placed it in her pocket - After five minutes of conversation, the group exited the gate and headed towards the intersection of Atlantic Place and Baltic Road - At 8:00 a.m., four individuals walked down one side of the street. Hoyt, Artie Edelman and the UBHF walked over to the white sedan and placed all their backpacks in the trunk - At 8:02 a.m., Hoyt and Artie Edelman appeared to be saying goodbye to the UBHF. The two males began walking down the street in the direction away from the center of town - The UBHF walked around to the driver's side of the white sedan, entered the vehicle, and drove away	


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STREET FAIR
food | crafts | music | fun
AUGUST 25 @ 12 p.m.
JORALEMON HISTORICAL VILLAGE
Featuring
Performances by:
Mari Trenta &
Destiny Ray!

By Meg Nelson August 26, 2018

The Boerum Gazette

Giving you the news as it is

Bomb Goes Off in Historical Village

A bomb partially exploded yesterday during the Boerum Street Fair in the Joralemon Historical Village. The day was beautiful and the sun was shining. However, around 3 p.m. an explosive device partially detonated inside the Boerum Municipal Fountain, destroying the World War II Veterans Memorial statue. Thankfully, nobody was seriously injured but there was thousands of dollars worth of damage to federal property.

The Boerum Police Chief Robert Fullerton stated that it is speculated that the bombing is linked to the infamous group, the Anti-Consumerist Brigade, also known as the ACB. The ACB is a radical group based on the sociopolitical ideology that is diametrically opposed to consumerism and buying of material possessions.

The ACB has been responsible for protests at similar events throughout the state over the last five years. Although the group has not been violent to this extent in the past, its intensity has been increasing over the last year.

It is likely that the ACB was protesting the hundreds of booths from local shops and large brand companies. Additionally, the event had several corporate sponsors, something that the ACB often protests. There was also a small entry fee to the concert at the end of the fair, with proceeds being given back to the vendors.

After the bombing, Chief Fullerton said the Department was on heightened alert and trying to secure all local areas. Police officers were canvassing the area, questioning locals to gather information and take witness statements.

This is a developing story.

By Rachel Cedeno September 5, 2018

The Boerum Gazette

Giving you the news as it is

Bombers Get Indicted

GEORGE HOYT, who is reputed to be the leader of the notorious ACB (Anti-Consumerist Brigade), was indicted yesterday in Boerum, along with STEPHANIE SILVER, on Federal charges of conspiracy to detonate an explosive device in the Boerum Municipal Fountain, destroying the World War II Veterans Memorial Statue on August 25, 2018.

According to Lionel Hutz, the United States Attorney for the Eastern District of Boerum, the indictment filed yesterday was the culmination of an intensive three-month investigation conducted by the FBI's Joint Terrorism Task Force, with the assistance of the local Boerum Police Department. A rep from the Task Force stated: "We realized that we had a major foreign terrorist operation dedicated to spreading terror and disruption in our peaceful city and so we started looking under every rock in an effort to bring these perpetrators to justice."

Hoyt, who was arrested on August 26, 2018, gave a full confession to the arresting agents of the FBI's Joint Terrorism Task Force, bragging that he was responsible for constructing the bomb and organizing the attack on the Boerum Street Fair. Hoyt, who refuses to implicate any of his alleged co-conspirators, is expected to enter a plea of guilty.

Silver is denying all involvement in the bombing attempt and has retained world famous criminal defense attorney Jackie Chiles, who has already indicated that she will move to suppress all evidence obtained during the course of Silver's arrest.

The charges provide for a sentence of up to life in prison, said Gloria Cortez, the Federal prosecutor handling the case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA Cr. No. 18-3023

- against -

STEPHANIE SILVER,

Defendants.
----------X
January 14, 2019

TRANSCRIPT OF HEARING ON MOTION TO SUPPRESS
Before: Hon. Robert Pitler

APPEARANCES:

For the United States of America: Gloria Cortez
Assistant United States Attorney
222 Cadman Road
Boerum City, Boerum 11201

For Defendant Stephanie Silver: Jackie Chiles
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COURT: All right. Counselors, this is the matter of United States v. Stephanie Silver, Docket No. 18-CR-3023. Counsel, is everyone ready to proceed?

CHILES: Yes, Your Honor, ready for Defendant.

CORTEZ: Ready for the Government, Your Honor.

Argument on Continuous Seizure Issue

COURT: Defendant has filed a motion to suppress, raising three issues. I've read your briefs. Let's start with the flip-phone. Ms. Chiles, please begin.

CHILES: Thank you. As you know, on August 25, 2018, a bomb was partially detonated at the Boerum Street Fair. Afterward, while canvassing the area, officers spotted Ms. Silver. They blocked Ms. Silver's path with their car and started questioning her. With the car blocking the sidewalk, Ms. Silver had no choice but to stop walking and answer their questions. For approximately one minute, she remained in a fixed position and answered three questions. She then turned and proceeded to leave the scene. The Government alleges that as she ran away, she discarded a flip-phone that had been in her pocket. The Government wants to present evidence obtained from the phone they allege connects Ms. Silver to the bombing. However, we ask the court to recognize the theory of continuous seizure and find that the officers seized Ms. Silver at the time of their initial stop and interaction with her. That seizure was illegal, because at the time, the officers lacked

probable cause or even reasonable suspicion, and Ms. Silver's subsequent flight neither negated the initial illegal seizure nor provided the necessary probable cause to justify the seizure of the phone. Because the officers violated Ms. Silver's Fourth Amendment rights when they seized the phone, the Court should suppress any evidence from the phone as fruit of the poisonous tree.

COURT: Ms. Chiles, why does it matter whether I recognize a continuous seizure doctrine?

CHILES: Because, Your Honor, if the seizure of Ms. Silver was continuous, starting with the initial encounter and continuing even after she ran, then anything obtained through the course of the seizure is fruit of the poisonous tree.

COURT: Ms. Cortez, how do you respond?

CORTEZ: Your Honor, the officers obtained the phone after Defendant ran from them and discarded it, creating probable cause for a lawful seizure. The continuous seizure doctrine is inconsistent with well-established Fourth Amendment jurisprudence, including the Supreme Court's decision in *California v. Hodari D.*, which held that a seizure requires - either by show of authority or by physical force - actual termination of a suspect's freedom to move. Under the Supreme Court's definition of "seizure," Defendant was not seized when the officers made initial contact with her because

her freedom to move was not restrained until after she ultimately fled.

COURT: Ms. Chiles, is the continuous seizure doctrine inconsistent with well-established Fourth Amendment precedent?

CHILES: No, Your Honor. *Hodari D.* held that an individual is seized upon application of physical force or upon submission to an officer's show of authority. The Supreme Court never clearly defined what qualifies as sufficient submission to authority. It's our position that submission to authority includes a continuous seizure from the initial interaction. In *United States v. Mendenhall*, the Supreme Court held that seizure occurs when a reasonable person believes that they are unable to leave an encounter with law enforcement officers. Here, when the officers blocked Ms. Silver's path on the sidewalk with their car and began asking her about the bombing, they seized her. And because the seizure was continuous, her subsequent flight didn't make her "unseized."

COURT: Ms. Chiles, how exactly did Defendant submit to the show of authority?

CHILES: She submitted to authority when she stopped and remained in a fixed position for a full minute and voluntarily responded to three of the officer's questions.

COURT: Ms. Cortez, does the Government concede that the police did not have adequate suspicion to stop her?

CORTEZ: Yes, Your Honor.

COURT: And you admit that based on the police conduct here, a person would not have felt like they could leave?

CORTEZ: Yes, Your Honor, but under *Hodari D.* a suspect not feeling free to leave is "a necessary, but not a sufficient, condition for a seizure."

COURT: Okay, but the sole issue here is whether her temporary compliance was a seizure?

CORTEZ: That's correct.

COURT: Ms. Chiles, is there any authority to support your position?

CHILES: Your Honor the continuous seizure doctrine has been recognized, either explicitly or implicitly, by the First Circuit, in *United States v. Camacho*, the Tenth Circuit, in *United States v. Morgan*, and the D.C. Circuit, in *United States v. Brodie*, just to name a few.

COURT: Ms. Cortez, what's the Government's position here?

CORTEZ: It's the Government's position that momentary compliance with an officer's order does not rise to the level of "submission" under the Fourth Amendment. Several Circuits agree. *United States v. Baldwin*, from the Second Circuit, *United States v. Hernandez*, from the Ninth Circuit, and *United States v. Washington*, from the D.C. Circuit, all support our position. Furthermore, the Supreme Court's plurality opinion in *Florida v. Royer* stated in another context that officers do not seize a person merely by approaching

the person on the street and asking the person to answer questions. And as the Second Circuit reaffirmed in *Baldwin*, "an order to stop must be obeyed" for there to be a seizure. It follows that complete compliance is necessary. Answering three preliminary questions before immediately fleeing just isn't enough.

COURT: Go on, Counselor.

CORTEZ: Defendant never submitted to the officers' show of authority. In *United States v. Huertas*, the Second Circuit indicated that courts should consider whether the defendant let the "opportunity to flee" pass. That didn't happen here. When an officer approaches someone and asks them a question, they can either refuse to answer questions and go about their business or they can comply with the officer's request. Here, Defendant didn't do either. She ran. As the Supreme Court said in *Illinois v. Wardlow*, "Flight, by its very nature, is not going about one's business; in fact, it is just the opposite." So, the officers may have attempted to seize Defendant, but they failed. And a failed seizure isn't a seizure, Your Honor.

COURT: Thank you, counsel. Anything else, Ms. Cortez?

CORTEZ: Yes, Your Honor. The Court should also reject Defendant's position as a matter of policy. As the Ninth Circuit noted in *Hernandez*, the continuous seizure doctrine would encourage suspects, "after the slightest contact" with law enforcement, to flee, discard evidence, and then argue that they were illegally

seized. Furthermore, the exclusionary rule's purpose is to deter police misconduct, and there was no police misconduct to deter here. The officers were patrolling the area, questioning citizens about a bombing. That kind of police conduct should be incentivized, not deterred. As *Herring v. United States* indicated, courts should apply the exclusionary rule only where the benefits of deterrence outweigh the cost of suppression. And here, they just don't.

Argument on Pole Camera Issue

COURT: Okay, Counselors. Let's move on to the pole camera issue. Ms. Cortez, why is the Government seeking to admit this evidence?

CORTEZ: To demonstrate Defendant's involvement with the group responsible for the bombing, the Anti-Consumerist Brigade, or "ACB," by connecting her with the residence at 594 Atlantic Place in Boerum, where she lived with the ACB's leader, George Hoyt.

COURT: And Ms. Chiles, on what grounds do you seek to exclude the pole camera footage?

CHILES: Your Honor, the FBI's warrantless video surveillance of my client's residence violated her Fourth Amendment rights. The Government used a technological device to track my client all day, every day, for approximately eight months. That constant tracking was a huge invasion of Ms. Silver's privacy. In *Carpenter v. United States*, the Supreme Court strengthened Fourth Amendment protections in the era of mass surveillance. As pole cameras become

more technologically sophisticated and more commonplace, it's necessary to establish a bright-line rule, at least for individuals living in residential neighborhoods.

COURT: Thank you, Ms. Chiles. Ms. Cortez, why shouldn't the Government be required to obtain a warrant before engaging in twenty-four-hour surveillance of the exterior of someone's home?

CORTEZ: Your Honor, the majority of the circuits that have addressed the use of pole cameras, including the Fourth, Sixth, Seventh, Eighth, and Tenth circuits, all agree that a warrant isn't required. Applying the standard from *United States v. Katz*, Defendant did not subjectively have an expectation of privacy in the public area outside the home, and any expectation she may have had is not one society is prepared to deem reasonable. Defendant willingly shared with the public her activities captured on the pole camera. Anyone walking by the home could have seen what the camera captured.

COURT: Okay, I understand that the Government is not challenging Ms. Silver's standing to raise this issue. Is that right?

CORTEZ: Yes. We're challenging only Defendant's argument that the Government must obtain a search warrant before installing a pole camera.

COURT: All right. Ms. Chiles, why should I reject the holdings from these other circuits?

CHILES: As an initial matter, most of the cases that the Government relies on precede *Carpenter*. And even prior to *Carpenter*, in *United States v. Jones*, where police attached a GPS tracking device to the defendant's vehicle to monitor his movements, the Supreme Court acknowledged that an individual may sometimes be entitled to Fourth Amendment protections even while traveling on a public thoroughfare. So, *Jones* reflects a pre-*Carpenter* view that prolonged surveillance, even in a public place, may intrude on a person's reasonable expectation of privacy in their physical movements. In light of *Carpenter*, it now seems clear that aiming a pole camera directly at a residence is akin to monitoring a person's location with a tracking device, and therefore requires a warrant.

COURT: But even after *Carpenter*, several district court cases have found that pole cameras don't require warrants, right? In its brief, the Government cites *United States v. Kelly* and *United States v. Kubasiak*, among others.

CHILES: Yes, Your Honor. But these courts have read *Carpenter* too narrowly. They've ignored the inherent similarities between cell phone data and information obtained from pole cameras. And they have mistakenly found that the cameras don't reveal much more than what any passerby can see in the neighborhood where the monitored house is located. Given the new and ever-increasing sophistication of the technology, pole cameras are being used by law enforcement

to acquire deeply personal information, comparable to the tracking information at issue in *Carpenter*, and the images caught on video show much more than a casual passerby could observe.

COURT: Okay, but didn't the Court in *Carpenter* restrict its holding to cell phone data?

CHILES: Not really, Your Honor. *Carpenter* stands for the proposition that individuals have a reasonable expectation of privacy in their physical movements. Pole camera surveillance implicates that expectation of privacy, and the modern pole camera's capabilities distinguish it from the "conventional surveillance techniques" that the Court in *Carpenter* arguably exempted from its holding.

COURT: Now, just to be clear, you're not arguing that the Government trespassed by looking into the residence or that the pole camera was within the home's curtilage, right?

CHILES: No, Your Honor.

COURT: Are you arguing that there is a reasonable expectation of privacy on a public sidewalk?

CHILES: Not always, Your Honor. But if I may, I would like to draw your attention to *United States v. Moore-Bush*, where the District Court rightly found that, in light of *Carpenter*, the defendants had an "objectively reasonable expectation of privacy" in the activities outside of the home during the eight-month period that the home was under surveillance. Ms. Silver similarly had an

objectively reasonable expectation of privacy in the activities outside the home. And she also had a subjective expectation of privacy, because she chose to stay in a quiet, residential, gated home.

COURT: Are you arguing that a warrant is required whenever the Government wants to install a pole camera, even, for example, in a commercial area?

CHILES: Your Honor, that is beyond the scope of this case. However, warrantless installation of a device with advanced capabilities in a residential area, like the one in this case, violates the Fourth Amendment.

COURT: Yet, this constant surveillance, as you describe it, captured only activities outside of the house. How is this different from an officer parking outside someone's home or a neighbor observing the residence?

CHILES: Although human surveillance may be able to capture similar movements, it can't track a person's activities to the same extent. With a pole camera, the Government can zoom in, freeze frames, and view multiple individuals at once. Agents can view the footage remotely at will. Your Honor, the Supreme Court has shown an increased sensitivity to driveways and front doors and recognized the area immediately outside of a residence as a protected space, deeming it part of one's home. A ruling permitting constant

surveillance of a person's walkway without a warrant would be inconsistent with the Court's decisions.

COURT: Thank you, Ms. Chiles. Ms. Cortez, why should this Court continue to follow the pre-*Carpenter* cases? Hasn't *Carpenter* changed the landscape?

CORTEZ: Your Honor, the Court in *Carpenter* narrowly limited its holding to cell site location information or "CSLI" and explicitly stated that the decision did not "call into question conventional surveillance techniques and tools, such as security cameras." The use of pole cameras clearly constitutes "conventional surveillance techniques and tools."

COURT: Okay, so do any cases in the Fourteenth Circuit address whether the warrantless use of pole cameras violates the Fourth Amendment?

CORTEZ: No, Your Honor. This is an issue of first impression in this Circuit. But in *United v. Knotts*, the Supreme Court held that there is no reasonable expectation of privacy in movement on public roadways. And, consistent with *Knotts*, most circuits have held that pole cameras do not violate a person's reasonable expectation of privacy because they monitor activity that the public could view. In light of the Tenth Circuit's decision in *United States v. Cantu* and the Sixth Circuit's decision in *United States v. Houston*, among many others, the Government contends that no warrant was required here.

COURT: But couldn't it be argued that because Defendant chose to stay in a home surrounded by a fence, with a gated entryway and a tree partially obstructing the front door, she had a reasonable expectation of privacy?

CORTEZ: Your Honor, the gate and fence surrounding the property were merely three-feet high, a decorative split-rail fence and see-through gate, making it easy to see inside the property. This was not a fence designed for privacy; indeed, the property was open to public view. Moreover, while the tree may have partially obstructed the view of the entryway to the home, the entryway was still in plain view. Thus, consistent with the Supreme Court's holding in *California v. Ciraolo*, any objects obstructing the view of the property were insufficient to "preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible."

COURT: I see, but in light of *Moore-Bush*, why shouldn't we reevaluate whether use of pole cameras constitute a Fourth Amendment search after *Carpenter*?

CORTEZ: While *Moore-Bush* may be the most recent decision, it shouldn't control here. *Moore-Bush* was wrongly decided. The Government urges this Court to interpret *Carpenter* as the Supreme Court intended – a decision limited to the issue of CSLI, which is wholly distinguishable from pole camera evidence. Unlike CSLI, the footage here was not "detailed, encyclopedic, and effortlessly

compiled." Moreover, unlike cell phones, which follow their owners "beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales," the pole camera has a limited viewing radius and only captures what happens outside the home.

COURT: Okay, thank you counsel. Let's move on. Ms. Chiles, you are also moving to suppress statements made by the defendant after her arrest. Which statements do you want suppressed?

CHILES: Those from the exchange during booking when Agent Montague repeatedly asked my client where she lived.

COURT: All right, Ms. Cortez, I understand that Agent Montague is prepared to testify about this exchange.

CORTEZ: Yes, Your Honor. The Government calls Special Agent Melanie Montague to the stand.

The witness is sworn.

Direct Examination of Melanie Montague by Ms. Cortez Regarding Routine Booking Question Exception Issue

Q. Special Agent Montague, please state your full name for the record.

A. Melanie Montague.

Q. Agent Montague, how are you currently employed?

A. I am a Special Agent with the Federal Bureau of Investigation and I'm currently assigned to the FBI's Joint Terrorism Task Force.

Q. How long have you been a Special Agent?

A. Over 10 years as of last January.

Q. And when did you become assigned to the Joint Terrorism Task Force?

A. Almost two years ago. December 2016.

Q. Agent Montague, could you briefly describe what your duties and responsibilities are as a member of the Task Force?

A. My duties and responsibilities include investigating crimes of domestic terrorism and enforcing federal laws.

Q. Now, Agent Montague, over the course of your career in the FBI, approximately how many arrests have you made?

A. I have made approximately five hundred arrests

Q. Directing your attention to August 25, 2018, did there come a time that you and the Task Force became involved in an investigation of a possible terrorist act?

A. Yes. At approximately 3:05 p.m., on August 25, 2018, the Task Force received word that a device had exploded in the Boerum Municipal Fountain, destroying the World War II Veterans Memorial statue.

Q. Was anyone injured?

A. No.

Q. What did you do when you received word of this explosion?

A. As the case agent in charge, I immediately dispatched Task Force officers to the scene to determine the cause of the explosion. They determined that there was nothing faulty in the fountain that

could have caused the explosion, but they recovered pieces of a backpack, cell phone and bomb residue from the fountain.

Q. What happened after that?

A. Immediately after the explosion occurred, Task Force officers began interviewing individuals on the streets in the area surrounding the fountain. Two officers stopped to question a young woman in the vicinity of the fountain. While speaking to the officers, the woman suddenly fled. After a short chase, the officers apprehended her and recovered a flip-phone that she had tossed into the bushes as she ran. She was then placed under arrest.

Q. After she was placed under arrest, where was Ms. Silver taken?

A. The officers transported her to the Task Force headquarters for processing and interview.

Q. Can you please explain what the processing of an arrest entails?

A. Certainly. First, the suspect must be fingerprinted, and any evidence seized from the suspect must be vouchered and safeguarded. At the time of fingerprinting, the officer obtains routine pedigree information, such as name, address, date of birth, telephone numbers, place of employment, etc. After printing the suspect and completing the pedigree form, the officer interviews the suspect to obtain information that might help the investigation. Finally, the case agent prepares the Complaint prior to the arraignment before the magistrate judge. It’s a lot of paperwork. (Laughs.)

Q. Agent Montague, when defendant Stephanie Silver was brought to the Task Force offices on August 25, 2018, was she processed in the manner you just described?

A. Yes.

Q. And who did the processing?

A. I did.

Q. Tell us what you did to process Ms. Silver.

A. First, I vouchered the cell phone that had been recovered from the bushes; then she was fingerprinted; I obtained pedigree information from her; and then I placed her in one of our interview rooms for questioning.

Q. And after processing the defendant did you conduct the interview?

A. Yes.

Q. Now, you said you obtained pedigree information from the defendant. Can you describe what was said?

A. Of course. First, I asked her for her full name. She responded, "Stephanie Silver." I then asked where she lived. She said, "I stay at my mom's. She's at 25 St. Anne's Street, over in Clinton City." Since that really wasn't responsive to my question, I asked again where she lived. I said, "Okay, you stay with your mom sometimes, but is that where you live? Is that the only place you live?"

Q. And how did she respond?

A. She said, "I also stay sometimes at 594 Atlantic Place in Boerum City but, I stay at my mom's too."

Q. Thank you Agent Montague. No further questions, your Honor.

Cross-Examination of Melanie Montague by Ms. Chiles Regarding Routine Booking Question Exception Issue

CHILES: Agent Montague, when you questioned my client, Stephanie Silver, she was already under arrest, right?

A. Yes.

Q. And you questioned her in a holding cell?

A. When you refer to questioning, what are you asking?

Q. When you asked her about her address, you were in a holding cell, yes or no?

A. No. I obtained her pedigree information while another agent was taking her fingerprints. We don't do that in the holding cells with the other prisoners.

Q. Well Agent, do you dispute that my client was under arrest, in handcuffs, and not free to go when you questioned her.

A. No, counselor. She was under arrest for suspected terrorist activity, so there was no way she was free to go.

Q. And before you started questioning her, did you advise her of her *Miranda* rights?

A. I gave her the *Miranda* warnings as soon as I took her to the interview room and before anyone started questioning her.

Q. Isn't it true Agent Montague, that you did not advise my client that she had the right to remain silent and not answer your questions when you asked her where she lived?

A. Well, I was just gathering routine pedigree information, I wasn't . . .

Q. Yes or no, Agent Montague, did you advise her of her *Miranda* rights, before asking her where she lived?

A. No. I did not. But . . .

CORTEZ: Objection Your Honor. Counsel is badgering the witness. She should be allowed to answer the questions without being cut off.

COURT: Counsel, let the witness answer your questions, please.

Q. Agent Montague, prior to the incident at the Boerum Street Fair, you had been investigating members of the Anti-Consumerist Brigade, or the ACB, since January 2018, right?

A. Yes.

Q. And one of the reasons you were investigating the ACB is because an informant told you that ACB members were researching how to make explosive devices at home?

A. That's one of the reasons, yes.

Q. And as part of the investigation, you and other agents established video surveillance of a residence at 594 Atlantic Place in Boerum City?

A. Yes.

Q. And this surveillance began in late January 2018 and continued until August 25, 2018, the date of the Street Fair explosion, right?

A. That sounds about right.

Q. And you and other agents repeatedly observed a female subject with blue hair entering and leaving that residence?

A. Yes, we did.

Q. And Agent Montague, prior to August 25, 2018, had you or the other Task Force agents been able to identify the female with the blue hair?

A. No. We had no way to put a name to the individuals we saw coming and going at 594 Atlantic Place, except for George Hoyt, who was renting the house at that location, and another male who we identified through his vehicle registration. Also because of the location of the pole camera, we could not see clearly the facial characteristics of the individuals captured on the video.

Q. Agent Montague, on August 25, 2018, when my client was brought to the Task Force office, and you first observed her, what color was her hair?

A. It was blue.

Q. I have nothing else for this witness, your Honor.

Re-Direct Examination of Melanie Montague by Ms. Cortez Regarding Routine Booking Question Exception Issue

COURT: Any redirect, Ms. Cortez?

CORTEZ: Briefly, your Honor.

Q. Agent Montague, you testified that on August 25, 2018, you processed the defendant's arrest?

A. I did.

Q. When you questioned the Defendant while she was being fingerprinted, were you asking her the same type of routine pedigree questions that would be asked of anyone placed under arrest?

A. Yes, of course.

Q. And where someone lives is always part of a routine pedigree inquiry. Correct?

A. Yes, of course.

CHILES: Objection, Your Honor! Ms. Cortez is testifying for the witness.

COURT: Yes, counselor. The witness is fully capable of answering these questions without you leading her. However, since this is a suppression hearing, the Court overrules the objection. Any further questions, Ms. Cortez?

CORTEZ: No, nothing further, Your Honor. Thank you, Agent Montague.

COURT: Anything else, Ms. Chiles?

CHILES: No thanks, your Honor. I'm all set.

Argument on Routine Booking Question Exception Issue

COURT: Well all right then. Let's hear your arguments.

Ms. Chiles, how did this questioning violate your client's rights?

CHILES: Your Honor, my client's Fifth Amendment right against self-incrimination was violated when Agent Montague, who had intimate knowledge of the facts that allegedly implicated my client in the bombing, asked her these questions without first providing her with *Miranda* warnings.

COURT: Counsel, isn't asking someone where they live a routine booking question that falls under the routine booking question exception to *Miranda*?

CHILES: No, Your Honor. While the routine booking question exception permits an officer to ask certain biographical questions even before *Miranda* warnings are given, the exception doesn't apply here because Agent Montague reasonably should have known that her questions were likely to elicit an incriminating response.

COURT: Is that the correct standard?

CHILES: Well, the Fourteenth Circuit has yet to articulate a standard. And there is currently a circuit split as to when the routine booking question exception applies. Some circuits, including the First, Second, Sixth, Eighth, and Ninth circuits, apply an objective standard that looks to whether the officer asking the question should have known that the question was likely to elicit an incriminating response, while others, including the Fourth, Fifth, Tenth, and Eleventh circuits, apply a subjective standard that asks whether the officer intended to elicit an incriminating response. State courts are similarly divided.

COURT: And you contend the objective standard should be applied here, Ms. Chiles?

CHILES: Yes, Your Honor.

COURT: How would the objective standard be applied in this case?

CHILES: Well, the Supreme Court in *Rhode Island v. Innis* made it clear that an interrogation occurs — and *Miranda* warnings are required — when "the police should know they are reasonably likely to elicit an incriminating response from the suspect." Here, any reasonable law enforcement officer with the same knowledge of the case and background information as Agent Montague should have known that the questions asked of Ms. Silver would be reasonably likely to elicit an incriminating response. As such, the questions fall outside the routine booking question exception, and *Miranda* warnings were required.

COURT: Ms. Cortez, what's the Government's position here?

CORTEZ: Your Honor, the subjective standard is the proper standard, and the jurisdictions that currently apply the objective standard have misinterpreted the relevant Supreme Court precedent. Under the subjective standard, the exception applies to routine booking questions so long as the questions are not designed to elicit incriminatory admissions. So, it's not whether the officer reasonably should have known that the question was likely to elicit such an admission; it's whether the officer actually intended to elicit the admission. We think that's the standard intended by the

Supreme Court, based on *Pennsylvania v. Muniz*, where the plurality stated, "[T]he police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." Furthermore, the objective approach places an unfair and impractical burden on police personnel. Requiring the police to analyze each and every question would bring standardized governmental functions to a halt.

COURT: So, it's the Government's position that Agent Montague's questions were not designed to elicit an incriminating response?

CORTEZ: Correct, Your Honor. A question regarding biographical data, such as Defendant's address, is not designed to elicit an admission. Such questions are about as routine as they get.

COURT: But what about Agent Montague's follow-up question?

CORTEZ: Your Honor, when Special Agent Montague asked Defendant to provide her address, her response was evasive, indicating that she "stayed" with her mom. It was entirely reasonable for Agent Montague to seek clarification with the follow-up question. Seeking clarification is not seeking an admission. There is no evidence that Agent Montague asked this question to elicit an admission.

COURT: Ms. Chiles, why should the objective standard apply?

CHILES: Your Honor, as an initial matter, the objective standard is derived from dicta in the Supreme Court case of *Rhode Island v. Innis*, which was a 6-3 decision, whereas the subjective standard

was mentioned solely in dicta in a footnote in the plurality decision in *Muniz.* And the rationale behind the objective approach is more persuasive. First, in *Innis*, the Court explained that when determining whether police conduct was the functional equivalent of interrogation, courts shouldn't focus on police intent. Second, the objective standard avoids the concerns raised by the Second Circuit in *U.S. ex rel. Hines v. LaVallee* that officers could ask investigatory questions disguised as routine booking questions. Finally, as *New York v. Quarles* demonstrates, the Supreme Court has used objective standards in determining whether other *Miranda* exceptions, like the public safety exception, apply to officers' questions.

COURT: How exactly would your proposed objective approach apply in this case?

CHILES: The same way it has been applied in the First, Second, Sixth, Eighth, and Ninth Circuits. The court should determine, based on the questions and the context in which they were asked, whether an incriminating response was reasonably likely. If it was, then the exception doesn't apply.

COURT: Ms. Cortez?

CORTEZ: We disagree, Your Honor. The defense is ignoring *Muniz* and extending *Innis* beyond its intended reach. The dicta in *Innis*, relied on by the circuits that apply the objective standard, involved only the issue of whether Government conduct constituted

the functional equivalent of interrogation. *Muniz*, on the other hand, actually addressed the issue of when the booking question exception applies. In short, once a court has applied the *Innis* standard to determine that a statement was elicited during interrogation and is incriminatory, *Muniz* provides a carveout for routine booking questions, unless the questions were specifically designed to elicit an incriminating response.

COURT: Ms. Cortez, you mentioned a third standard in your brief?

CORTEZ: Yes, Your Honor. There is a third standard, the legitimate administrative function test, followed by the D.C. Circuit and the State of Texas. However, we do not believe that standard is proper.

COURT: Ms. Chiles, do you agree?

CHILES: The defense agrees.

COURT: And if this Court applies the subjective standard, does the defense lose?

CHILES: No, Your Honor. Under the subjective standard, the exception still doesn't apply because Agent Montague's questions were designed to obtain an incriminating response. Just like the officers in *United States v. Virgen-Moreno*, Agent Montague used her knowledge that the suspect was likely connected to an address associated with criminal activity to elicit an incriminating response.

COURT: Ms. Cortez, if this Court applies the objective standard, does the Government lose?

CORTEZ: No, Your Honor, Agent Montague reasonably believed that she was asking an administrative question required to complete the standardized booking form. One's address is not an element of a charged crime. As the First Circuit said in *United States v. Reyes*, "[I]t would be a rare case indeed" where pedigree questions violate *Miranda*.

COURT: Thank you. I am reserving judgment on all three issues and will have a decision shortly.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF BOERUM
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UNITED STATES OF AMERICA, No. 18-3023

-against-

STEPHANIE SILVER,

Defendant.
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February 1, 2019

TRANSCRIPT OF DECISION ON MOTION TO SUPPRESS
Before: Honorable Robert Pitler

APPEARANCES:

For the United States of America: Gloria Cortez
Assistant United States Attorney
222 Cadman Rd.
Boerum City, Boerum 11201

For Defendant Stephanie Silver: Jackie Chiles
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Court Reporter: Perry Guarino
Eastern District of Boerum
Court Reporter Services
228 Cadman Rd.
Boerum City, Boerum 11201

CLERK: United States of America versus Stephanie Silver. Counsel, please note your appearances for the record.

CORTEZ: Gloria Cortez for the United States. Good Morning, your Honor.

CHILES: Jackie Chiles, Chiles & Allen, for the Defendant, Stephanie Silver.

COURT: Good morning, counsel. I have reached a decision on Defendant Stephanie Silver's motion. After considering the parties' memoranda of law and oral arguments, I hereby grant Defendant's motion in all respects. Moving first to Defendant's request to exclude the evidence of the discarded flip-phone, I adopt the theory of a continuous seizure as urged by Defendant and will suppress the evidence. In my opinion, the continuous seizure doctrine is consistent with the Supreme Court's Fourth Amendment jurisprudence. Here, as soon as law enforcement officers blocked Defendant's path and told her to stop, they effectively seized her. And when Defendant stopped in her tracks, remained in a fixed position, and answered several of the officer's questions, she submitted to the officer's show of authority. So, the seizure was continuous from the moment the officers approached Defendant, blocked her path, and initiated verbal communication.

Furthermore, the officers had neither probable cause nor reasonable suspicion when they first approached Defendant. Defendant's subsequent flight from the encounter does not provide

probable cause to justify the initial illegal seizure. Therefore, I find that the stop was illegal, and any evidence obtained as a result of the seizure is inadmissible as fruit of the poisonous tree.

Moving next to Defendant's request to suppress the pole camera surveillance footage, I find the FBI agents violated Defendant's Fourth Amendment right to be free from unreasonable searches and seizures by failing to obtain a warrant before installing the pole camera outside of the residence where Defendant was living. I agree with the holding of the District Court in *United States v. Moore-Bush*, that the continuous surveillance of an individual over an extended period of time with a pole camera focused on the pathway in front of a residence, located in a quiet, residential neighborhood, constitutes an unlawful search.

I further find that Defendant had a subjective expectation of privacy in her physical movements, and that society is prepared to recognize that expectation as objectively reasonable. First, Defendant had a subjective expectation of privacy because she elected to stay in a private residence partially obstructed by a tree, guarded by a fence, and secured by a gate. Second, in light of the Supreme Court's holding in *Carpenter v. United States*, and the technological capabilities of the pole camera, I conclude that constantly tracking Defendant's movements for an extended period of time violated her objectively reasonable expectation of

privacy. Therefore, in the absence of a warrant, the evidence is inadmissible, and I am going to suppress the pole camera footage.

Finally, I'm going to suppress the statements Defendant made in response to Agent Montague's questions about Defendant's address. In so holding, I conclude that the objective approach is the correct method to be used in determining if a booking question is exempt from *Miranda* warnings. The objective approach rings true to the underlying purpose of *Miranda* warnings — to protect citizens' constitutional rights against self-incrimination from the coercive nature of police confinement. Questions an officer asks during booking that create the risk of coerced self-incrimination, regardless of an officer's intent, should be subject to Fifth Amendment protection, and officers should provide *Miranda* warnings before asking such questions. I disagree that the objective standard will unduly burden police officers. The few sentences required in the *Miranda* warnings are not too high a cost for protecting people's constitutional right against self-incrimination.

Applying the objective standard in this case, it is abundantly clear that Agent Montague was in a position to know that Ms. Silver's response was likely to be incriminating. The facts suggest that Agent Montague was well aware that asking Ms. Silver where she lived was likely to elicit a response that connected Ms. Silver to the ACB home and strengthened the case against Ms. Silver for

conspiracy. Therefore, her statements should be suppressed. In sum, I am granting Defendant's motion in all respects.

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

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UNITED STATES OF AMERICA, No. 19-1120

Appellant,

-against-

STEPHANIE SILVER,

Defendant-Appellee.

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ARGUED: July 10, 2019

DECIDED: August 3, 2019

Before: FALK, BENTELE, and CAPLOW, Circuit Judges:

OPINION OF THE COURT

FALK, *Circuit Judge*.

The United States brings this interlocutory appeal pursuant to 18 U.S.C. § 3731 from three rulings of the District Court. For the reasons set forth below, we affirm the rulings of the District Court on all issues and hold that: (1) the theory of continuous seizure should apply where a suspect temporarily submits to police authority but then subsequently flees; (2) the Fourth Amendment requires that law enforcement officers obtain a warrant before installing a pole camera to surveil a residence in a residential neighborhood; and (3) an objective test should be used to determine whether the routine booking question exception to the *Miranda* requirements applies to a law enforcement officer's specific questions.

Facts

On September 4, 2018, the Defendant-Appellee, Stephanie Silver, was charged in a two-count indictment with conspiracy to bomb a place of public use and attempt to bomb a place of public use, in violation of 18 U.S.C. § 2332f(a)(1) and (2). The charges stem from an incident on August 25, 2018, when a bomb partially detonated in the Boerum Municipal Fountain, located in the Joralemon Historical Village in Boerum City, Boerum. The bomb went off during the Boerum Street Fair. The Government claims that the bomb was planted by the Anti-Consumerist Brigade ("ACB") to protest the event's purported promotion of consumerism. The ACB is an "anti-consumerist" organization, opposed, among other things, to the sale and consumption of material goods.

On January 2, 2018, approximately eight months before the bombing, Sidney Aitken, a former ACB member acting as a confidential source, met with FBI Special Agent Melanie Montague to discuss the activities of the ACB and the election of a new ACB leader, George Hoyt.

Ms. Aitken stated that, following Hoyt's election, the ACB began planning a future demonstration involving possible acts of violence, and that she personally observed ACB members discuss the manufacture of explosive devices. Ms. Aitken provided a brief description of Mr. Hoyt and stated that the ACB would hold future meetings at a residence located at 594 Atlantic Place in Boerum City. The FBI subsequently lost contact with Ms. Aitken.

Based on the information received from Ms. Aitken, Agent Montague sought to install a pole camera to surveil the residence at 594 Atlantic Place. Working with a local utility company, Agent Montague arranged for the camera's installation on a public utility pole across the street from the premises. For approximately eight months, from late January 2018 through August 25, 2018, FBI agents, under Agent Montague's supervision, monitored activity outside the home. Video recordings from the camera showed George Hoyt and a woman with short blue hair entering and exiting the home on at least twenty separate occasions. The camera also showed that the blue-haired woman stayed overnight at the home on occasion, used a key to open the front gate when visiting the home, and carried miscellaneous items in and out of the home.

On August 25, 2018, following the partial detonation of the bomb, two members of the Joint FBI Task Force were on patrol near Joralemon Historical Village, asking pedestrians if they knew anything about the bombing, when they observed Defendant walking down the sidewalk. The officers pulled their patrol vehicle into Defendant's path, identified themselves as police officers, and began asking her questions about the bombing. The Government concedes that the officers had no probable cause to arrest Defendant or even reasonable suspicion to believe that she had any involvement with the bombing. In response to the officers' actions, Defendant stopped in her tracks and responded to the officers' initial questions in an encounter that lasted approximately one minute, after which she suddenly turned and ran away from the officers. As she fled, the officers observed her discard a flip-phone that had been in her pocket. The officers chased Defendant on foot. After they caught up with her, they placed her under arrest and retrieved the flip-phone from the ground where Defendant had thrown it. The Government later sought to admit evidence that Defendant had fled and discarded this flip-phone, alleging that the phone was used to detonate the bomb and connected Defendant to the bombing.

Following Defendant's arrest, the officers brought Defendant to the Task Force Office, where Agent Montague fingerprinted and photographed Defendant and initiated the standard booking procedure, including asking standard booking questions. During the booking process, Agent Montague asked Defendant, "Where do you live?" Defendant responded, "I stay at my mom's. She's at 25 St. Anne's Street, over in Clinton City." Agent Montague then asked, "You stay with your mom, but is that where you live? Is that the only place you live?" Defendant replied, "I also stay sometimes at 594 Atlantic Place in Boerum City, but I stay at my mom's too." It is undisputed that, at this time, Defendant was in custody and had not been advised of her *Miranda* rights.

Following her indictment, Defendant moved before the District Court to suppress the following: (1) evidence relating to her flight from the officers or obtained from the discarded flip-phone; (2) evidence obtained from the pole camera used to surveil the residence at 594 Atlantic Place; and (3) statements made by Defendant to the FBI agent during Defendant's post-arrest booking.

Following a hearing, the District Court ruled in favor of Defendant on all three issues. First, the District Court, adopting the theory of continuous seizure, found that the officers seized Defendant within the meaning of the Fourth Amendment during their initial encounter. Second, the District Court held that the warrantless installation of the pole camera to monitor the residence over the course of eight months amounted to an unlawful search in violation of the Fourth Amendment. Finally, the District Court, applying an objective test, determined that the routine booking question exception to the *Miranda* requirements did not apply to Agent Montague's questions to Defendant about her residence because, under the circumstances, the questions were reasonably likely to elicit an incriminating response.

The Government now appeals from the District Court's rulings.

Discussion

A. Admissibility of Appellant's Cell Phone

We first consider whether this Court should adopt a theory of continuous seizure and affirm the holding of the District Court excluding the evidence of the discarded flip-phone. We hold that the theory of continuous seizure should apply, and that because the officers lacked probable cause, they illegally seized Defendant from the moment of the initial encounter, when defendant submitted to the officers' show of authority. Therefore, the evidence obtained should be excluded as the fruit of the poisonous tree.

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. We find the continuous seizure doctrine to be consistent with the Supreme Court's Fourth Amendment precedent. In *California v. Hodari D.*, 499 U.S. 621 (1991), the Court held that a suspect is seized upon the application of physical force by a law enforcement officer or submission to an officer's assertion of authority. The Court has never defined "submission to authority." However, in *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968), the Court held that a seizure occurs when an officer has "in *some way* restrained the liberty of a citizen" through "physical force or show of authority." (Emphasis added). The phrase "in some way" indicates that restraint need not result from a grand gesture or a particularly long conversation. And nothing in the Supreme Court's prior rulings suggests that, once a suspect has been restrained, the suspect's subsequent flight provides the necessary probable cause to negate the initial unlawful seizure. In fact, as in the present case, even one minute in which a reasonable person would not feel free to leave is sufficient to constitute a seizure. We therefore hold that a momentary pause by a defendant in response to a verbal communication and a show of authority by a police officer constitutes submission, regardless of whether the defendant subsequently flees.

In so holding, we reject the decisions of those circuits that have held that a seizure requires more than temporary compliance with a law enforcement officer's order. *See, e.g.*, *United States v. Baldwin*, 496 F.3d 215 (2d Cir. 2007); *United States v. Valentine*, 232 F.3d 350 (3d Cir. 2000); *United States v. Bradley*, 196 F.3d 762 (7th Cir. 1999); *United States v. Hernandez*, 27 F.3d 1403 (9th Cir. 1994). *See also* Darby G. Sullivan, Note: *Continuing Seizure and the Fourth Amendment: Conceptual Discord and Evidentiary Uncertainty in United States v. Dupree*, 55 Vill. L. Rev. 235, 251-53 (2010). Instead, we adopt the reasoning of those circuits that have either explicitly or

implicitly applied the continuous seizure doctrine. *See, e.g.*, *United States v. Brodie*, 742 F.3d 1058 (D.C. Cir. 2014); *United States v. Camacho*, 661 F.3d 718 (1st Cir. 2011); *United States v. Coggins*, 986 F.2d 651 (3d Cir. 1993); *United States v. Morgan*, 936 F.2d 1561 (10th Cir. 1991). *See also* Sullivan, *supra*, at 254-58. We find particularly persuasive the First Circuit's decision in *Camacho*, 661 F.3d 718, and Justice Poole's dissent in *United States v. Huertas*, 864 F.3d 214 (2d Cir. 2017). These decisions seem far more consistent with the Fourth Amendment as well as with the Supreme Court's analyses in *Hodari D*, 499 U.S. 621, and *United States v. Mendenhall*, 446 U.S. 544 (1980).

Turning to the present case, we agree with the District Court that, under the totality of the circumstances, Defendant's encounter with the police constituted a continuous seizure that began when Defendant stopped to respond to the officers' questions. Therefore, regardless of her subsequent flight, Defendant was seized. Because the officers had no probable cause or even reasonable suspicion to seize Defendant, the District Court properly suppressed the evidence obtained as a result of the seizure.

B. Admissibility of Evidence Obtained From the Pole Camera Surveillance Footage

We next consider whether, the Government must obtain a warrant before installing a pole camera to surveil the outside of an individual's home. We hold that it must.[1]

This is a case of first impression in this circuit. We acknowledge that, prior to *Carpenter v. United States*, 138 S. Ct. 2206 (2018), most courts that have addressed the issue have held that use of a pole camera to survey the outside of residence does not require a warrant. *See, e.g., United States v. Cantu*, 684 F. App'x. 703 (10th Cir. 2017); *United States v. Wymer*, 654 F. App'x. 735 (6th Cir. 2016); *United States. v. Houston*, 813 F.3d 282 (6th Cir. 2016); *United States v. Vankesteren*, 553 F.3d. 286 (4th Cir. 2009); *United States v. Kelly*, 385 F. Supp. 3d 721 (E.D. Wis. 2019); *United States v. Stefanyuk*, No. 4:17-CR-40042 (KES), 2018 WL 3235569 (D.S.D. June 15, 2018). Nevertheless, several courts have held that the installation of a pole camera to survey an individual's home constitutes a search because of the "intrusiveness" associated with video surveillance. *See, e.g., United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987); *United States v. Vargas*, No. CR-13-6025 (EFS), 2014 U.S. Dist. LEXIS 184672 (E.D. Wash. Dec. 15, 2014); *Shafer v. City of Boulder*, 896 F. Supp. 2d 915 (D. Nev. 2012.)

Since *Carpenter*, where the Supreme Court held that the Government must obtain a warrant before accessing a person's cell-site location information, few courts have analyzed the use of pole cameras. After *Carpenter*, those courts that have continued to hold that use of pole cameras does not constitute a search ignore the inherent similarities between the information obtained from cell phone data in *Carpenter* and the information gathered from pole camera footage. We agree with the court in *United States v. Moore-Bush*, 381 F. Supp. 3d 139, 141, 143-45, 147-48 (D. Mass 2019), one of the few post-*Carpenter* cases to address the issue, that the reasoning in *Carpenter*

[1] The Government did not argue to the District Court, and does not argue here, that the good faith exception to the exclusionary rule applies. *See United States v. Leon*, 468 U.S. 897, 923 (1984). Therefore, we consider the argument waived, and we need not address the issue.

applies with equal weight to pole camera surveillance, and that a person who elects to stay in a quiet, residential area secured by a fence has both a subjective and an objectively reasonable expectation of privacy even in the exterior of their residence. We disagree with the dissent's argument that the Supreme Court in *Carpenter* did not intend to extend its holding to other surveillance techniques. The Court merely declined to decide on matters not before the Court.

For the reasons set forth above, we hold that the Government must obtain a warrant before installing a pole camera to surveil the exterior of a home in a residential neighborhood. To hold otherwise would be inconsistent with the Supreme Court's recent Fourth Amendment jurisprudence, particularly *Carpenter* and *Jones*. Because the Government failed to obtain a warrant in the present case, the District Court properly suppressed the footage from the pole camera used to surveil Defendant's home.

C. Admissibility of Appellant's Statement

The final issue on appeal raises a Fifth Amendment question of first impression in this Circuit: whether an objective or a subjective test should be used to determine whether the routine booking question exception to the *Miranda* requirements applies to a law enforcement officer's questions to a suspect. The objective approach asks whether, under the circumstances of the case, an officer should reasonably have expected the question to elicit an incriminating response, while the subjective approach asks whether the officer intended to elicit an incriminating response. *See* George C. Thomas III, *Lost in the Fog of Miranda*, 64 Hastings L.J. 1501, 1511, 1514 (2013). We affirm the District Court's ruling that the objective approach is the proper one.

The Fifth Amendment prohibits law enforcement officers from questioning a suspect who is in custody without advising the suspect of the right to remain silent and the right to counsel, among other things. *Miranda v. Arizona,* 384 U.S. 436, 484–485 (1966). However, an exception exists for routine booking questions that "secure the biographical data necessary to complete booking or pretrial services." *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990).

Our holding, that an objective approach is the correct method for determining when the routine booking question exception applies, is consistent with the views of the First, Second, Sixth, Eighth, and Ninth Circuits. *See United States v. Pacheco-Lopez*, 531 F.3d 420 (6th Cir. 2008); *United States v. Rodriguez*, 356 F.3d 254 (2nd Cir. 2004); *United States v. Reyes*, 225 F.3d 71 (1st Cir. 2000); *United States v. Brown*, 101 F.3d 1272 (8th Cir. 1996); *United States v. Mata-Abundiz*, 717 F.2d 1277 (9th Cir. 1983). In so holding, we reject the reasoning of the Fourth, Fifth, Tenth, and Eleventh Circuits, all of which have adopted the subjective approach. *See United States v. Virgen-Moreno,* 265 F.3d 276 (5th Cir. 2001); *United States v. D'Anjou*, 16 F.3d 604 (4th Cir. 1994); *United States v. Parra*, 2 F.3d 1058 (10th Cir. 1993); *United States v. Sweeting*, 933 F.2d 962 (11th Cir. 1991).

As an initial matter, we note that, while both tests originated in dicta, the objective approach stems from the 6-3 majority decision in *Rhode Island v. Innis,* 446 U.S. 291 (1980), while the subjective approach is derived from a footnote in the plurality decision in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). The objective approach is also more consistent with *Miranda* in that it protects citizens' constitutional rights by apprising them of their rights before posing questions

that have the potential to elicit incriminatory responses. In adopting this approach, moreover, we find persuasive the Supreme Court's explanation that the inquiry into when *Miranda* safeguards come into play "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Innis*, 446 U.S. at 301.

Furthermore, the Supreme Court has consistently expressed a resistance to a subjective approach in the criminal procedure context. *See Whren v. United States*, 517 U.S. 806, 813 (1996) (rejecting a test that relied on officer's subjective intentions in Fourth Amendment probable cause inquiries); *New York v. Quarles*, 467 U.S. 649, 656 (1984) (rejecting test based on officer's subjective motives when applying public safety exception to *Miranda* because officer's intentions are "largely unverifiable"). As Justice O'Connor so eloquently noted, an intent-based test to determine the admissibility of a confession obtained after the deliberate withholding of *Miranda* warnings, is "an unattractive proposition that we all but uniformly avoid." *See Missouri v. Seibert*, 542 U.S. 600, 625–26 (2004) (O'Connor, J., dissenting).

Finally, adoption of a subjective test would inevitably result in challenges to previously accepted routine booking inquiries and require judges to engage in time consuming investigations into the intent of law enforcement officers, undoubtedly leading to inefficiencies and clogged dockets. Adoption of the objective test, by contrast, will discourage officers from seeking to circumvent the *Miranda* requirements by asking investigatory questions during booking.

For these reasons, we affirm the District Court's ruling and hold that the objective approach applies. In the present case, Agent Montague reasonably should have known that her questions to Defendant about her place of residence were likely to elicit an incriminating response. Thus, the District Court properly suppressed Defendant's responses to those questions.

CAPLOW, *Circuit Judge, dissenting.*

The majority takes bold steps in expanding the reach of the Fourth Amendment by establishing binding precedent in previously uncharted territory through the adoption of a theory of "continuous seizure" that threatens the ability of law enforcement to conduct any reasonable investigation, and by ignoring decades of rulings that found no need for a search warrant before installing a pole camera, thereby extending *Carpenter* well beyond the bounds of the Supreme Court's holding. Finally, the majority's imposition of an objective test that looks not to the intent of the officer but rather to the objective reasonableness of an officer's routine booking questions when determining if *Miranda* warnings should be given threatens the ability of law enforcement to obtain standard pedigree information necessary for processing suspects.

A. Admissibility of Appellant's Cell Phone

Today, the majority, in holding that "even one minute in which a reasonable person would not feel free to leave is sufficient to constitute a seizure," departs from well-established Supreme Court precedent that clearly declined to adopt the "continuous seizure" doctrine. In adopting this theory, my colleagues fail to acknowledge that the objective requirement that an individual would not feel free to leave is "a *necessary*, but not a *sufficient*, condition for seizure." *California v.*

Hodari D., 499 U.S. 621, 628 (1991). Simply put, to be seized, a suspect must actually submit to authority.

Further, the majority ignores that "it is the nature of the interaction, and not its length, that matters." *United States v. Baldwin*, 496 F.3d 215, 219 (2d Cir. 2007) (internal citation omitted). Here, Defendant answered only three preliminary questions, none of which elicited any substantive information. Merely acknowledging the presence of police officers standing in front you is not submitting to authority. Nor is "momentary hesitation and direct eye contact." *See United States v. Hernandez*, 27 F.3d 1403, 1407 (9th Cir. 1994); *see also Florida v. Royer*, 460 U.S. 491, 497 (1983); *United States v. Huertas*, 864 F.3d 214, 217 (2d Cir. 2017); *Baldwin*, 496 F.3d at 218–219; *United States. v. Valentine*, 232 F.3d 350, 353, 355, 358–59 (3d Cir. 2000); *United States v. Washington*, 12 F.3d 1128, 1133 (D.C. Cir. 1994). Indeed, there is a natural tendency to stop and acknowledge someone who speaks to you, and some length of time is required for a defendant to process what is occurring and thus decide whether to submit or "ignore the officer[s] and go about [one's] business." *United States v. Muhammad*, 463 F.3d 115, 123 (2d Cir. 2006) (citing *Royer*, 460 U.S. at 498). Furthermore, "[f]light, by its very nature, is not 'going about one's business'; in fact, it is just the opposite." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

For these reasons, I would hold that total compliance with a show of authority is required for a defendant to be seized. *See Hodari D.*, 499 U.S. at 629. Indeed, absent a suspect's complete compliance, an officer's show of authority at most constitutes an attempted seizure, and "[a]ttempted seizures are beyond the scope of the Fourth Amendment." *Sacramento v. Lewis*, 523 U.S. 833, 843 n.7 (1998) (citation omitted). I would further hold that, in determining the length of time required for complete submission, courts should also take into consideration whether the defendant has "let pass [the] opportunity to flee." *See Huertas*, 864 F.3d at 217.

Turning to the facts of the present case, it is clear that Appellant was not seized before she discarded the phone. Instead of obeying the officers' order, Appellant decided to run. There was no seizure, let alone an unlawful one.

Aside from turning the Fourth Amendment on its head, the majority's decision undermines the rationale behind the exclusionary rule. The purpose of the exclusionary rule is to deter law enforcement officers' misconduct. It is a harsh remedy that should be applied only to extreme violations. *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006); *United States. v. Leon*, 468 U.S. 897, 909 (1984). So, I ask my colleagues, what extreme misconduct are we trying to deter here? Officers were investigating an explosion in a public place that could have caused serious injury. When they questioned persons near the scene of the crime, they intended only to protect the community and prevent potential future attacks. Today's decision will effectively deter officers from engaging in the kind of purely routine investigatory conduct that could save lives. Indeed, characterizing a "street encounter between a citizen and the police as a 'seizure,'" merely because the defendant temporarily acknowledged the show of authority, "while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980). It would also have the unintended effect of encouraging suspects to flee "after the slightest contact with an officer in order to discard evidence," and then argue that the evidence was fruit of the poisonous tree. *See Hernandez*, 27 F. 3d at 1407.

B. Admissibility of Evidence Obtained from the Pole Camera Surveillance Footage

I also disagree with the majority's extension of *Carpenter* to the traditional surveillance technique that uses a fixed pole camera to conduct surveillance of a public area. Today, the majority completely abandons years of precedent applying the well-established test from *Katz v. United States,* 389 U.S. 347, 360 (1967), and determines that Fourth Amendment protections should extend to public thoroughfares.

Prior to today's decision, the majority of courts that have considered the issue have held that law enforcement officers do not need to obtain a warrant prior to installing a pole camera to surveil a subject's home. *See United States v. Cantu*, 684 F. App'x. 703 (10th Cir. 2017); *United States. v. Houston*, 813 F.3d 282 (6th Cir. 2016); *United States v. Vankesteren*, 553 F.3d. 286 (4th Cir. 2009); *United States v. Stefanyuk*, No. 4:17-CR-40042-KES, 2018 WL 3235569 (D.S.D. June 15, 2018); *United States v. Kelly*, 385 F. Supp. 3d 721 (E.D. Wis. 2019). Those courts have properly found that an individual does not have a reasonable expectation of privacy, nor one that society is prepared to recognize as reasonable, in front of a home, where any passerby could see the same activity the pole camera captured. *See Houston*, 813 F.3d at 286. Each of these decisions is consistent with the Supreme Court's admonition that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351.

In arriving at its holding, the majority wholly misconstrues the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). In *Carpenter*, the Court explicitly stated that its decision was not intended to "call into question conventional surveillance techniques and tools, such as security cameras." *Id.* at 2220. A pole camera is clearly a traditional surveillance tool. The majority's misplaced reliance on a comparison between the cell-site location information (CSLI) at issue in *Carpenter* and information obtained from a pole camera completely mischaracterizes the nature of pole cameras. The information obtained from a pole camera, unlike CSLI, cannot be used to track an individual's every movement. Pole cameras do not enter the home or go to work with an individual as does a personal cell phone. Indeed, in the present case, the pole camera simply captured a single view of the front of a home and the affairs Defendant chose to conduct in front of the home.

In arguing that *Carpenter* supports the proposition that warrantless installation and use of pole cameras violates the Fourth Amendment, the majority finds support in the district court's decision in *United States v. Moore-Bush*, 381 F. Supp. 3d 139 (D. Mass. 2019), which I think was wrongly decided. The majority also erroneously extends the right to privacy to public thoroughfares. But, as the Supreme Court has made clear, "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them." *See United States v. Knotts*, 103 S. Ct. 1081, 1086 (1983).

The proposition promulgated by the majority is not only a significant departure from prior Fourth Amendment precedent, it is also bad policy. If law enforcement agents cannot surveil activity that any passerby can see, then they cannot adequately perform their jobs and protect our

communities. I cannot agree with such a prohibitive decision. For these reasons, I would reverse the District Court's holding and allow the pole camera evidence to be used at trial as critical evidence of Defendant's involvement with the ACB and the bombing.

C. Admissibility of Appellant's Statement

With this decision, my colleagues have exceeded the bounds of the Constitution. The Supreme Court has previously held that *Miranda* warnings are not required for routine pedigree questions that are "reasonably related to the police's administrative concerns." *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990). Questions such as an arrestee's address fall squarely within the "administrative concern[]" category, as they enable law enforcement to collect "biographical data necessary to complete booking or pretrial services." *Id.* at 584, 602. Indeed, such "routine booking questions . . . do not normally elicit incriminating responses." *United States v. Parra,* 2 F.3d 1058, 1068 (10th Cir. 1993). Unless it can be shown that an officer manifested a specific intent to elicit an incriminating response, the routine booking question exception applies.

The subjective standard is the proper standard to determine whether the exception applies. As an initial matter, it is the standard articulated by the Supreme Court. *See Muniz*, 496 U.S. at 601-02 n.14; *United States v. Virgen-Moreno*, 265 F.3d 276, 293-94 (5th Cir. 2001). Furthermore, the majority's application of the objective standard in the present case showcases why the objective method is unworkable; it prevents an officer with the purest intentions from asking the most innocuous questions on a booking form simply because the officer has some basic knowledge of external facts surrounding the arrest.

Applying the subjective standard to the present case, there is simply no evidence that Agent Montague's questions were designed to obtain an incriminating response. *See United States v. Sweeting*, 933 F.2d 962, 965 (11th Cir. 1991). Indeed, "[a]sking a person, about to be charged with a crime and booked by the police, [her] name and address is both proper and necessary." *People v. Stewart*, 406 N.E.2d 53, 56 (Ill. App. Ct. 1980). *See also United States v. Sims*, 719 F.2d 375, 378-79 (11th Cir. 1983) (explaining that routine information elicited from the accused does not trigger *Miranda* warnings just because "that information turns out to be incriminating."). Here, Defendant's own vague response forced Agent Montague to repeat her question. Because "the incriminatory element was created by [Defendant herself] through [her] non-[completely] truthful responses," it cannot be said that this line of questioning was designed to elicit incriminatory admissions. *United States v. D'Anjou*, 16 F.3d 604, 609 (4th Cir. 1994). This decision ignores binding law and expands Constitutional protections to a level unintended by the Founding Fathers. Therefore, I respectfully dissent.

No. 19–2417

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

--against---

STEPHANIE SILVER,
Respondent.

Date: December 19, 2019

The petition for writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted, limited to the following questions:

I. Whether, under the Fourth Amendment, a suspect is subject to a continuous seizure where the suspect temporarily submits to police authority but then subsequently flees.

II. Whether, under the Fourth Amendment, the government must secure a warrant issued upon probable cause to install a video camera on a utility pole outside of a residence to surveil an individual.

III. Whether, under the Fifth Amendment, an objective or subjective standard should be used to determine if police questioning falls under the routine booking question exception to the *Miranda* requirements.