IN THE UNITED STATES COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. [1] EMANUEL GÓMEZ-REYES [2] JEAN C. MADERA-ALICEA, [3] ALEX OCASIO-VELÁZQUEZ, [4] KATISHA RODRÍGUEZ-VÁZQUEZ, Defendants.	CRIM. NO.: 14-416(CCC/SCC)

REPORT AND RECOMMENDATION

Defendants Emanuel Gómez-Reyes and Katisha Rodríguez-Vázquez filed motions to suppress, which were joined by their co-defendants, Jean C. Madera-Alicea and Alex Ocasio-Velázquez. The motions were referred to the undersigned for report and recommendation by the presiding district judge, Docket No. 54, and a hearing was held in several parts. I now recommend that the motions be denied.

1. Background

The defendants in this case are charged with various drug offenses, as well as with possession of a firearm in furtherance of a drug trafficking crime. Docket No. 21. The evidence against the defendants appears to be based, at least in large part, on the fruits of a search of a residence in the Colinas subdivision of Toa Alta, Puerto Rico, on June 26, 2014. That search was authorized by a warrant, which was issued on the basis of an affidavit signed by a Police of Puerto Rico ("POPR") agent named José Ortíz-Merced. The bulk of the evidence at the hearing concerned alleged untruths made by Agent Ortíz in his warrant application. However, the motions also allege that an alleged search of a trash can at the residence was itself illegal, and that its fruits should be suppressed for that reason.

Below, because Defendants' motions are essentially asking for relief under *Franks*, I first discuss the warrant application. I then discuss the facts as found at the hearing. Finally, I analyze whether *Franks* or general Fourth Amendment principles require suppression of any evidence.

1.1 The Warrant Affidavit

According to Agent Ortíz's affidavit, on June 19, 2014, he began work at the Criminal Investigations Division in

Bayamón at 4:00 p.m. *See* DEFS.' EXH. A. He was told by his sergeant about an anonymous call alleging that someone named Many was distributing cocaine out of residence 3Y18, on Camino del Parque street in Colinas del Plata. The call included the detail that the owner had two cars—a black Toyota Sequoia SUV and a white Mitsubishi Galant—that were always parked in front of the house with their front ends facing the street. Agent Ortíz states that he was assigned to investigate this tip.

Agent Ortíz then states that at 6:00 p.m. that same day he went in an unmarked car to Colinas del Plata and found the residence, where the Sequoia and Galant were parked as reported. An hour later—so, around 7:00 p.m.—a blue Mercury Grand Marquis, license plate CMM-632, arrived and parked in reverse. A "slim, dark skinned individual got out," removed what appeared to be two kilos of cocaine from the trunk, and entered the residence. Agent Ortíz says that he left a bit later because of the presence of a number of children in the street.

At 10:00 p.m. that same evening, Agent Ortíz claims to have returned to Colinas del Plata. The same vehicles were still present, and the Grand Marquis had its trunk open. "After a couple of minutes" the Grand Marquis's driver came outside

and placed a black bag in the trunk. He returned to and exited the residence again, this time holding "a clear plastic bag with pressure seal which contained inside a rather big white rock" that Agent Ortíz identified as cocaine. The Grand Marquis's driver was joined "by another person[,] tall and with a regular physical constitution," who subsequently left in the Galant, the license plate of which Agent Ortíz recorded as GGN-856. Agent Ortíz left a bit later.

On June 23, 2014, Agent Ortíz says he returned to Colinas del Plata around 3:00 p.m., again in an unmarked vehicle. After an hour, he saw a man "with regular physical constitution" leave the house and put a black trash bag in the trash can on the sidewalk in front of the residence. The man returned inside but reemerged thirty minutes later with "several clear plastic bags with pressure seal with what seemed to be a white residue inside." Agent Ortíz reports seeing the man also throw out "some cylindrical containers with white caps with a seal." The man then left in the Sequoia. Agent Ortíz opened the trash can and found "two clear plastic bags with pressure seals which were impregnated inside with a white powder" as well as "two clear cylindrical containers with white caps with a logo or seal of Transformers." Agent Ortíz seized this evidence and

returned to Bayamón's drug division to perform a field test on the bags' residue. The test, which was performed by Agent Waldemar Rivera-Quiñones, came back positive for cocaine. The cylindrical containers did not test positive.

1.2 The Hearing

1.2.1 Agent Ortíz's Testimony

At the hearing, Agent Ortíz was the Government's sole witness, and his testimony regarding his surveillance was different in several important respects from what he put in his affidavit. He testified that he began working at noon—not 4:00 p.m.—on June 19 and that he arrived at Colinas del Plata around 3:00 p.m., not 6:00 p.m. He testified that he entered the subdivision—which has a manned gate—by saying that he was a former resident who needed to retrieve some mail.[1] Agent Ortíz found the residence by identifying the Sequoia and Galant parked in front, but he confirmed it by looking at the electricity meter, which read 3Y18. Approximately an hour later, the Grand Marquis arrived. The man who got out was young and light-skinned, and he removed two packages from the trunk that looked like bricks of cocaine. As he stated in his

1. According to Agent Ortíz's testimony, he was in fact a former resident of Colinas del Plata, but he had not actually lived there since 2005.

affidavit, Agent Ortíz left after seeing a number of children come to play in the street.

Agent Ortíz testified that he returned at 10:00 p.m. that night. When he arrived, the Grand Marquis's trunk was open, and after a while he observed the same young man from before put a black bag in the trunk. He returned to the residence and came back with a big pressure-lock bag with white rocks in it. He left in the Grand Marquis, and immediately afterward another young man in jeans came out and left in the Galant.

Agent Ortíz testified that he returned at 3:00 p.m. on June 23 in a different unmarked car. This time, he identified himself as a police officer to the guard, but he did not state the purpose of his visit. When he reached the residence, the Galant and Sequoia were again outside. After about an hour, someone emerged from the house and dumped a large bag of trash in the trash can. A bit later, another man came out and threw some big pressure-lock bags with white powder on the inside in the trash, as well as cylindrical containers with white caps and decals. Then saw that man—who Agent Ortíz identified as Gómez—leave in the Sequoia, so Agent Ortíz went and opened the trash can, which was near—but on the residence's side of—the sidewalk. Agent Ortíz took a photo with his phone of

the area where the trash can was found. Inside, he found the bags, which he took to the Bayamón drug division to perform a field test. The field test came back positive and the evidence was sealed in an envelope by the testing officer.

1.2.2 The Defendants' Evidence

Agent Ortíz's warrant application was thus based on three observations of criminality: the first at approximately 4:00 p.m. on June 19, 2014, when he claims to have seen bricks of cocaine brought into the residence; the second at approximately 10:00 p.m. that same night, when he saw someone leave the house with what appeared to be rocks of cocaine; and the third at approximately 3:00 p.m. on June 23, when he claims to have found bags in the house's trash with cocaine residue. The defendants' evidence shows without question that Agent Ortíz was lying regarding what he saw on the afternoon of June 19, leaving me with serious doubts regarding the truthfulness of his other testimony.

To begin, Agent Ortíz has inexplicably contradicted himself. In an affidavit written only days after the supposed surveillance, Agent Ortíz said that he began work at 4:00 p.m. and began surveillance at 6:00. In his testimony, these times were revised substantially earlier, but his initial error was

never explained. Moreover, while the hearing evidence showed that Agent Ortíz did check out an unmarked car on June 19, 2015, he only drove it fifteen miles. *See* DEFS.' EXH. I (showing mileage). During his activities that day, however, Agent Ortíz is meant to have driven from the Bayamón police headquarters to Colinas del Plata, left for several hours, come back, and then driven back to headquarters. Agent Ortíz could not remember which route he took from headquarters to Colinas del Plata, but Google Maps suggests that the minimum distance is 8 miles.[2] Thus, a single round-trip would be difficult in 15 miles; two trips, along with some additional unremembered driving in between, would be impossible.[3]

That Agent Ortíz's narrative of his activities on June 19 is

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2. Google Maps suggests three possible routes from the Bayamón police headquarters to Colinas del Plata; the shortest is approximately 8 miles, and the others are over 9. *See* https://goo.gl/maps/gHwxe; *see also Rindfleisch v. Gentiva Health Sys., Inc.*, 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010) (explaining that courts "commonly use internet mapping tools to take judicial notice of distance and geography").

3. Agent Ortíz testified to remembering little about his activities between the two surveillances. He testified that he didn't return to headquarters, but he said that he might have gotten gas or food, though he couldn't say where. Likewise, he couldn't remember how or where he passed the several hours between the two supposed surveillances.

false is also suggested by the testimony of Jesús Castillo, who was the security guard on duty at Colinas del Plata's gate that afternoon. According to Castillo, apart from residents with a beeper that can automatically open the gate, the identities and license plate numbers of all persons entering the community are recorded in a log book. And according to that log, there is no record of Agent Ortíz's car—a white Hyundai Elantra—entering the community that afternoon, much less an entry that corresponds to Agent Ortíz's name. DEFS.' EXH. N. This is in contrast to the logbook for that evening, which, in keeping with the protocol that was testified to, records the entry of a policeman in a white Hyundai at 10:31 p.m. DEFS.' EXH. O. The logbook thus strongly implies that Agent Ortíz did not enter Colinas del Plata on the afternoon of June 19.

Furthermore, Agent Ortíz reported seeing both the Galant and the Sequoia in front of the residence on the afternoon of June 19, but the defendants' evidence suggests this would have been impossible. The defendants' made a strong showing that Gómez, Ocasio, and Rodríguez were—along with the Sequoia and Galant—away from the residence from the early morning until the late evening of June 19. It appears that June 19 was Rodríguez's birthday, and she, Gómez, Ocasio, and several

other members of her family went swimming at a river in Juncos, Puerto Rico, to celebrate. These facts are confirmed by texts between Rodríguez and her mother, in which Rodríguez is wished happy birthday at 8:19 a.m., and then, around 8:30 a.m., responds by saying that she is going to the river. DEFS.' EXH. Y(2). After 5:00 p.m. that evening, Rodríguez sent her mother a number of pictures of her daughter and others at the river. DEFS.' EXHS. Y(6)–(10). In addition to these time-stamped texts, the defendants also produced a number of other photos taken at the river; the fact that they were also taken on June 19 is confirmed by the fact that they include pictures of Rodríguez holding a cake that says "Felicidades Katicha,"[4] DEFS.' EXHS. R, S, and pictures of Rodríguez's daughter wearing the same bathing suit as she is wearing in the pictures Rodríguez sent to her mother, *compare* DEFS.' EXH. Y(6), *with* DEFS.' EXH. R. Thus, the evidence shows that several of the defendants were away from Colinas del Plata on June 19.

The evidence additionally shows that the Galant and Sequoia—which Agent Ortíz reported seeing—were not there

4. Though she is indicted as "Katisha," the photograph of her cake spells her name "Katicha." Because I do not know which spelling is correct, I have used the indictment's spelling throughout.

either. According to the credible testimony of Gómez's mother, Noemi Reyes-Morales, she met Gómez, Rodríguez, and several other people that morning on a hill near her house in Sabana Seca so that they could caravan to the river.[5] According to her testimony, Gómez and Rodríguez drove separately to Sabana Seca in the Sequoia and Galant respectively. According to the testimony of José Cintrón, a former neighbor of Gómez, Gómez then dropped the Sequoia off sometime around 9:30 or 10:00 a.m. so that Cintrón could paint the bottom of the car. Reyes testified that she then rode to the river in the Galant with Gómez, Rodríguez, and Rodríguez's daughter.

That Gómez drove the Sequoia that morning is confirmed by a text Rodríguez sent her mother, which said that "Ema"—Emanuel, presumably—"is going in the SUV." DEFS.' EXH. Y(4). Toll records, moreover, show that the Galant passed through lane 20 of the Buchanan toll plaza at 10:17 a.m.. DEFS.' EXH. L. According to the testimony of a representative from AutoExpreso, the company that operates Puerto Rico's toll

5. Reyes did not specifically testify that Ocasio was one of the individuals who met to caravan to the river, but she did identify him in a number of the photos taken that day. I thus find that he was at the river along with Gómez and Rodríguez.

roads, that lane heads in the direction of San Juan from Sabana Seca. AutoExpreso's website provides a map showing, moreover, that the Buchanan toll plaza is located on PR-22,[6] which is the road one would take from Sabana Seca—which is west of San Juan—to Juncos, which is south-southeast of San Juan.[7] Then, at 6:24 p.m., AutoExpreso records show that the Galant passed through lane 18 of the Caguas North toll plaza. DEFS.' EXH. L. The Caguas North plaza is located on PR-52, and according to the AutoExpreso representative's testimony, lane 18 is northbound. A person traveling from Juncos to San Juan and points west would pass through this plaza on their drive.

The times registered by AutoExpreso match the time-stamps of pictures recovered from Rodríguez's phone, a disk-image of which was entered as an exhibit at the hearing. DEFS'.

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6. The map can be found at https://goo.gl/y9qRdA or by by going to AutoExpreso's website and clicking on the "Puntos de Venta"—or "Points of Sale"—link. Puerto Rico's Department of Transportation also has a page confirming that the Buchanan plaza is on PR-22 and that the Caguas North plaza, discussed below, is on PR-52. *See* http://www.dtop.gov.pr/carretera/det_content.asp?cn_id-119.

7. A car passing the Buchanan toll plaza towards San Juan would be traveling away from Colinas del Plata, which is located in Toa Alta, a municipality to the south of Sabana Seca and the southwest of San Juan.

EXH. Z.[8] Photos taken just after 9:00 a.m. show photos of Rodríguez's daughter at home, looking ready to go. Around noon, there are photos of a river and Rodríguez's daughter in her swimsuit. And after 5:00 p.m., there are pictures of Rodríguez, her daughter, and others grilling and having cake by the river. The time-line created by these photo-captures is in line with Rodríguez's text messages and AutoExpreso's capture of the Galant going towards Juncos at 10:17 a.m. and returning in the direction of San Juan at 6:24 p.m.

Thus, as of 6:30 p.m., Gómez and Rodríguez were near Caguas, and neither of their cars were at home. They then drove back to Sabana Seca, arriving, according to Reyes, after 7:30 p.m. Once back at Reyes's house, Gómez went to the home of a family member; Rodríguez stayed until around 8:00 or 8:15

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8. Defendants' Exhibit Z is a thumb-drive containing encrypted disk-images of six phones and an iPad seized by agents executing the search warrant in this case. The photos discussed in this paragraph were found on the image labeled "Iphone 5 IMEI 4770 Wht," in the filepath "\AppleiPhone5(A1428)_IMEI_4770_Wht_Iphone5\Files\Pictures." Organizing the images in that folder by date shows numerous photos taken on June 19. By looking at the file properties, substantial information regarding how and when the photos were taken can be viewed, including the time of capture and the program used to take the photo. The photos found on the phone are, in many cases, the same ones admitted by the defendants at the hearing.

p.m., when she went to have dinner at her mother's house nearby. This comports with messages Rodríguez's mother sent around 6:00 p.m. telling Rodríguez she had made her lasagna. DEFS.' EXH. Y(11).[9] Cintrón also testified that Gómez picked up the Sequoia sometime between 8:00 and 8:30 p.m.

1.2.3. Findings of Fact

The overwhelming evidence shows that Agent Ortíz invented out of whole cloth the observations he swore to regarding what he saw on the afternoon of June 19, 2014. First of all, I find that he did not go to Colinas del Plata that afternoon at all—neither at 6:00 p.m., as he swore, nor at 4:00 p.m., as he testified. This is shown by the low mileage on his car, as well by the fact that his entrance into the urbanization was not recorded by its guard. Furthermore, had Agent Ortíz actually been at Colinas del Plata that afternoon, he could not have seen what he claimed: the white Galant, which he reported seeing, was provably absent from the morning until the evening, as

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9. Rodríguez responded positively to her mother's offer of lasagna, but at 7:00 p.m., her mother sent her a message saying that it was getting late and if Rodríguez wanted, they could postpone dinner until the next day. DEFS.' EXH. Y(11). The messages entered into evidence do not provide Rodríguez's response, and thus do not show whether or not Rodríguez in fact had dinner with her mother that night.

were Rodríguez, Gómez, and Ocasio; and credible testimony, corroborated by text messages, shows that the Sequoia was not there either. I conclude, therefore, that Agent Ortíz perjured himself in both his sworn statement and his testimony regarding what he saw that afternoon, and I discredit his testimony on those points completely.

As for Agent Ortíz's alleged observations later that evening, the urbanization's log does show that a police officer in a white Hyundai entered the urbanization at 10:30 p.m. Though this puts the events a bit later than Agent Ortíz claimed in either his testimony or statement, it confirms that Agent Ortíz was at least present in the urbanization that evening. Agent Ortíz claims that when he arrived, the Grand Marquis was there with its trunk open, and, sometime later, a man walked out carrying a black bag, which he placed in the Grand Marquis's trunk, as well as a clear Ziploc-type bag, in which Agent Ortíz could see a rock that was identifiably cocaine. According to his affidavit, Agent Ortíz saw this person just minutes after arriving; in his testimony, he made his story more plausible by saying it might have been *forty-five* minutes. He did not, however, attempt to explain his earlier recollection. Further, Agent Ortíz reported having recorded the Galant's

license plate as it drove off: GGN-856. Agent Ortíz went one-for-six; a photograph taken during the warrant's execution, as well as AutoExpreso's records, show that the Galant's license plate is in fact GBG-043. DEFS.' EXHS. E, K. It's not conceivable that Agent Ortíz could have misread the Galant's plate so badly, and so I presume that this was another invention. These unexplained discrepancies, along with Agent Ortíz's perjured statements regarding what happened earlier that day, lead me to conclude that he his testimony about what he saw that night was also untrue. That is, I give no credibility to his report that he serendipitously arrived to see the Grand Marquis's trunk open and his targets leave, one carrying a small transparent bag of drugs that was nonetheless visible in spite on the dark and Agent Ortíz's need to be in an undetectable place.

Finally, Agent Ortíz claims to have returned on June 23, 2014, and seen a man leave the house and throw some plastic bags with white residue, along with some cylindrical vials, in the trash before leaving. Agent Ortíz then claims to have removed from the trash two of the bags and two of the cylinders, which had a Transformers logo. The bags, he said, tested positive for cocaine at a subsequent field test.

Documents provided by the Government show that two

Ziploc-bags were in fact taken for field-testing. Notably, though, these bags are not visibly "impregnated," as Agent Ortíz testified, with any white powder; on the contrary, they appear clear, if worn from use. Docket No. 101-5. The Government also produced a document written after a field test allegedly found cocaine residue in the bags. Docket No. 101-2. Neither that document nor the photographs or incident report, however, make any mention of the cylindrical vials that Agent Ortíz reported seizing. *See* Docket Nos. 101-2, 101-5. Likewise, neither the report nor the photographs include a visual of the field test confirming that the residue was cocaine.[10] Even so, I conclude that Agent Ortíz found the bags in the residence's

10. Generally, field-tests for cocaine are carried out by placing a sample of the suspected cocaine in a solution of cobalt thiocyanate; if the solution turns blue, the substance is presumptively cocaine. *See, e.g.*, *United States v. Diaz*, Crim. No. 05-167, 2006 WL 3512032, at *2 (N.D. Cal. Dec. 6, 2006) (describing test). Given that a positive result is indicated by a change in color, photographing the test's results would be trivial—and persuasive, too, in a case like this where the Government's main witness lacks credibility. *See, e.g.*, *United States v. Bohn*, Crim. No. 12-63, 2015 WL 1538808, at *3 (N.D. Ind. April 7, 2015) (noting that positive field test had been photographed); *United States v. Lizarraras-Estudillo*, Crim. No. 14-30, 2014 WL 7411801, at *6 (E.D. Ky. Dec. 31, 2014) (same).

trash and that they tested positive for cocaine.[11]

2. Analysis

The search in this case was authorized by a warrant, which was supported by an affidavit. Such affidavits carry "a presumption of validity." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). Where, as here,[12] the affidavit's contents are challenged, the defendant can only prevail by proving, by a preponderance of the evidence, that (1) the affiant knowingly or recklessly made false statements of fact in the affidavit; *and* (2) that these statements were necessary to a finding of probable cause. *Id.* at 155–56. Likewise, "when faced with a warrant containing information obtained pursuant to an illegal search, a reviewing court must excise the offending information and evaluate whether what remains is sufficient to establish probable cause." *United States v. Dessesaure*, 429 F.3d 359, 367 (1st Cir. 2005) (citing *Murray v. United States*, 487 U.S. 533 (1988)).

Agent Ortíz's affidavit alleges that he found evidence of

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11. The defendants' post-hearing briefs do not dispute what was found in the trash; instead, they argue that the search was illegal.

12. In setting this matter for a hearing, I determined that the defendants had made the "substantial preliminary showing" necessary to be entitled to a *Franks* hearing. *Franks v. Delaware*, 438 U.S. 154, 155 (1978).

illegality twice on June 19, 2014, and once on June 23. For the reasons explained above, I conclude that the events Agent Ortíz reported seeing on June 19 did not happen and were in fact invented. Given that Agent Ortíz could only have made these claims knowing of their falsity, they must be excluded in determining whether the affidavit otherwise contained probable cause supporting the search.

That leaves the events of June 23, as to which the facts support only Agent Ortíz's finding of two bags that turned out to contain cocaine residue (but not his claims about seeing the plastic vials, or being able to see the residue from far away). Nonetheless, the defendants argue that this information must be excluded from the warrant affidavit because it was learned as the result of an illegal search of the trash can.

At the time Agent Ortíz searched the trash can, it was on the residence's property, but just so: in the driveway and next to a wall in the far corner of the property, adjacent to the sidewalk. *See* GOV.'S EXH. 2(a) (showing trash can's position). Even so, the defendants' argument that the trash search was illegal fails. To begin with, the Supreme Court has sharply limited the circumstances in which it is willing to acknowledge a privacy interest in trash left at the curb, ready for pickup, as

the trash in this case was. In *California v. Greenwood*, the Supreme Court held that trash "left on or at the side of a public street" is "exposed . . . to the public sufficiently to defeat [a] claim to Fourth Amendment protection." 486 U.S. 35, 40 (1988). Indeed, given that the *purpose* of leaving the trash near the curb is to let "'strangers take it,'" the person disposing of the trash has "no reasonable expectation of privacy in the inculpatory items that [he] discarded." *Id.* at 41 (quoting *United States v. Reicherter*, 647 F.2d397, 399 (3d Cir.1981)). And it is of no moment that the trash can in this case was on the property rather than the street; the First Circuit has expressly held that *Greenwood*'s rationale nonetheless applies in such circumstances. *United States v. Wilkinson*, 926 F.2d 22, 27 (1st Cir. 1991) (finding no expectation of privacy where the defendant had left the trash "on his own lawn next to the curb"), *overruled on other grounds*, *Bailey v. United States*, 516 U.S. 137 (1995).

Greenwood notwithstanding, the Supreme Court's recent opinion in *Florida v. Jardines*, 133 S. Ct. 1409 (2013), provides another avenue of attacking the search. In *Jardines*, the Supreme Court confirmed that police may not, without a warrant or the owner's permission, enter into a home's curtilage; thus, evidence gathered based on an illegal entry into the curtilage

would be suppressible. *Id.* at 1417–18. Furthermore, *Greenwood* does not seem to provide an exception to *Jardines*'s rule, and so if a trash can is found in the curtilage, it cannot be searched without a warrant even if the property owner has no privacy interest in its contents. *See, e.g.*, *United States v. Jackson*, 728 F.3d 367, 371–72 (4th Cir. 2013) (finding it necessary to analyze the validity of a trash search under both *Greenwood* and *Jardines*). But *Jardines* offers the defendants no relief because the First Circuit has held that "[i]f the relevant part of the driveway is freely exposed to public view"—as was the place where the garbage bin was found in this case—"it does not fall within the curtilage." *United States v. Brown*, 510 F.3d 57,65 (1st Cir. 2007). Here, the area where the trash was found was in the open, exposed to passers-by, and as far from the house itself as any place on the property could be. The trash was thus not found in the curtilage, and so *Jardines* did not prohibit the search. *Cf. id.* at 65–66 (finding driveway not curtilage where it was 400 feet long "not visible from the public street," because it was not surrounded by barriers and had no signs "discouraging public entry").

The warrant's validity thus turns on whether the fruit of the trash search, along with the warrant's mention of the tip, are

sufficient to establish probable cause.[13] To begin with, I do not believe that the two bags found in the trash are themselves sufficient to support a finding of probable cause to search the house. To be sure, the bags show that drugs were probably in the house at some point in the past, but given that it was just two bags containing nothing but residue, an inference does not arise that more will be found inside. I acknowledge that this determination conflicts with the Eighth Circuit's holding that drug residue (or, specifically, marijuana seeds) found during a trash search is "sufficient *stand-alone* evidence to establish probable cause" to search the home. *United States v. Briscoe*, 317

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13. Frustratingly, none of the defendants' three post-hearing briefs acknowledges that the remedy for perjurious statements in an affidavit is their redaction, followed by a *de novo* determination of whether the affidavit's remainder establishes probable cause. Defendant Madera's brief fails to even mention *Franks*, Docket No. 91, and Defendants Rodríguez's and Ocasio's briefs suggest that the remedy for perjurious statements in an affidavit is automatic suppression, Docket Nos. 98, 99. By this failure, the defendants forfeited the opportunity to present arguments about why the probable cause does not exist. *Cf. Alejandro-Ortiz v. PREPA*, Civ. No. 10-1320(SCC), 2014 WL 4729250, at *2 n.2 (D.P.R. Sept. 23, 2014) ("By not acknowledging such adverse precedent, the firm lost the opportunity to argue against its applicability."). That is, the briefs barely mention the trash search, and they ignore completely the affidavit's mention of the anonymous tip (the facts of which the defendants did not challenge at the hearing).

F.3d 906, 908–09 (8th Cir. 2003). But in an exhaustive search, I have found no similar cases from outside of the Eighth Circuit. On the contrary, in every case I have found where probable cause was based in part on drug residue found during a trash search, there was additional corroborating evidence that drugs or other evidence would actually be found inside. *See, e.g.*, *United States v. Becknell*, — F. App'x —, 2015 WL 874398, at *7 (10th Cir. March 3, 2015) (tip from confidential informant, multiple trash searches, and traffic "suggesting drug sales were occurring"); *United States v. Martin*, 526 F.3d 926 (6th Cir. 2008) (tip from a reliable informant, trash pull revealing cocaine residue, and resident had multiple prior drug arrests); *United States v. Sauls*, 192 F. App'x 298, 299–300 (5th Cir. 2006) (trash search revealing cocaine residue and resident's prior criminal history); *United State v. Harris*, 118 F. App'x 592, 594 (3d Cir. 2004) (multiple trash searches, plus the resident had previous drug arrests); *United States v. Buchanan*, 70 F.3d 818, 826 (5th Cir. 1995) (trash pull revealing cocaine residue at house where police were "aware of purported drug activity" and the occupant's husband had recently been arrested on drug charges). Thus, I conclude that evidence from a single trash pull, standing alone, does not provide probable cause to search

the home. *Cf. United States v. Elliott*, 576 F. Supp. 2d 1579, 1582 n.1 (S.D. Ohio 1984) ("To conclude that such a single instance provides sufficient probable cause for a search warrant would be to subject to a full and probing search, the home of a cocktail party host, whose guests, perhaps unbeknownst to him, indulge in illicit substances and discard the residue. We are not prepared to say that such searches are reasonable within the meaning of the Fourth Amendment.").

Though it's a close case, the discovery of the cocaine residue, combined with the anonymous tip, does provide probable cause. The tipster claimed that the residence was being used to pack cocaine and then distribute it to various drug points. The trash search corroborated this tip insofar as it tied the particular residence to, at the least, possession of cocaine. That is, the trash search corroborated, if only partially, allegations of illegality regarding the residence; this goes some way towards establishing probable cause. I have found at least two cases finding probable cause in similar circumstances. *See Becknell*, 2014 WL 874398, at *7 (finding anonymous tip corroborated in part by finding of cocaine residue in trash search); *People v. Keller*, 739 N.W.2d 505 (Mich. 2007) (finding probable cause on basis of anonymous tip about marijuana

grow operation which was corroborated by a trash search revealing marijuana). Though the affidavit fails to corroborate much of the tipster's information, the fact that the tipster accused the residence's occupants of packing cocaine, combined with the discovery of cocaine residue in the residence's trash, makes it probable that more cocaine, or related evidence, would be found in the residence. For this reason, I conclude that the motion to suppress must be denied.

3. Conclusion

In this case alone, POPR Agent José J. Ortíz-Merced has twice perjured himself—once in the warrant affidavit, and again in a hearing before me. This perjury, moreover, consisted not of minor inconsistencies but of wholesale fabrications of criminal activity on the defendants' part. And that this activity was fabricated—especially Agent Ortíz's allegations regarding what happened on June 19, 2014—is beyond dispute: it is proven by toll records, text messages, photographs, mileage records, and visitor logs. Disappointingly, the Government maintains that Agent Ortíz was truthful in his recollections, though it does so in a half-hearted way, unwilling or unable to explain how, precisely, those "observations" could have been true in spite of all the contrary evidence. *See* Docket No. 96, at

1–2 ("The evidence presented by the United States showed that *all three* observations did in fact occur." (emphasis added)).

Despite Agent Ortíz's flagrant lies, this prosecution will proceed. The defendants themselves bear much responsibility for this outcome: their failure to recognize the *Franks* standard, and thus challenge the factual underpinnings of the tip and the trash search (about which I maintain some doubts), permits only one conclusion. Jurists far more learned than myself have built the legal framework in which I act, and I have to take some solace in the fact that they have deemed the present result just.

Still, I cannot help but remember that the United States Attorney's Office is meant to act in the public interest. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) ("Prosecutors are also public officials; they too must serve the public interest."). I do not believe the public's interest is served, however, by the Government's promotion of and reliance upon perjurers or fabulists; this is only more true when the perjurer is himself a public official, cloaked in the state's prestige. It is thus disheartening to see the Government continue to put its imprimatur on Agent Ortíz's falsehoods, because it suggests that Agent Ortíz,

and others like him, will continue[14] to take a perverse lesson

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14. The incidence of police perjury is difficult to assess, but the scholarly consensus is that it is rampant. *See, e.g.*, 2 WAYNE R. LAFAVE, SEARCH & SEIZURE § 3.3(g) (5th ed.) ("[I]t does seem fair to say that the threat of police perjury is much greater than most courts are willing to acknowledge." (internal quotations omitted)); Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 NOTRE DAME L. REV. 1259, 1266 & n.33 (2005) ("No definitive data exists documenting the degree to which police perjury accounts for wrongful convictions. However, there is overwhelming anecdotal evidence of widespread police perjury in our criminal justice system."); Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 SUFFOLK U. L. REV. 445, 449 (2008) (similar); *see also United States v. Janis*, 428 U.S. 433, 447 n.18 (1976) (noting studies suggesting that the exclusionary rule incentivizes police perjury); *Heffernan v. City of Chicago*, 286 F.R.D. 332, 335 n.3 (N.D. Ill. 2012) ("Studies of the problem of police perjury and deception in search and seizure cases have yielded disturbing results."). But the conflict of interest that inheres in prosecuting police officers, on whom prosecutors must regularly rely, means that police perjury is almost never punished. *See Briscoe v. LaHue*, 460 U.S. 325, 365–66 (1983) (Marshall, J., dissenting) (explaining that "[d]espite the apparent prevalence of police perjury, prosecutors exhibit extreme reluctance in charging" law enforcement officers for such conduct (footnote omitted)); *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 621 (Foreign Intel. Surv. Ct. 2002) (lamenting that despite federal agents regularly making false statements and regular omissions in warrant affidavits, resulting in one FBI agent being barred from acting as an affiant, the FBI had shown minimal interest in even investigating the problem), *abrogated on other grounds*, *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002); *see also* Goldsmith, 80 NOTRE DAME L. REV. 1267–68 & n.42 (assessing problem).

from their actions: that official acts of dishonesty carry with them no consequences—not reprimand, not termination, not prosecution—so long as they are committed in the Government's interest. This is a sorry state of affairs, and one in which the Government should take no pride.

I RECOMMEND that the motions to suppress be DENIED.

IT IS SO RECOMMENDED.

The parties have fourteen days to file any objections to this report and recommendation. Failure to file the same within the specified time waives the right to appeal this report and recommendation. *Henley Drilling Co. v. McGee*, 36 F.3d 143, 150-51 (1st Cir. 1994); *United States v. Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986).

In San Juan, Puerto Rico, this 10th day of June, 2015.

S/ SILVIA CARREÑO-COLL

UNITED STATES MAGISTRATE JUDGE