IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 94-10117

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

XXXX XXXX,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

The Appellant, **XXXX XXXX,** pled guilty and was sentenced before the Honorable **Jerry Buchmeyer,** United States District Judge for the Northern District of Texas. Judge Buchmeyer also ruled on the Motion to Suppress. The Honorable **John B. Tolle**, United States Magistrate Judge for the Northern District of Texas, conducted preliminary proceedings in this case.

Appellant was initially represented in the proceedings below by **Franklyn R. Mickelsen, Jr.**, Assistant Federal Public Defender, Northern District of Texas, and was later represented in the proceedings below by **F. Clinton Broden.**

The Appellee, the United States of America, was represented in the proceedings below and is represented on appeal by Assistant United States Attorney **Michael Snipes.** The United States Attorney for the Northern District of Texas is **Paul Coggins.**

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because of the fact-specific nature of the suppression claims in this case as they relate to the law. Therefore, Mr. XXXX believes that oral argument would particularly assist the Court in judging the merits of these claims.

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291, as this is an appeal from a final judgment entered by the United States District Court for the Northern District of Texas.

STATEMENT OF THE ISSUES

A. Search

I. An overnight guest in another's motel room has standing to contest a search of that room.

II. A consent to search following a previous illegal search does not render the items seized during the initial search admissible.

III. A host cannot consent to the search of a bathroom while it is being used by a guest.

B. Statement

IV. A statement made shortly following an illegal search must be suppressed.

V. A reasonable person who is 1) cursed at several times by a postal inspector; 2) followed to police headquarters; 3) Mirandized; 4) fingerprinted; 5) photographed; and 6) locked in a room, would believe he was under arrest. Moreover, a statement made immediately following such an illegal arrest must be suppressed.

STATEMENT OF THE CASE

A. Proceedings Below

By one count indictment filed May 19, 1993, the Appellant, XXXX XXXX, was charged with possession of stolen mail, in violation of 18 U.S.C. §§ 1708 and 2. See Excerpts at 3.[1] Subsequently, Mr. XXXX filed a motion to suppress illegally seized evidence and an illegally obtained statement both of which formed the basis of the indictment. See Rec. at I:21. An evidentiary hearing was held on Mr. XXXX's Motion to Suppress before the Honorable Jerry Buchmeyer on November 18, 1993, and, following that hearing, the District Court overruled that motion from the bench. See Excerpts at 5.

On November 19, 1993, Mr. XXXX entered a conditional guilty plea to the indictment before Judge Buchmeyer. See Rec. at I:104. The conditional guilty plea was entered pursuant to Fed. R. Crim. P. 11(a)(2) and Mr. XXXX reserved his right to appeal the District Court's ruling on his Motion to Suppress. Id.

On February 4, 1994, Mr. XXXX was sentenced to a term of imprisonment of ten months. See Excerpts at 4. Mr. XXXX was also sentenced to a term of Supervised Release for a period of three years. Id.

On February 7, 1994, Mr. XXXX filed a timely notice of appeal and this appeal follows. Id. at 2.

B. Statement of the Facts

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[1] References to the Record Excerpts ("Excerpts") refer to the tab number. References to the Record ("Rec.") refer to the volume number:page number(s). References to the transcript of the suppression hearing ("Tr.") refer to the page number of the transcript. The transcript can be found at Volume II of the record and a portion of the transcript can be found in the Excerpts at tabs 5 and 6.

Prior to the events of this case, James Stiles had lived in Room 129 of the Abrams Inn in Arlington, Texas for three years. See Tr. at 35. Mr. Stiles lived at the Abrams Inn with his girlfriend. Id. at 37. On April 1, 1993, the Appellant, XXXX XXXX, visited Mr. Stiles and his girlfriend at the Abrams Inn and stayed overnight in their room as Mr. Stiles' guest. Id. at 37; 39; 41.

Early on the morning of April 2, 1993, while Mr. XXXX was in the only bathroom in Room 129, Postal Inspector David McDermott and two officers from the Arlington Police Department (collectively "the officers") knocked on the door of the unit. Id. at 6. Mr. Stiles testified at the suppression hearing that he answered the door and invited the Officers into the unit's living room/bedroom area. Id. at 36. At the time the Officers entered the room, Mr. XXXX was in the bathroom, sitting on the toilet, with the door to the bathroom closed. Id. at 41-42. Sergeant Cowcert of the Arlington Police Department then ordered Mr. XXXX to come out of the bathroom.[2] Id. at 32; 42. Mr. XXXX testified at the suppression hearing that he would not have come out of the bathroom had he not been ordered to do so by Sergeant Cowcert. Id. at 42-43.

After Mr. XXXX came out of the bathroom, Sergeant Cowcert entered the bathroom and noticed a book of checks that Mr. XXXX had placed in the bathroom's trash can. Id. at 28-29. Mr. XXXX testified that he had a possessory interest in the checkbook. Id. at 43. Significantly, Mr. XXXX also testified that the checkbook was covered with a blue and black marbled checkbook cover that covered the checks completely. Id. at 43-44. Inspector McDermott

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[2] There was conflicting testimony at the suppression hearing as to whether Mr. XXXX voluntarily came out of the bathroom, whether he was ordered to come out of the bathroom, or whether he was forcefully removed from the bathroom by one of the Officers. The District Judge resolved the conflict by choosing to believe the middle position: that Mr. XXXX was ordered to come out of the bathroom. See Tr. at 64. Mr. XXXX does not contest this finding on appeal.

confirmed that the checkbook did have a checkbook cover. Id. at 22. Despite the fact that the checkbook was clearly not a weapon that might have endangered Sergeant Cowcert's safety and despite the fact that the checkbook cover prevented Officer Cowcert from determining that the checks might have belonged to an individual other than one of those in the motel unit, when Officer Cowcert saw the checkbook he proceeded to reach into the trash can, seized the checkbook, and he then brought the checkbook into the main room. Id. at 28-29.

After the checkbook was brought out into the main room, Inspector McDermott began questioning Mr. XXXX, Mr. Stiles, and Mr. Stiles' girlfriend regarding ownership of the checks. Id. at 29; 38. Although the checks were printed in the name of Tricia or Brant Whetstone, the Officers did not know at that point the names of the occupants of Room 129 (id. at 33) and, therefore, they did not know whether any of the three occupants were Tricia or Brant Whetstone. Id. at 10; 30; 44. Only at this point, after the checkbook was seized and after the initial questioning had begun, did the Officers request and receive consent from James Stiles to do a complete search of the motel room. Id. at 29; 38.

After the complete search, Inspector McDermott asked Mr. XXXX to give him a handwriting sample on a piece of paper provided by one of the Arlington Officers. Id. at 10; 44-45. At first Mr. XXXX complied and began writing an exemplar with Inspector McDermott's direction, but then Mr. XXXX changed his mind and folded up the piece of paper and refused to return the paper to Inspector McDermott. Id. at 17; 45. Inspector McDermott testified that after Mr. XXXX refused to return the paper containing the handwriting exemplar, he told Mr. XXXX words to the effect that XXXX was to give him the "fucking piece of paper" because it was "goddamn federal property." Id. at 18; 45. Inspector McDermott candidly conceded at the suppression hearing that he was not going to let Mr. XXXX change his mind and keep the piece of paper and admitted that he believed that Mr. XXXX also understood that he (Inspector McDermott) was going to get the piece of paper from him. Id. at 18-19; 46. Mr. XXXX characterized the heated exchange as "hostile" and "a show of power" by Inspector McDermott. Id. at 46. In contrast, Inspector McDermott testified that, despite his profanity and his clearly

understood intent to get the piece of paper from Mr. XXXX no matter what it took, the exchange was friendly. Id. at 11.

After this first exchange between Mr. XXXX and Inspector McDermott, another exchange took place concerning whether Mr. XXXX would go with Inspector McDermott to the Postal Inspector offices. Inspector McDermott's testimony differed from the testimony of Mr. XXXX regarding this exchange also. Inspector McDermott admitted that he told Mr. XXXX "I think I have enough to put you in jail," but nevertheless testified that he only "asked" Mr. XXXX if he wanted to accompany him to his office and that Mr. XXXX complied. Id. at 12. Mr. XXXX, on the other hand, testified that he was told by Inspector McDermott that he would be put in jail by the Arlington Police for forty-eight hours, but that Inspector McDermott also told him that he might be able to convince the Arlington Police to let him go to the Postal Inspector offices instead. Id. at 47. Mr. XXXX testified that he did not feel he was free to simply leave the motel room at the time of this exchange and he also testified that he believed that he would either have to accompany Inspector McDermott to Postal Inspector offices or be put in the Arlington jail. Id. The District Court did not make any factual determinations regarding this exchange.

Mr. XXXX testified that he did eventually accompany Inspector McDermott to the Postal Inspector offices because he felt he had no choice. Id. at 47-48. Although Mr. XXXX used his own motorcycle to follow Inspector McDermott's car for the fifteen mile trip between the Abrams Inn and the Postal Inspector offices, Inspector McDermott kept Mr. XXXX under constant surveillance during the entire trip. Id. at 48-49. Indeed, at one point, Mr. XXXX stopped for gasoline and Inspector McDermott also stopped so that he could maintain his surveillance of Mr. XXXX. Id. at 49-50. Once the two arrived at Postal Inspector offices, Mr. XXXX was taken through locked doors and given his Miranda warnings. Id. at 13; 19; 50. Mr. XXXX was also fingerprinted and his mug shots were taken. Id. at 20. Mr. XXXX did not believe he was free to leave and testified that he "knew he was in custody." Id. at 50-51. Eventually, Mr. XXXX gave Inspector McDermott an additional handwriting exemplar and a

statement admitting to the possession of stolen mail. Id. at 51. It was this statement that formed the basis for the indictment in this case. After giving that statement, Mr. XXXX was buzzed out of the locked room and told that he could leave. Id. at 20; 51.

Following the suppression hearing, Judge Buchmeyer ruled from the bench. See Excerpts at 5. The District Court ruled that Mr. XXXX had "no expectation of privacy" in Mr. Stiles' apartment and, therefore, that Mr. XXXX had no standing to challenge the seizure of the checks. See Tr. at 63; 65. As to the subsequent statement by Mr. XXXX at the Postal Inspector offices, Judge Buchmeyer held that it was not fruit of an illegal arrest because Mr. XXXX was not under arrest at the time he gave the statement. Id. at 65. The Court reasoned that if Inspector McDermott had intended to arrest Mr. XXXX, it would have been "malpractice" for him to allow Mr. XXXX to follow him on his own motorcycle and, therefore, Mr. XXXX could not possibly have been under arrest. Id.

SUMMARY OF THE ARGUMENT

A. The Checkbook Was Seized as a Result of an Illegal Search and Must Be Suppressed.

The District Court overruled Mr. XXXX's Motion to Suppress the checkbook seized from the motel's bathroom, because it believed that Mr. XXXX did not have standing to contest a search of the motel unit. The District Court's conclusion is directly contrary to the holding of the United States Supreme Court in Minnesota v. Olson, 495 U.S. 91 (1990). In Olson, the Supreme Court held that an overnight guest, such as Mr. XXXX in this case, does have standing to contest a search of his host's premises.

Since the District Court held that Mr. XXXX had no standing to contest the search of the motel unit, it did not reach the question of whether a subsequent consent to search given by the renter of the motel unit, James Stiles, after the initial unconsented to search and illegal seizure of the checkbooks, was valid. Although courts have sometimes upheld a second search following an illegal search where it is the second search that produces the evidence in question, this Court in Melendez-Gonzalez, 727 F.2d 407 (5th Cir. 1984), has held that a subsequent consensual to search does not make admissible evidence produced by the first search that was illegal. The Government may not unring the bell.

In any event, Mr. XXXX had exclusive control over the bathroom in which the checks were seized and, therefore, although Mr. Stiles was his host, Mr. Stiles could not consent to a search of the bathroom. By closing the door to the bathroom as he sat on the toilet, Mr. XXXX demonstrated a subjective intent to exercise temporary "exclusive control" over the bathroom. Moreover, numerous courts have recognized that the use of the bathroom is an activity our society recognizes as very private and, in a related context, that hosts may not consent to a search of a bathroom stall that is being used by an invitee. Therefore, Mr. Stiles' consent to search the bathroom where the checks were found was invalid first, because the consent was given only belatedly, and second, because he had no authority to consent to a search of the bathroom over

which Mr. XXXX had temporary "exclusive control." As a result, the checks that were seized from the bathroom of Room 129 must be suppressed.

B. The Statement Made By Mr. XXXX is Fruit of the Illegal Search and Also Fruit of an Illegal Arrest, Therefore, It Must Be Suppressed.

This Court recognizes the applicability of the 'fruit of the poisonous tree' analysis to confessions obtained as a result of an illegal search. Since, as set forth above, the initial search producing the checkbook was illegal, the statement given by Mr. XXXX regarding the checkbook that was made shortly following the seizure of the checkbook must be suppressed.

The statement was also given following an illegal arrest. Following the seizure of the checkbook, Mr. XXXX was cursed at several times; followed to Postal Inspector offices; Mirandized; fingerprinted; photographed; and locked in a room at the Postal Inspector offices. This Court has previously held that hostile exchanges between police and citizens will turn a consensual encounter into an arrest. A reasonable person in Mr. XXXX's position would have definitely believed he was under arrest following the hostile exchange and police booking process that he was subjected to. The District Court found it dispositive that Mr. XXXX was not told he was under arrest by Postal Inspector McDermott (although neither was he told that he was not under arrest) and that Inspector McDermott did not subjectively intend to arrest him. Nevertheless, the District Court performed the wrong analysis because courts will apply an objective test when deciding whether an arrest has occurred. Since a reasonable person in Mr. XXXX's position would have believed he was under arrest and this statement was given immediately following the arrest, the statement must be suppressed on this basis as well.

ARGUMENT[3]

I. THE CHECKBOOK WAS SEIZED AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE AND, THEREFORE, MUST BE SUPPRESSED.

As noted above, the District Court denied Mr. XXXX's motion to suppress the seized checkbook, because it held that Mr. XXXX did not have standing to contest the illegal search. Tr. at 63; 65. The District Court judge held that since the motel room that Mr. XXXX had spent the previous night had been Mr. Stiles' motel room, "[t]he defendant had no expectation of privacy in somebody else's apartment." Id. at 63. This Court will review de novo the lower court's legal conclusion that Mr. XXXX had no standing to contest the search of Mr. XXXX's motel room - a motel room in which he was an overnight guest. United States v. Lee, 898 F.2d 1034, 1037 (5th Cir. 1990), cert. denied, 113 S.Ct. 1057 (1993) (Questions of standing are legal questions reviewed de novo).

A. Mr. XXXX, as an Overnight Guest, Had Standing to Contest the Search of His Host's Residence.

The question of whether Mr. XXXX, who had been an overnight guest in James Stiles' motel room, had standing to contest the search of that hotel room has already been answered by the United States Supreme Court in Minnesota v. Olson, 495 U.S. 91 (1990).

In Olson, Mr. Olson was contesting his warrantless arrest and a subsequent confession. Id. at 94. Mr. Olson had been arrested inside of his friend's duplex where he had spent the previous evening as an overnight guest. Id. The State of Minnesota argued that Mr. Olson could not contest his warrantless arrest inside his friend's duplex because he had no reasonable expectation of privacy in the friend's duplex. Id. at 96-97. The State pointed out that Mr. Olson was never left alone in the duplex or given a key to the duplex. Id. at 97. The Supreme Court

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[3] Generally, this Court will review a District Court's factual findings regarding a motion to suppress using a clearly erroneous standard and will review questions of law related to such a motion de novo. United States v. Richard, 994 F.2d 244, 247 (5th Cir. 1993) (citation omitted).

rejected the State's argument and held that Mr. Olson did, in fact, have standing to contest his warrantless arrest. Id. at 96-97.

> We need go no further then to conclude, as we do, that Olson's stature as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.

Id. In reaching its holding, the Supreme Court relied upon and affirmed the ultimate conclusion of its decision in Jones v. United States, 362 U.S. 257 (1958), overruled, United States v. Salvucci, 448 U.S. 83, 97-98 (1980).[4] In Jones, the Supreme Court had held that a guest, such as Mr. XXXX in the instant case, does have standing to contest the search of an apartment where he has spent the previous night. Jones, 362 U.S. at 265.

The instant case is indistinguishable from Olson. Mr. XXXX, like Mr. Olson, had been an overnight guest at the premises in question. Therefore, Mr. XXXX's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the [premises] that society is prepared to recognize as reasonable." Olson, 495 U.S. at 96-97. It is of no import that the premises in this case was a motel room as opposed to a house or apartment. First, the Abrams Inn was apparently a residential motel and Mr. Stiles had lived there for approximately three years prior to the search. See Tr. at 35. Second, it is settled that even a traveler has an expectation of privacy in a motel room similar to the expectation of privacy he has in his home. See Stoner v. California, 376 U.S. 483, 487-90 (1964). This expectation of privacy, under the Supreme Court's holding in Olson, would naturally flow to an overnight guest in that person's motel room.

The District court's holding that Mr. XXXX had no standing to contest the search of James Stiles' motel room is incorrect as a matter of law. Since this holding forms the basis of the

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[4] Salvucci overruled Jones reasoning that a defendant who has a possessory interest in property seized automatically had standing to contest the seizure of that property, but it did not overrule the Court's ultimate conclusion in Jones. Salvucci, 448 U.S. at 84-85.

District Court's denial of Mr. XXXX's Motion to Suppress the seized checkbook (see Tr. at 63, 65), this Court must reverse the District court's ruling on this motion.

B. The Checkbook Was Not Seized Pursuant to a Valid Consent to Search By James Stiles.

As noted above, Mr. XXXX had been in the bathroom with the door closed, sitting on the toilet when the Officers entered the motel room. See Tr. at 41-42. Mr. XXXX was then ordered out of the bathroom by Sergeant Cowcert who, at that point, searched the bathroom, picked up the checkbook from the trash can where Mr. XXXX had left it, and opened the checkbook cover and discovered that the checks belonged to Tricia or Brant Whetstone. Id. at 28-29; 42. Only after all of this occurred did the officers secure Mr. Stiles' consent to search his motel room. Id. at 9; 29.

Because the District Court held that Mr. XXXX did not have standing to contest the search of the bathroom, it did not really have occasion to fully address the issue of Mr. Stiles' belated consent. But see Id. at 64.

1. Mr. Stiles' consent to search did not come until after the checkbook was illegally seized and, therefore, is invalid.

Since Mr. XXXX has standing to challenge the search of the bathroom (see supra. Argument I.A.), he also has standing to challenge the validity of the belated consent given by Mr. Stiles to the search of the motel unit. See, e.g., Bumper v. North Carolina, 391 U.S. 543, 548, n.1 (1968).

When the Officers entered Room 129 on April 2, 1993, they did not have a search warrant. It was also conceded by the officers at the suppression hearing that, at the time they entered the room, they did not have probable cause to arrest Mr. XXXX and, therefore, to conduct a search incident to arrest. See Tr. at 15. Finally, both Inspector McDermott and Officer Cowcert admitted that they did not obtain Mr. Stiles' consent to search any room of the

motel unit until after Officer Cowcert had searched the bathroom and seized the checkbook. Id. at 9; 29.[5] Therefore, the initial seizure of the checkbook violated the warrant requirement of the Fourth Amendment.

Just as it is clear that the initial warrantless search and seizure of the bathroom prior to Mr. Stiles' consent was illegal and violative of the Fourth Amendment to the Constitution, it is equally clear that Mr. Stiles' belated consent to search the motel unit did not make evidence seized in the initial consent voluntary. This Court reached an identical conclusion in United States v. Melendez-Gonzalez, 727 F.2d 407, 413-14 (5th Cir. 1984). In that case, Border Patrol Agents had conducted an illegal search of the defendant's automobile trunk, but later, following the search, the defendant signed a consent form giving the Agents permission to conduct a search of the car. Id. at 413. The Court correctly noted in suppressing the evidence seized from the trunk that "[t]here is no authority...which justifies an earlier illegal search based upon a later consent to an additional search." Id. at 414.[6]

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[5] Even if the Government could somehow argue that Sergeant Cowcert was legally present in the bathroom without Mr. Stiles' consent to search when the checkbook was seized, the seizure of the checkbook cannot be justified under a "plain view" rationale because the checkbook cover covering the checks prevented it from being immediately apparent to Sergeant Cowcert that the checks were stolen. See Arizona v. Hicks, 480 U.S. 321, 326 (1987). Moreover, the checkbook was clearly not a weapon that Officer Cowcert might have been permitted to seize for safety purposes.

[6] Melendez-Gonzalez and the instant case do not involve a scenario in which the evidence is found in the second search and where a person argues simply that the consent for the second search is tainted by the first illegal search. See United States v. Sheppard, 901 F.2d 1230 (5th Cir. 1990). In that case, the Court will perform a typical consent and attenuation analysis. Here and in Melendez-Gonzalez, the question involves evidence found in the initial search that was an illegal search and the Government asks the Court to unring the bell.

Therefore, Mr. Stiles' belated consent to search his motel unit whose bathroom had been subject to a prior illegal search was not valid as to the items seized from the bathroom.

2. Mr. XXXX had exclusive control of the bathroom and, therefore, Mr. Stiles could not, in any event, consent to the search of the bathroom.

Even assuming that Mr. Stiles could somehow remove the taint of the prior illegal search of the bathroom by his belated consent, he did not have authority to consent either beforehand or belatedly to the search of the bathroom while it was being used by Mr. XXXX. Indeed, while it is generally true that a host may consent to a search of premises under his control and that such consent is binding upon a guest, this proposition is not necessarily true when a particular room is made available by the host for the exclusive use of the guest. See, e.g., Commonwealth v. O'Neal, 429 A.2d 1189 (Pa. Super. Ct. 1991); State v. Cover, 450 So.2d 741, 746 (La. Ct. App. 1984), writ denied, 456 So. 166 (La. 1984). It appears to be an issue of first impression whether a host can consent to a search of a bathroom while it is being used by a guest, however, numerous cases indicate that the answer to this question in our society surely must be "no."

In Olson, the Supreme Court spoke at length regarding the societal custom of visiting another's residence:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

Olson, 495 U.S. at 98. This type of recognition by the Supreme Court of the social custom of visiting another's home supports a holding that when a guest uses a host's bathroom to engage in

bodily functions that this society considers highly private, that the guest has been given "exclusive control" over the bathroom for the time it takes him to perform his bodily functions. Indeed, "[t]he activities associated with the use of a toilet are private, based on widely accepted societal norms." State v. Limberhand, 788 P.2d 857, 861 (Idaho Ct. App. 1990). Moreover, none of us, while a guest in a person's house, expects a host to order us out of the bathroom while we are sitting on the toilet. It is simply not a risk we assume in our society when using another's bathroom.[7]

Cases that are clearly instructive on this issue of first impression are the legion of court cases that have held that individuals are protected from warrantless searches and seizures while inside public toilet stalls. See, e.g., Kroehler v. Scott, 391 F.Supp. 1114 (E.D. Pa. 1975) (Restroom in railway station); People v. Morgan, 558 N.E.2d 524 (Ill. App. Ct.), (Restroom in student center), appeal denied, 561 N.E.2d 701 (Ill. 1990); State v. Limberhand, 788 P.2d 857 (Restroom in public rest areas); City of Tukwilla v. Nalder, 770 P.2d 670 (Wash. Ct. App. 1989) (Restroom at shopping mall); People v. Kalchik, 407 N.W.2d 627 (Mich. Ct. App. 1987) (Restroom at shopping mall); Buchanan v. State, 471 S.W.2d 401 (Tex. Crim. App. 1971), cert. denied, 405 U.S. 930 (1972) (Restroom in Sears Department Store); State v. Bryant, 177 N.W.2d 800 (Minn. 1970) (Restroom in Montgomery Ward Department Store); Brown v. State, 238 A.2d 147 (Md. Ct. Spec. App. 1968) (Restroom in bar). Although it is government entities or public businesses that are providing the bathroom facilities that are the "hosts" in these cases, the courts have refused to allow these government or business "hosts" to consent to searches of their bathroom stalls because their invitees or "guests" had a reasonable expectation that they would have exclusive use over the respective facilities during the time they were using them. See, e.g., Buchanan, 471 S.W.2d at 409 ("A toilet stall in a public restroom [at the Sears Department

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[7] See United States v. Matlock, 415 U.S. 164, 171 n.11 (1974) (When premises are shared, a co-occupant normally assumes the risk that another co-occupant might permit a "common area" to be searched).

Store] is private to the extent it is offered to the public for private...individual use."); Bryant, 177 N.W.2d at 804 ("[O]nce facilities are provided wherein those using them are assured of privacy, the store has no right to destroy that privacy without consent, actual or implied, of one to who it has been assured."). It is of little import that the host in this case was James Stiles as opposed to a shopping mall, or a Sears Department Store, or the City of Dallas.

In short, we as a society have recognized that guests have exclusive control over bathroom facilities while they are using them. Moreover, in this case, Mr. XXXX clearly had a subjective expectation of privacy and temporary "exclusive control" of the Room 129 bathroom as he sat on the toilet. Indeed, when Officer Cowcert ordered Mr. XXXX out of the bathroom, Mr. XXXX was sitting on the toilet with the door closed. See Tr. at 41-42. Therefore, James Stiles did not have the authority to consent to the search of the bathroom.[8]

II. THE STATEMENT MADE BY MR. XXXX TO THE POSTAL INSPECTOR FOLLOWING BOTH AN ILLEGAL SEARCH AND SEIZURE AND AN ILLEGAL ARREST MUST BE SUPPRESSED.

A. The Statement Made By Mr. XXXX to the Postal Inspector Followed the Illegal Search and the Illegal Seizure of the Checkbook and Must Be Suppressed as 'Fruit of the Poisonous Tree.

The United States Supreme Court dealt with the now familiar 'fruit of the poisonous tree' doctrine in Wong Sun v. United States, 371 U.S. 471 (1963). Wong Sun dealt with a confession arising out of an illegal arrest, but it would be equally applicable to a confession arising out of an illegal search. Noted one commentator:

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[8] It should be of no relevance that Mr. XXXX was forced to involuntarily relinquish his exclusive control of the bathroom when Sergeant Cowcert ordered him to come out into the living room. Had it not been for Officer Cowcert's exercise of his Governmental authority, Mr. XXXX would have remained in the bathroom (see Tr. at 42-43) and, as set forth above, Mr. Stiles could then not have consented to the search of the bathroom.

> Although the Supreme Court has never confronted, except obliquely, a situation in which...a confession was the fruit of a prior illegal search, in most such cases there is little doubt as to what the result should be. In the typical case in which the defendant was present when incriminating evidence was found in an illegal search or in which the defendant was confronted by the police with evidence they had illegally seized, it is apparent that there has been an "exploitation of that illegality" when the police subsequently question the defendant about that evidence or the crime to which it related. This is because "the realization that the 'cat is out of the bag' plays a significant role in encouraging the suspect to speak."

4 Wayne R. LaFave, Search and Seizure § 11.4(c) (1987) (citations omitted). In United States v. Parker, 722 F.2d 179, 185-86 (5th Cir. 1983), overruled on other grounds, United States v. Hurtado, 905 F.2d 74 (1990), this Court recognized the applicability of the 'fruit of the poisonous tree' analysis to confessions obtained as a result of an illegal search.

In this case there can be no doubt that the statement made by Mr. XXXX to Postal Inspector McDermott came as a direct result of the Officers having found and seized the checkbook. Indeed, Mr. XXXX gave his statement shortly after his arrival at Postal Inspector offices where he was taken following the seizure of the checkbook. It is self evident that Mr. XXXX only gave this statement when he realized the 'cat was out of the bag.'

Therefore, should this Court follow Olson by holding that, contrary to the District Court's ruling below, Mr. XXXX had standing to contest the illegal search of the motel room and the illegal seizure of the checkbook, the Court must then also suppress the statement made by Mr. XXXX coming shortly after the illegal seizure of the checkbook.

B. Even Assuming Arguendo That Mr. XXXX Did Not Have Standing to Contest the Illegal Seizure of the Checkbook, Mr. XXXX Was Nonetheless Subject to an Illegal Arrest and, Therefore, His Statement Must Still Be Suppressed as Fruit of the Illegal Arrest.

Following a hostile exchange between Inspector McDermott and Mr. XXXX, Mr. XXXX was followed to Postal Inspector offices. Id. at 18; 45-47. Upon his arrival at Postal Inspector offices, Mr. XXXX was taken to a locked room, he was fingerprinted and his mug shots were

taken. Id. at 20; 50. Nevertheless, the District Court held that Mr. XXXX was not under arrest at any time. Id. at 65.

A person can be said to be under arrest when a reasonable person in the person's position would not have understood he was free to leave. See, e.g., Florida v. Royer, 460 U.S. 491, 502-03 (1983). The Government bears the burden of proving that a person has voluntarily accompanied officers to a place where he is questioned. See Morales v. New York, 396 U.S. 102, 105 (1969); United Stats v. Webster, 750 F.2d 307, 321 (5th Cir. 1984), cert. denied, 471 U.S. 1106 (1985). The ultimate question of whether a seizure occurred and what a so-called reasonable person would have believed regarding his custodial status are legal questions that this Court should review de novo. United States v. Bloom, 975 F.2d 1447, 1450 (10th Cir. 1992); United States v. Hernandez, 825 F.2d 846, 851 (5th Cir. 1987) (The type and level of seizure is a question of law), cert. denied, 484 U.S. 1068 (1988).

This Court examined a case with a set of facts similar to those involved in the instant case in United States v. Johnson, 846 F.2d 279 (5th Cir.), cert. denied., 488 U.S. 945 (1988). In that case, Mr. Johnson was stopped by postal inspectors and "asked" to walk with them to their offices in order to answer some of their questions. Id. at 280. Upon arriving at the Postal Inspector offices, Mr. Johnson was advised of his rights and asked to sign a waiver form, although Mr. Johnson, unlike Mr. XXXX, was nevertheless told that he was not under arrest. Id. at 280-81. Also in contrast to the instant case, Mr. Johnson was not locked in the postal inspector offices nor was he photographed or fingerprinted. Nevertheless, during the questioning of Mr. Johnson, the questioning "took a decidedly hostile turn." Id. at 281. This Court held that when the postal inspectors rejected Mr. Johnson's explanations to their questions "with hostility," a reasonable person would have believed that he was no longer free to move without the consent of the inspectors and, therefore, also held that an "arrest" had occurred. Id. at 283.

The fact that Inspector McDermott did not inform Mr. XXXX in this case that he was under arrest does not establish the Government's burden of proving that Mr. XXXX accompanied Inspector McDermott voluntarily to the Postal Inspector offices. See Royer, 460

U.S. at 494. Indeed, in Johnson, Mr. Johnson was specifically informed that he was not under arrest and this Court nonetheless found an "arrest." Johnson, 846 F.2d at 280-81. The instant case illustrates the concern, articulated by the American Law Institute and noted by the Supreme Court in Dunaway v. New York, 442 U.S. 200 (1979), that a request to appear at a police station "may easily carry an implication of obligation, while the appearance itself, unless clearly stated to be voluntary, may be an awesome experience for the ordinary citizen." Model Code of Pre-Arraignment Procedure § 110.1, Commentary at 261 (1975). While it was disputed at the suppression hearing and left unresolved by the District Court judge whether Mr. XXXX was politely asked to accompany Inspector McDermott to the Postal Inspector offices or whether he was told that he could either go with Inspector McDermott or be detained by Arlington police for forty-eight hours, in either case Mr. XXXX was under arrest by the time he gave his statement.

Prior to Inspector McDermott and Mr. XXXX leaving the motel room, they already had the hostile type of exchange that this Court found dispositive in Johnson. Id. at 18; 45. When Mr. XXXX refused to give Inspector McDermott the piece of paper he had used to write a handwriting sample on, Inspector McDermott shouted profanity at Mr. XXXX more than once. Id. at 18; 45. Moreover, Inspector McDermott admitted at the suppression hearing that he was planning on getting the piece of paper from Mr. XXXX no matter what was necessary and that he believed Mr. XXXX understood his intentions. Id. at 18-19; 46. Inspector McDermott also testified that at minimum he told Mr. XXXX that "I think I have enough to put you in jail" prior to leaving the motel room. Id. at 12. Although Mr. XXXX was allowed to accompany Inspector McDermott from the motel to Postal Inspector offices using his own motorcycle, he was kept under constant surveillance during the entire trip including a stop at a gas station. Id. at 48-50. As noted above, prior to giving his statement, Mr. XXXX was given his Miranda warnings[9], his

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9 The giving of Miranda warnings while not dispositive on the issue of whether a person has been arrested is evidence that the nature of detention has grown more serious and perhaps degenerated into an arrest. See United States v. Obasa, 15 F.3d 603, 608 (6th Cir. 1994).

mug shots were taken, his fingerprints were taken, and he was locked in a room at the Postal Inspector offices. Id. at 19-20; 50. While not dispositive, Mr. XXXX testified that subjectively he did not believe he could have requested that the doors be unlocked so he could leave. Id. at 50-51.

Clearly, the facts support a finding of an "arrest" in this case even more strongly than in Johnson. Inspector McDermott offered no explanation as to why he could not have questioned Mr. XXXX in the hotel room and why, instead, he postponed the questioning until he got Mr. XXXX to his offices and all the procedures that accompany a traditional arrest (e.g. Miranda warnings, photographing, fingerprinting) had been performed. Cf. United States v. Ceballos, 812 F.2d 42, 49 (2d. Cir. 1987).

The District Court, in finding no "arrest," focused solely on the fact that Mr. XXXX was allowed to use his own motorcycle to arrive at Inspector McDermott's offices - albeit under constant surveillance - and on the belief that if Inspector McDermott had meant to arrest Mr. XXXX, it would have been "malpractice" to allow Mr. XXXX to drive himself to Postal Inspector offices. Id. at 65. However, this offers little, if any, insight into whether Mr. XXXX was under arrest at the time he and Inspector McDermott left the motel or, for that matter, whether the encounter grew into an arrest at some later point such as when Mr. XXXX had been locked inside Postal Inspector offices and processed. First, as noted above, a request to appear at a police station may carry an implication of obligation for the ordinary citizen so that driving one's own vehicle while under surveillance would provide little comfort to a reasonable person. Model Code of Prearraignment Procedure § 110.1, Commentary at 261 (1975). Second, whether Inspector McDermott meant to arrest Mr. XXXX and whether he committed "malpractice" in carrying out his intent, is not the objective test that must be applied in order to determine whether an arrest has occurred. See Berkemer v. McCarthy, 468 U.S. 420, 442 (1984) ("A policeman's

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Moreover, the giving of Miranda warnings to a "reasonable person" would likely indicate to that person that he had, in fact, been arrested.

unarticulated plan has no bearing on the question of whether a suspect was "in custody" at a particular time; the only inquiry is how a reasonable man in the subject's position would have understood his situation."); United States v. Holloway, 962 F.2d 451, 458 (5th Cir. 1992) ("Courts are precluded from giving weight to the subjective intent of police officers."). As set forth earlier, the test is whether a reasonable citizen, in Mr. XXXX's position, would have believed he was free to decline Inspector McDermott's demand and whether, at any point prior to Mr. XXXX giving his statement, the reasonable citizen would have believed he was not free to go. The question this Court must ask itself is whether a reasonable person who is 1) cursed at several times, 2) followed to police headquarters, 3) Mirandized, 4) fingerprinted, 5) photographed, and 6) locked in a room, would have believed that he was free to leave the police headquarters before being told he could do so. Unless this so called reasonable person has gone through a metamorphosis since Johnson, the reasonable person in Mr. XXXX's position would have believed he was under arrest regardless of what Inspector McDermott might have subjectively intended.

Since the question of what a reasonable person understood and whether an arrest has occurred is a legal question and since Mr. XXXX's statement was clearly fruit of the illegal arrest (see Dunaway v. New York, 442 U.S. 200, 216 (1979)), this Court should reverse the District Court holding regarding the admissibility of the statement given to Inspector McDermott.

CONCLUSION

For the foregoing reasons, the checkbook seized at the Abrams Inn and Mr. XXXX's subsequent statement must both be suppressed because they were obtained in violation of the Fourth Amendment to the United States Constitution. This Court, therefore, must reverse the District Court's denial of Mr. XXXX's Motion to Suppress and remand the case to the District Court for further proceedings and/or dismissal.

DATED: March 29, 1994.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on March _____, 1994, I caused two copies of the foregoing Brief of Appellant to be deposited in the United States Mail, first class, postage prepaid, addressed to Michael Snipes, Assistant United States Attorney, 1100 Commerce Street, Third Floor, Dallas, Texas.

F. Clinton Broden