No. 09-10147

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

SONG JA CHA
and
IN HAN CHA,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT OF BAIL/DETENTION STATUS

Pursuant to Circuit Rule 28-2.4, I state that both defendants are released on their own recognizance.

s/ Lisa J. Stark
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IN THE UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLANT

STATEMENT OF JURISDICTION

This is an appeal of a pretrial order granting defendants' motions to suppress evidence seized from a crime scene pursuant to a validly issued search warrant. The district court had jurisdiction pursuant to 18 U.S.C. 3231 and issued its order on March 24, 2009. The United States filed a timely notice of appeal on March 30, 2009. This Court has jurisdiction pursuant to 18 U.S.C. 3731.

STATEMENT OF THE ISSUES

1. Whether evidence seized from a crime scene pursuant to a validly issued search warrant was improperly suppressed when it was not the "fruit" of an earlier unlawful seizure and the police did not engage in any intentional misconduct.

2. Whether the district court erred in concluding that the police acted unreasonably in violation of the Fourth Amendment when they secured a crime scene for 25½ hours to obtain a search warrant and prevent the destruction of evidence.

STATEMENT OF THE CASE

1. Prior Proceedings

On February 20, 2008, a grand jury sitting in the Territory of Guam returned a four-count indictment charging defendants Song Ja Cha and In Han Cha and two codefendants with conspiracy in violation of 18 U.S.C. 371, sex trafficking in violation of 18 U.S.C. 1591 and 2, and coercion and enticement to travel for the purpose of prostitution in violation of 18 U.S.C. 2422 and 2. R. 27.[1] The indictment also sought forfeiture of $250,543.44 that was seized during a search of defendants' apartment that was conducted pursuant to a validly issued search

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[1] "R. ___" refers to the record number listed on the district court docket sheet. "E.R. ___" refers to the page number of the Record Excerpts filed with this Court by the United States under separate cover along with this brief.

warrant. R. 27.

On April 22 and 25, 2008, respectively, defendants filed separate Motions for Return of Seized Property and Suppression of Evidence and Memoranda in Support of their requests. R. 70, 71, 73, 74. Defendants argued, *inter alia*, that the initial warrantless entry by the police into Blue House, a single structure, which includes a bar and one room apartment, at approximately 1:00 a.m. Sunday, January 13, 2008, was unlawful and that the 33-hour seizure of the premises was unreasonable in violation of their Fourth Amendment rights. On May 9, 2008, the United States filed a response to defendants' motions. R. 84.

On July 23, 2008, a 21-count superceding indictment was filed charging defendants with one count of conspiracy in violation of 18 U.S.C. 371 (Count One), nine counts of sex trafficking in violation of 18 U.S.C. 1591(a) and 2 (Counts Two through Ten), and ten counts of coercion and enticement to travel for the purpose of prostitution in violation of 18 U.S.C. 2422 and 2. (Counts 11 through 20) R. 110; E.R. 350-368. Like the original indictment, it also sought forfeiture of cash proceeds seized during a search of Blue House conducted pursuant to a validly issued warrant. E.R. 367.

On December 12, 30, and 31, 2008, Magistrate Joaquin V. E. Manibusan, Jr. held an evidentiary hearing on defendants' motion to suppress evidence. R.

139, 145, 146. At the hearing, defendants repeatedly conceded that the police had probable cause to believe that the Blue House premises contained evidence of a crime and that their initial entry into the premises was lawful. E.R. 327-329.

On February 19, 2009, the magistrate issued a 21-page Report and Recommendation (Report) recommending that defendants' motions be granted. R. 147; E.R. 3-23. On March 2, 2009, the United States filed Objections to the Magistrate's Report. R. 152. On March 11, 2009, defendant Song Ja Cha filed a response to the United States' objections, which defendant In Han Cha joined on March 12, 2009. R. 157, 158.

On March 24, 2009, the district court (the Honorable Dean D. Pregerson) entered a two-paragraph order overruling the objections of the United States and "adopt[ing] the Magistrate's Report in its entirety." R. 159; E.R. 2.

2. Facts

Blue House is a single structure that contains the Blue House Karaoke Lounge and a one-room apartment. E.R. 161, 229, 238.[2] Defendants, In Han Cha and Song Ja Cha, husband and wife, own the business establishment and live in the residence. E.R. 50-52, 65.

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[2] "Blue House" refers to the entire premises, including the business establishment and apartment, unless otherwise indicated.

On Saturday night, January 12, 2008, Officer Thomas B. Manibusan, a patrol officer with the Guam Police Department (GPD) received a telephone call from his wife, who stated that her cousin and a female friend, who had worked at Blue House, had come to their home asking for assistance. E.R. 45-46. The two women, who spoke Chuukese and did not know English, related that the owner of Blue House refused to return the friend's passport. E.R. 45. Officer Manibusan suggested that the women go to Blue House to retrieve the friend's passport because the owner was not entitled to keep it. E.R. 46.

Later that evening, Officer Manibusan and his partner Officer Mario Laxamana drove to Blue House, which was open for business. E.R. 30, 48-49. Officer Manibusan saw his wife in the parking lot and she pointed out the two women who had come to their house and were now being denied entry into the premises by the security guard. E.R. 48-50. Officer Manibusan directed the security guard to get the owner, Mrs. Cha. E.R. 50.

Once outside, Mrs. Cha, in response to questioning by Officer Manibusan, said that she had sent the friend's passport to the friend's mother in Chuuk. E.R. 50. The friend, who communicated through Officer's Manibusan wife, said that that was impossible because her mother was deceased. E.R. 50-51. She also related that two Chuukese women, whom she named, were inside and being held

against their will. E.R. 51-52. Officer Manibusan directed Officer Norbert Tan, who had arrived at Officer Manibusan's request, to go into the bar and have the two women come outside so he could determine whether they were being held against their will. E.R. 51, 106.[3]

Officer Tan found one of the women serving drinks and asked her to go outside. E.R. 107. He asked the bartender about the other woman and was directed to a back area where there were several small rooms. E.R. 107. After hearing a female voice from one room, he knocked on the door several times. E.R. 107-108. The door was opened by a woman wearing a red dress, which she appeared to have just put on because the shoulder strap was down and the hem was pulled up and rumpled. E.R. 108-109, 143-144. As the woman stepped from the dark room, Officer Tan noticed a man, who was bare chested and holding his unzipped and unbuckled pants at his waist, hiding behind the door. E.R. 109, 119, 143. Officer Tan escorted the woman outside and told Officer Manibusan about the "half naked" man he had seen in the room. E.R. 51, 109.

Once outside, the two women, who also spoke Chuukese and communicated through Officer Manibusan's wife, said they were being held against their will and and that Mrs. Cha refused to give them their passports. E.R. 51, 131, 141. They

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[3] Officers Manibusan and Tan both testified at the suppression hearing.

stated that they were forced to have sex with customers and that if they refused, Mrs. Cha would not feed them that night. E.R. 55. The woman, who Officer Tan had found inside the small room, was crying and admitted that she had been engaging in sexual activity when he knocked on the door. E.R. 55. The woman who was seeking her passport related that when she came to Guam, Mrs. Cha picked her up at the airport and brought her to Blue House. E.R. 57. She said she had been told she would be a waitress, but when she saw the nature of the business she refused to work there. E.R. 58.

At approximately 1:00 a.m. Sunday, January 13, Officer Manibusan directed Mrs. Cha to close the bar and lounge, which normally remains open on weekends until 4:00 a.m. E.R. 65, 285. Mrs. Cha complied and also agreed to give Officer Manibusan a tour of the premises, which included the bar and lounge area, several small rooms, and a bedroom where defendants lived. E.R. 52, 64-65, 95. During the tour, Officer Manibusan saw several customers who were leaving because they had been told the bar was closing. E.R. 72.

Meanwhile, at least three other GPD police officers arrived and went inside. E.R. 135-136. A crime scene official started taking photographs and Officer Tan also performed a “scene check” and took notes of what he observed. E.R. 128-130.

At about 1:30 a.m. Sunday, after all the customers had left and the police were outside, Mr. Cha used his keys to lock the front door of Blue House. E.R. 54, 59, 70. Afterwards, he drove his wife and several female employees to the police precinct to be interviewed. E.R. 53-54, 86-87, 91. Once the defendants left, all the police officers departed. E.R. 54, 58-59, 73, 93, 116-117.[4]

At the Tamuning-Tuming police precinct, which is approximately a mile from Blue House, Officers Laxamana, Tan, and Cruz, supervised by Officer Manibusan, interviewed Mrs. Cha and seven women from Blue House. They arrested and processed Mrs. Cha and three of her employees and completed the required paperwork which included writing official police reports. E.R. 67, 83, 145, 153, 156-160.[5] Officer Manibusan's wife served as a translator for the interviews along with Officer Bia Nanoto from the Criminal Investigation Section

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[4] The private security guard from Blue House testified at the suppression hearing on behalf of defendants and stated that he and defendants were the last three people to leave the scene after he helped Mrs. Cha lock-up the premises. E.R. 271. He related that there were no police officers on the scene by then and there were none when he left the bar next door to Blue House later that morning to go home. E.R. 271-272.

[5] Two employees were charged as codefendants in the original indictment filed on February 20, 2008, and subsequently pled guilty to one count of conspiracy to commit sex trafficking in violation of 18 U.S.C. 371. See R. 27. The other employee was charged with a violation of local law, which was subsequently dropped.

(CIS). E.R. 59, 141, 171-172. The four patrol officers worked six to eight hours overtime and remained at the precinct until sometime Sunday afternoon when they completed their reports. E.R. 87, 153-154.

Mrs. Cha was in police custody until she was arrested sometime after daybreak Sunday morning. E.R. 87. Mr. Cha, who was not questioned or detained by the police, stayed mostly in the precinct lobby, but left at least once to get his wife food before she was arrested. E.R. 59, 73, 92, 115.[6]

At approximately 9:20 a.m. Sunday, CIS Officer John Perez[7] received a telephone call from his supervisor, Officer Camacho, telling him to report to CIS's office in Tiyan at noon because patrol officers had uncovered a possible trafficking and prostitution operation. E.R. 167-168. Officer Camacho told Officer Perez that the police had just posted an officer at Blue House to secure the premises and prevent destruction of evidence. E.R. 202, 204.[8]

Officer Perez arrived at work at 11:30 a.m. and briefly talked with Officer

[6] An arrest warrant was issued for Mr. Cha on February 7, 2008. R. 4.

[7] Officer Perez testified at the suppression hearing.

[8] At the suppression hearing, Officer Perez testified that a police report he reviewed when preparing the affidavit stated that Officer Topasna secured Blue House at 9:22 a.m. Sunday and that Mr. Cha was inside when he got there. E.R. 176-177.

Nanoto about the interviews he had translated. E.R. 169, 201. At noon, Officer Perez attended a general briefing, conducted by Officer Camacho, who relayed "primarily generalities" based on incomplete indirect accounts, in part because interviews were still ongoing at the Tamuning-Tuming precinct. E.R. 201. See E.R. 169, 195-196, 209, 229. During the meeting, Officer Camacho directed Officer Perez to draft the affidavit and papers to secure a search warrant for Blue House. E.R. 184.

Immediately after the briefing, at approximately 1:30 p.m., Officer Perez "hurr[ied]" to get the official police reports so he could begin to draft the affidavit. E.R. 186. See E.R. 185, 208-209, 233. Because he understood "time was of the essence," he intended to secure judicial approval of the warrant in time for execution before 10:00 p.m., since local law has a presumption against nighttime (defined as 10:00 p.m. to 6:00 a.m.) execution, except when searching for narcotics or weapons. E.R. 192. See E.R. 172, 186, 189-190, 194, 214-215. Officer Perez testified that consistent with his division's policy and the directive of his supervisor he believed that information from patrol officers could not be included in an affidavit in support of a search warrant unless that information was contained in official police reports. E.R. 185, 189, 199, 212, 220, 233. He also explained that as affiant he considered it his duty to review police reports to

ensure the accuracy of information and the reliability of sources and to make certain the police had sufficient facts to establish probable cause and obtain authorization to search all requested locations and specified objects. E.R. 203, 233, 236, 244.

Officer Perez called the Tamuning-Tumon precinct to obtain the police reports and asked to speak to Officers Tan, Laxamana, and Manibusan. E.R. 211-212. When the desk clerk related that the first two were still in interviews and the third was unavailable, Officer Perez sought the assistance of Officer Camacho to obtain the reports. E.R. 212. In the meantime, Officer Perez started filling out preliminary paperwork for the warrant. E.R. 185. At approximately 3:00 p.m., Officer Camacho directed Officer Perez to wait for the police reports that should arrive in an hour or two. E.R. 185, 212.

At 6:30 p.m., Officer Perez received three official patrol officer reports, each of which was approximately seven single-spaced pages, which he immediately started to review. E.R. 170, 180, 187, 245. At 9:15 p.m., Officer Perez told Officer Camacho that he was still reviewing the police reports and that he would be unable to meet the 10:00 p.m. deadline for execution of the warrant. E.R. 172, 187. A few minutes later, Officer Camacho telephoned Officer Perez

and said that the prosecutor wanted to review the warrant application at 8:00 a.m. before it was submitted. E.R. 173, 189.

Officer Perez worked to complete the application "as quickly as [he] could," and finished drafting the 17-page affidavit at 4:00 a.m. Monday. E.R. 190. See E.R. 173, 194. Although he had previously gone to a judge's house at night to get a warrant approved, he did not do so this time because of the late hour and the fact that the prosecutor wanted to review the application before submission. E.R. 225.

Officer Perez testified that it took longer than usual to draft the affidavit because the facts were complicated, all the witnesses had pseudonyms, the police reports were unusually long, and the charges – prostitution and trafficking – were atypical. E.R. 235, 246-247. He also related that even after he received the police reports, he had to verify some and did not have all the information that was necessary to secure the warrant. E.R. 228, 236.

At 7:50 a.m. Monday, Officer Perez arrived back at work to have the affidavit reviewed. E.R. 173. Sometime after 8:00 a.m., Officer Perez called the chambers of a judge, who was scheduled to hear a case for which he had been subpoenaed at 9:00 a.m. E.R. 174, 199. After relating that he had a search warrant application, the judge's staff directed Officer Perez to go to the judge's courtroom because the judge had not yet arrived. E.R. 174, 200. After Officer

Perez was excused from his subpoena and the judge completed her other matters on the bench, a member of the judge's staff told Officer Perez that the judge was not taking any more matters and that he should go to the chambers of Judge Steven Unpingco to get the warrant application reviewed. E.R. 174, 200. Officer Perez complied, and at 10:25 a.m. Monday, Judge Unpingco signed the search warrant for Blue House. E.R. 179.

At approximately 1:15 p.m., the police contacted defendants' attorney, Curtis Van de Veld, with whom they had spoken several times on Sunday, and requested that Mr. Cha unlock Blue House so that the search warrant could be executed at 2:00 p.m. Mr. Van de Veld requested that the police postpone execution of the warrant for a couple of hours because Mrs. Cha had a court hearing. E.R. 323. The police declined to wait and executed the warrant as scheduled. During the search, the police seized, *inter alia*, travel documents, bank records, logs of defendants' alleged prostitution business, used condoms, and $250,543.44 in currency.

Mr. Van de Veld testified at the suppression hearing on behalf of defendants. He stated that at approximately 8:00 a.m. Sunday, while playing golf, he received a telephone call from Mr. Cha, who was at Blue House, who complained that the police were still there and would not let him inside. E.R. 291-

292. Mr. Van de Veld arrived at Blue House at approximately 12:45 p.m., and said that he became concerned about Mr. Cha's health because Mr. Cha, who has diabetes, looked pale and was sweating. E.R. 294, 298, 321. Mr. Van de Veld talked to the officer standing guard, who said that the premises had been "detained" since around midnight and that no one was allowed to enter. E.R. 295. Mr. Van de Veld gave the officer his cell phone number and requested that a supervisor call him. E.R. 295.

At approximately 1:00 p.m., Officer Manibusan called Mr. Van de Veld, who was no longer at Blue House. E.R. 296. According to Mr. Van de Veld, Officer Manibusan said that the premises had been "detained" since about 1:00 a.m., that interviews were ongoing at the precinct, and that the case had been turned over to CIS in order to obtain a search warrant. E.R. 296.

At approximately, 3:00 p.m., Mr. Van de Veld spoke to a patrol officer and requested that Mr. Cha be allowed into his apartment to retrieve a glucose monitor and insulin. E.R. 299. At approximately 7:00 p.m., a CIS officer escorted Mr. Cha into his apartment. E.R. 300. Once inside, Mr. Cha realized that he was out of insulin, and according to Mr. Van de Veld, could not refill his prescription because it was too late. E.R. 300-301. Mr. Van de Veld remained outside Blue House with Mr. Cha until 1:00 a.m. Monday. E.R. 300.

3. The Magistrate's Report And Recommendation

The magistrate ruled that the seizure of Blue House violated the Fourth Amendment because "the premises were seized [for] much longer than reasonably necessary for the police, acting with due diligence, to obtain a warrant." E.R. 23. The magistrate noted that because of defendants' concessions during the suppression hearing, the only argument "propounded by [them] at the conclusion of the evidentiary hearing, was [whether] the premises (both the business establishment and the private residence) were unlawfully and unreasonably seized for over 30 hours before the police obtained a search warrant." E.R. 16-17.

The magistrate based his opinion on a comparison with the circumstances in *Illinois* v. *McArthur*, 531 U.S. 326 (2001). That case held that a refusal to allow a defendant to enter his residence without a police officer escort during a two-hour seizure to prevent the destruction of evidence was reasonable.

First, the magistrate held that the police had probable cause to secure the premises and noted that defendants conceded the issue. E.R. 16, 18, 21, 23. He nonetheless emphasized, "[u]nlike *McArthur*, however, here the police had no probable cause to believe that the residence contained any contraband." E.R. 18.

Second, the magistrate concluded that the police had "no reason to fear that Mr. Cha would destroy evidence within [his] business premises or * * * home

quarters." E.R. 18. He noted, "[t]here were no drugs within the premises," Mr. Cha "was not under arrest," and "he accompanied and drove his wife to the Tamuning-Tumon Precinct when his wife alone was directed to go there." E.R. 18.

Third, the magistrate found "that the police did not make reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy." E.R. 19. He explained that Mr. Cha's possessory interests cannot be characterized as "minimal" and that the "complete denial of entry for eleven hours" while Mr. Cha sought medication "substantially interfered" with those interests. E.R. 19, 23. The magistrate also concluded that the seizure interfered with Mrs. Cha's "possessory interest in the business establishment." E.R. 19. He reasoned, that even though "Mrs. Cha was detained throughout the seizure" and the "allegations that she operated a prostitution house constitute a criminal offense," she "could have authorized the re-opening of the business * * * and could have requested her husband to do so" to sell "alcoholic spirits, [which] is not illegal." E.R. 19.

Finally, the magistrate ruled that the 33-hour seizure of Blue House from 1:30 a.m. Sunday, January 13 until 10:30 a.m. Monday, January 14 was unreasonable. E.R. 19-20. He reasoned that the seizure occurred at 1:30 a.m. Sunday because that was when "Officer Manibusan ordered that the Blue House

Lounge cease its operation [and] [w]ithout such an order the establishment would have stayed open for a few more hours, until 4:00 a.m." E.R. 20. He explained that because the police did not seek a search warrant "immediately" when they had probable cause, or "secure a search warrant as quickly as they could," their actions failed to "comport with the Supreme Court's mandate [to] act with due diligence in obtaining a warrant once the premises are secured." E.R. 21, 23. The Magistrate faulted Officer Perez, who drafted the warrant application, because "he did not know that he had a duty to diligently pursue" a warrant, "waited until the police reports were all completed before he began drafting the warrant application," "chose" not to "personally attend the interviews of the alleged victims," "let his 'personal preferences' dictate the speed at which he reacted to the situation," and carried out his responsibilities in a "relaxed fashion" and with a "nonchalant attitude." E.R. 20, 22.

SUMMARY OF ARGUMENT

1. The district court should not have suppressed evidence seized from a crime scene pursuant a validly issued search warrant because, regardless of the legality of an earlier seizure of the premises, the evidence was not a "fruit" of that activity. The exclusionary rule should not be applied in this case since the court below expressly found that the police did not engage in misconduct when it seized

the premises.

2. The district court erred in concluding that the duration of the seizure was unreasonable for at least three reasons. First, it misconceived when the crime scene was seized within the meaning of the Fourth Amendment. Contrary to the conclusion of the district court, the premises were not seized until the police secured and restricted Mr. Cha's access to Blue House – or no earlier than 8:00 a.m. Sunday. Accordingly, the police seized Blue House for 25½ – not 33 – hours in order to obtain a search warrant.

The district court also applied the wrong legal standard and erroneously concluded that the duration of the seizure was unreasonable merely because the police could have secured a search warrant more quickly, or failed to apply for a warrant as soon as they had the minimum amount of information needed to establish probable cause. Because the police acted in good-faith, did not intentionally delay in securing a search warrant, and were not responsible for nearly half the 25½ hours between when they secured the crime scene and obtained a search warrant, the court should not have concluded that the police acted unreasonably in securing a warrant.

Finally, the court below wrongly concluded that the seizure was unreasonable because Mr. Cha did not have access to the premises for eleven

hours on Sunday. The police acted reasonably in providing Mr. Cha access to the premises within 11 hours of requesting entry and within four hours of being told he sought to retrieve medical items.

ARGUMENT

Standard Of Review

An appellate court reviews *de novo* a district court's decision to suppress evidence and the factual findings underlying the ruling for clear error. *United States* v. *Delgado*, 545 F.3d 1195 (9th Cir. 2008), cert. denied, 129 S. Ct. 1383 (2009); *United States* v. *Lopez*, 474 F.3d 1208 (9th Cir.), cert. denied, 127 S. Ct. 2154 (2007). Because the lawfulness of a search and seizure is a mixed question of law and fact, court of appeals' review is *de novo*. See *United States* v. *Linn*, 880 F.2d 209, 214 (9th Cir. 1989).

I

THE DISTRICT COURT ERRED IN SUPPRESSING EVIDENCE SEIZED PURSUANT TO A VALIDLY ISSUED SEARCH WARRANT WHEN IT WAS NOT THE "FRUIT" OF AN EARLIER UNLAWFUL SEIZURE AND THE POLICE DID NOT ENGAGE IN ANY INTENTIONAL MISCONDUCT

The district court suppressed the evidence seized from Blue House on the ground that the police did not obtain the search warrant quickly enough and, therefore, the seizure of the premises was unreasonable and violated the Fourth

Amendment. We argue below that the seizure of the Blue House premises was lawful. In any event, because the evidence was seized pursuant to a validly issued search warrant, it should not have been suppressed, regardless of the validity of the earlier seizure of the premises.

"The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995) (quoting *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983)). As a result, the Supreme Court has repeatedly rejected the notion that the exclusion of evidence is an automatic remedy and instead emphasized that it should be "our last resort" when there is a Fourth Amendment violation. *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009) (quoting *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006)). See *e.g.*, *United States* v. *Leon*, 468 U.S. 897, 904-905 (1984). Accordingly, those seeking the exclusion of evidence for a Fourth Amendment violation face "a high obstacle" since it places a "costly toll upon truth-seeking and law enforcement objectives." *Herring*, 129 S. Ct. at 701 (quoting *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 364-365 (1998)).

Suppression of the evidence in this case is improper because the evidence was seized pursuant to a validly issued search warrant and thus was not a “fruit” of the allegedly unlawful seizure of the premises. See, *e.g.*, *United States* v. *Segura*, 468 U.S. 796, 813-815 (1984); *Anderson* v. *Calderon*, 232 F.3d 1053, 1070-1077 (9th Cir. 2000) (refusing to suppress defendant’s statements made following an unreasonable 76-hour pre-arraignment delay because they were not “a fruit of the poisonous tree”), cert. denied, 534 U.S. 1036 (2001).

In *Segura*, the Court held that even though the police unlawfully entered the premises prior to the 19-hour seizure, evidence seized pursuant to a valid warrant should not have been suppressed because it was not a “fruit” of the illegal entry. 468 U.S. at 813-816. The Court emphasized that suppression is not justified under the “fruit of the poisonous tree” doctrine unless “the illegality is at least the ‘but for’ cause of the discovery of evidence.” *Id*. at 815. It explained that because the evidence at issue was seized pursuant to a valid warrant secured without reliance on any information “derived from or related in any way to the initial [illegal] entry into [defendant’s] apartment” and “came from sources wholly unconnected with the entry and was known to the agents well before the initial entry,” “not even the threshold ‘but for’ requirement was met” since the illegal police conduct “did not contribute in any way to the evidence seized under the warrant.” *Id*. at 814-815.

See, *e.g.*, *United States* v. *Davis*, 932 F.2d 752, 759 n.5 (9th Cir. 1991) (combination for safe and items removed therefrom pursuant to valid search warrant were admissible and not tainted by unlawful seizure); *United States* v. *Salas*, 879 F.2d 530, 537-538 (9th Cir.) (items seized from apartment pursuant to a valid warrant were admissible and not tainted by police's prior unlawful entry onto the premises), cert. denied, 493 U.S. 979 (1989).

The evidence seized from Blue House pursuant to a validly issued warrant should not have been suppressed because the alleged illegality – the delay in securing the warrant – is unrelated to that evidence. Defendants do not dispute that the items from Blue House were seized pursuant to a validly issued warrant. The warrant was based on information that the police acquired apart from the seizure of the premises. During the seizure, the police remained outside the premises. Indeed, the magistrate found that the police had the authority to apply for a warrant based on what they learned at the scene before the premises were seized (see E.R. 20) – or had such knowledge at least six hours *before* the premises were seized. Clearly, defendants cannot meet the threshold "but for" requirement that is necessary for application of the exclusionary rule. Thus, the items seized from Blue House pursuant to a valid warrant should not have been suppressed.

Even if the seizure of the premises had been related to the seizure of the evidence, (which it was not), the exclusionary rule would not be applicable in this case because the alleged illegality was not the result of intentional police misconduct. The Supreme Court has recognized that application of the exclusionary rule is appropriate only when police misconduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 129 S. Ct. at 702. Because the court below expressly found that the police did not engage in intentional misconduct when they seized the premises, application of the exclusionary rule is not justified in this case. See E.R. 19-20 (explaining that the failure of the police to obtain the warrant more quickly resulted because they "did not know they had a duty to diligently move to secure the search warrant [and] * * * Officer Perez * * * did not know that he had a duty to diligently pursue the drafting and eventual approval of the warrant by a detached magistrate"). Accordingly, the district court erred in suppressing the evidence seized from Blue House.

II

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE POLICE ACTED UNREASONABLY IN VIOLATION OF THE OF THE FOURTH AMENDMENT WHEN THEY SECURED A CRIME SCENE FOR 25½ HOURS TO OBTAIN A SEARCH WARRANT AND PREVENT THE DESTRUCTION OF EVIDENCE

A. Blue House Was Not Seized Within The Meaning Of The Fourth Amendment Until The Police Sought To Restrict Entry Onto The Premises

The magistrate held that the Blue House premises were seized for 33 hours until the search warrant was issued. He found that the seizure began at 1:30 a.m. Sunday. E.R. 20. That was legal error because the circumstances necessary to constitute a seizure did not begin until at least 8:00 a.m. Sunday.

The Fourth Amendment prohibits "unreasonable searches and seizures." As a result, it "protects two different interests of the citizen – the interest in retaining possession of property and the interest in maintaining privacy." *Texas* v. *Brown*, 460 U.S. 730, 747 (1983). Because seizures affect "only possessory interests, not privacy interests[,]" they are "generally less intrusive" than searches. *United States* v. *Segura,* 468 U.S. 796, 810 (1984). See *United States* v. *Place*, 462 U.S. 696 (1983); *Brown*, 460 U.S. at 747.

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property." *Soldal* v. *Cook County*

Ill., 506 U.S. 56, 63 (1992) (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984)). That standard is generally satisfied when law enforcement takes custody of, or restricts an individual's access to his property. See *Jacobsen*, 466 U.S. at 120 n.18 (seizure occurred when agents took custody of and "exert[ed] dominion and control over the package for their own purposes"). Accordingly, so long as the police have not taken physical custody of property, removed it from an individual's possession, or controlled who has access to it, a seizure has not occurred within the meaning of the Fourth Amendment. See *United States* v. *Karo*, 468 U.S. 705, 712-713 (1984) (explaining that "technical trespass" to an individual's property "is only marginally relevant to the question of whether the Fourth Amendment has been violated"). See, *e.g.*, *Place*, 462 U.S. at 708 (seizure of luggage occurred when agents, following defendant's "refusal to consent to a search, told [him] that he was going to take [it] to a federal judge to secure issuance of a warrant").

There is no evidence that the police restricted defendants' access to the Blue House premises until an officer was posted on the premises – no earlier than 8:00 a.m. Sunday. The only three witnesses at the suppression hearing who were at Blue House at 1:30 a.m. Sunday, agreed that no officers remained on the premises

once defendants locked-up Blue House at that hour. E.R. 73, 79, 117, 271-272, 284-285, 289-290.[9]

The record also establishes that Mr. Cha had access to Blue House at least until approximately 8:00 a.m. Sunday, when as Mr. Van de Veld testified, he received a telephone call complaining that a police officer would not allow Mr. Cha to enter the premises. E.R. 291-292. Several witnesses testified that at approximately 1:30 a.m., Mr. Cha used his key to lock the front door of Blue House, kept them, and drove his wife along with four of their employees to the precinct. E.R. 53-54, 91, 286. At the station, Mr. Cha was neither questioned nor detained and left the precinct at least once to retrieve food for his wife. E.R. 59, 73, 92, 115. Accordingly, because the police did not secure Blue House until at least 8:00 a.m. Sunday and Mr. Cha was free to enter prior to then, the premises were seized for 25½ – not 33 – hours in order to secure a search warrant. See E.R. 177.

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[9] Two police officers testified that no official remained on the scene once defendants departed for the precinct. The security guard at Blue House, who testified on defendants' behalf, stated that he and defendants were the last to leave and that there was no officer on the premises when they did. E.R. 271-271, 284-285. He also related that, later that morning when he left a bar, which was next to Blue House, no one was on the premises. E.R. 272.

B. The Duration Of The Seizure Was Reasonable

1. To assess whether a seizure is reasonable under the Fourth Amendment, courts examine the "totality of circumstances" and "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Segura*, 468 U.S. at 806; *Place*, 462 U.S. at 703. See *Illinois* v. *McArthur*, 531 U.S. 326 (2001); *United States* v. *Knights*, 534 U.S. 112, 118 (2001). Pursuant to that standard, the Supreme Court has repeatedly approved warrantless seizures of residences and property based on probable cause in order "to preserve the status quo while a search warrant is being sought." *Segura*, 468 U.S. at 809. See *Place*, 462 U.S. at 701 ("Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property pending issuance of a warrant to examine its contents."). See, *e.g.*, *McArthur*, *supra* (seizure of a residential trailer); *Segura*, *supra* (seizure of an apartment); *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970) (seizure and impoundment of an automobile). As the Court has emphasized, to conclude otherwise would render the police powerless "to prevent the removal or

destruction of evidence" while they secure and execute a warrant. *Segura*, 468 U.S. at 809. See *ibid.* at n.7.

For example, in *Segura*, six members of the Court agreed that a 19-hour delay between the seizure of defendant's dwelling and execution of a search warrant to prevent the destruction of evidence was reasonable. 468 U.S. at 812-813 (opinion of Burger, C.J., joined by O'Connor, J.); *id.* at 824 n.15 (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, J.J.J.) ("[A]ssum[ing that seizure is] permissible even absent exigent circumstances when it occurs 'from the outside' - when the authorities merely seal off premises pending the issuance of a warrant but do not enter."). See also *McArthur*, 531 U.S. at 333 (explaining that in *Segura* "both majority and minority assumed, at least for argument's sake" that police could "lawfully have sealed the apartment from the outside, restricting entry into the apartment while waiting for a warrant"). As to the duration of the seizure, Chief Justice Burger, joined by Justice O'Connor, recognized that because delay in securing a warrant is "inevitable," it "is not itself" evidence that the police acted unreasonably. *Id.* at 809 n.7; *id.* at 812. As a result, because there was no suggestion that "the officers, in bad faith, purposely delayed obtaining the warrant[,]" they refused to conclude that the police acted unreasonably merely because they "focused first on the task of processing those whom they arrested,

before turning to the task of securing the warrant." *Id.* at 812. They also explained that "[th]ere [was] no evidence that the agents in any way exploited their presence in the apartment" and "more than half of the 19-hour delay [occurred] between 10:00 p.m. and 10:00 a.m.," when "it is reasonable to assume that judicial officers are not as readily available for consideration of warrant requests." *Id.* at 812-813.

More recently, in the context of an arrest – which arguably is more intrusive than a seizure of premises – the Supreme Court emphasized that "courts *must* allow a substantial degree of flexibility" when evaluating whether delay in a particular case is reasonable. *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991) (emphasis added). For example, in *McLaughlin*, the Court held that a 44-hour delay between an arrest and a judicial determination of probable cause was presumptively reasonable absent evidence that the police acted in bad faith, engaged in misconduct, or delayed to justify the arrest, or just "for delay's sake." *Ibid*. The Court explained, even though delay may result in additional time that a "presumptively innocent individual spends in jail," the Fourth Amendment does not require "immediate" administrative action. Indeed, it admonished:

> Courts cannot ignore the often unavoidable delays in transporting [arrestees] from one facility to another, handling late-night bookings where no magistrate is

> readily available, obtaining the presence of an arresting officer who may be busy processing other suspects, or securing the premises of an arrest, and other practical realities.

Id. at 56-57.

Consistent with Supreme Court precedent, this Court has repeatedly upheld the seizure of premises to allow the police to obtain a search warrant. See, *e.g.*, *Dixon* v. *Wallowa County*, 336 F.3d 1013, 1018 (9th Cir. 2003); *United States* v. *Alaimalo*, 313 F.3d 1188, 1192 n.1 (9th Cir. 2002), cert. denied, 540 U.S. 895 (2003); *United States* v. *Holzman*, 871 F.2d 1496, 1507 (9th Cir. 1989), overruled on other grounds, *Horton* v. *California*, 496 U.S. 128 (1990); *United States* v. *Crespo de Llano*, 838 F.2d 1006, 1016 (9th Cir. 1988). In so doing, it has emphasized that "the fact that officers secure a dwelling until they obtain a search warrant, where probable cause exists to conduct a search in order to prevent the destruction or removal of evidence is not an unreasonable seizure of the dwelling or its contents." *Id.*, 838 F.2d at 1016. See *Dixon*, 336 F.3d at 1018 (quoting *Alaimalo*, 313 F.3d at 1192) ("police may secure a home * * * without a warrant [when] 'a reasonable person would believe that [it is] necessary to prevent the destruction of relevant evidence, or some other consequence improperly frustrating legitimate law enforcement efforts'").

For example, in *Holzman*, this Court concluded that the police acted reasonably in securing defendants' hotel room from within for 13 hours "even though 'there was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant.'" 871 F.2d at 1507 (quoting *Segura*, 468 U.S. at 809). Because "there is no evidence that [the police] purposely delayed this process in an exercise of bad faith" and "most of [the] thirteen hours" occurred between midnight and 1:00 the following afternoon, when "judicial officers are not readily available for consideration of warrant requests," "[i]t is * * * reasonable to assume that [the police] spent the balance of the delay preparing a complete and accurate affidavit and presenting it to the judicial officer who issued the warrant." *Id.* at 1507 (quoting *Segura*, 468 U.S. at 812-813).

2. Evaluating the "totality of the circumstances" in this case, the duration of the seizure was reasonable because the police acted in good-faith, did not intentionally delay in securing a warrant, and were not responsible for nearly half of the 25½ hours between when they secured the crime scene and when they obtained the search warrant. *Segura*, 468 U.S. at 806.[10]

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[10] It is undisputed that the police had probable cause to believe that Blue House contained evidence of a crime. Defendants repeatedly conceded the issue

(continued...)

There is no evidence that even suggests that the police acted in bad-faith in securing the warrant. E.R. 330 (conceding that there is no evidence that police acted in bad-faith). Nor is there even a suggestion that the police sought to use their presence at the scene to obtain any tactical advantage. In fact, they never reentered the premises while awaiting the search warrant, except once to accompany Mr. Cha at his request into his apartment.

Moreover, nearly half of the approximately 25½ hours between the seizure of the premises and judicial approval of the search warrant was not attributable to the police. In Guam, local law establishes a presumption against the execution of search warrants at night, between 10:00 p.m. and 6:00 a.m., unless the police are searching for firearms or narcotics. 8 Guam Code Annotated Section 35.20(c). See also E.R. 189. It is undisputed that Officer Perez worked for 9½ hours from 6:30 p.m. Sunday until 4:00 a.m. Monday, to draft a 17-page affidavit. Even if

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[10](...continued)
below. E.R. 327-329. Even if that were not the case, the record clearly establishes that the police had probable cause to believe that multiple crimes were occurring on the premises when they seized Blue House. E.R. 23 (concluding that the seizure was supported by probable cause). After all, within minutes of arriving shortly after midnight, law enforcement officers learned that two women were being held against their will and that forced prostitution was going on inside. E.R. 54, 65, 117, 127. See also E.R. 18 ("find[ing] that the police had probable cause to believe that the business premises contained evidence of a crime, possibly prostitution").

Officer Perez had all the information necessary to draft the affidavit at 1:30 p.m. on Sunday, (a point we dispute, see discussion, p. 35, infra,) and was ultimately able to find and meet with a judicial officer 9½ hours later, the warrant would not have been executed at least until 6:00 a.m. Monday, due to the presumption against nighttime searches. See E.R. 189, 194, 203. Consequently, the police should not be faulted for the eight hours between 10:00 p.m. Sunday and 6:00 a.m. Monday when the search warrant could not be executed under any circumstances. See, *e.g.*, *Segura*, 468 U.S. at 812 (refusing to conclude that police acted unreasonably for portion of 19-hour delay that occurred when judicial officers are not readily available to review warrants).

Nor are the police responsible for the more than two hour delay that occurred Monday morning when a judicial officer was not initially available to review the warrant application. At least 10 of the 25½ seizure hours are not attributable to police. There is no reason to conclude that they were anything but diligent during the remaining 15 hours of the seizure. See, *e.g.*, *Segura*, 468 U.S. at 812-813; *Holzman*, 871 F.2d at 1507-1508.

3. The record establishes that the police were extraordinarily diligent and worked tirelessly around the clock in their pursuit of a search warrant. See, *e.g.*, *United States* v. *Gamez*, 301 F.3d 1138, 1143 (9th Cir. 2002) (31-hour pre-

arraignment delay was not unreasonable when defendant missed the court's cut-off time for scheduling an arraignment because it was impossible to determine prior to interrogation by a Spanish-speaking agent, the charge that would be brought against defendant), cert. denied, 538 U.S. 1067 (2003). Cf. *McLaughlin*, 500 U.S. at 57 (noting finding of the Ninth Circuit that "it takes 36 hours to process arrested persons in Riverside County"); *United States* v. *Van Poyck*, 77 F.3d 285, 289 (9th Cir.) ("We * * * now explicitly hold what has been implicitly understood all along: An overnight or weekend delay in arraignment due to the unavailability of a magistrate does not by itself render the delay unreasonable."), cert. denied, 519 U.S. 912 (1996).

First, a team of four Guam patrol officers, along with two translators, one of whom was the wife of an officer and was merely volunteering, worked overtime for more than 12 straight hours to process the arrest of Mrs. Cha and three of her employees. From early Sunday morning – before defendants' premises had been seized – until Sunday afternoon, the police team questioned defendant, interviewed seven women, all of whom spoke only Chuukese, and completed the required paperwork pursuant to those responsibilities.

That process was arduous and time-consuming. The police conducted each of the seven interviews of Blue House's current and former employees through a

translator and unraveled who along with Mrs. Cha committed specific violations of federal and/or local law. E.R. 171.

Because four of the interviewed women were victims and the nature of defendants' crimes – prostitution and human trafficking – required that the women provide details about the most private and intimate of matters, the police also had to be unusually sensitive and patient in the manner in which they solicited information. In fact, it would have been counterproductive for the police to rush through the interviews and insist that the victims quickly communicate what had occurred. There is nothing in the record to suggest that the patrol officers delayed, faltered, or were negligent in any respect.

The evidence also establishes that Officer Perez was assiduous in his efforts to acquire reliable information and draft a detailed, accurate affidavit as expeditiously as possible. Officer Perez was clearly vigilant in his efforts to obtain the police reports prepared by the patrol officers so that he could draft the affidavit. He explained that up until his receipt of the patrol officer reports at 6:30 p.m. Sunday, he could not draft the affidavit because the information he had was incomplete, and primarily based on insufficiently reliable indirect accounts of what had occurred. E.R. 185, 195-196, 199, 201, 209, 227, 233. As a result, he telephoned the Tamuning precinct, asked to speak with two officers preparing the

reports as well as their supervisor. E.R. 211-212. When he was told they were unavailable, he requested the assistance of his supervisor. E.R. 185, 208, 211-212.[11]

Moreover, once Officer Perez received the official police reports at approximately 6:30 p.m. Sunday, he worked continuously and "as quickly as [he] could" until he finished drafting the affidavit 9½ hours later at 4:00 a.m. Monday. E.R. 190. See E.R. 180, 186, 190-192, 194. The process was particularly time-consuming because the three reports were lengthy and related an intricate set of facts, information had to be verified, the charges – human trafficking and prostitution – were atypical, and the 17-page affidavit was unusually long. E.R. 235-236, 245, 247.

Less than four hours later, after a 16½ hour tour of duty, Officer Perez reported to the prosecutor's office so the affidavit could be reviewed and he

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[11] It would have been impossible for Officer Perez to attend the victim interviews. First, they were ongoing and simultaneous beginning sometime after 2:00 a.m. Sunday when the patrol officer returned to the station. E.R. 127-128. In addition, Officer Perez did not receive notice of defendants' criminal activities until approximately 9:30 a.m. Sunday and did not know he would be drafting the warrant application until sometime during the noon briefing. In any event, since Officer Perez was repeatedly assured that he would receive the official police reports sometime Sunday afternoon, there was no reason for him to attend the victim interviews. E.R. 185, 213. Moreover, interviews with victims of sexual abuse have to be conducted delicately and may have been hampered by the presence of another man.

contacted a judge's chambers to expedite authorization of the warrant application. E.R. 173. Accordingly, the record reflects that the police were diligent in their efforts to secure a warrant during the entire 25½ hours following the seizure of the premises.

4. The district court applied the wrong legal standard in concluding that the duration of the seizure was unreasonable. It concluded that the length of the seizure was unreasonable because the police did not "secure a search warrant as quickly as they could" and failed to "immediately" obtain a warrant as soon as they had the minimum amount of information needed to establish probable cause. E.R. 20, 23.

"The test for determining whether a delay is violative of the [F]ourth [A]mendment is not whether the government acted ideal[ly], but whether under the totality of the circumstances, it is reasonable." *United States* v. *Dass*, 849 F.2d 414, 417 (9th Cir. 1988) (citation and internal quotation marks omitted). The Fourth Amendment does not require the police to eliminate all, or even most, delay, to act "immediately," or seek "a judicial determination of probable cause * * * as soon as" possible. *McLaughlin*, 500 U.S. at 58. See *Segura*, 468 U.S. at 809 n.7; *id.* at 812. See, *e.g.*, *United States* v. *Johns*, 469 U.S. 478, 487 (1985) (search of car three days after it was seized and impounded not unreasonable even

though search could have been done at the scene); *United States* v. *Van Leewen*, 397 U.S. 249 (1970) (29-hour seizure of two mailed packages not unreasonable even though police had sufficient information to seek a warrant for one of the packages after an hour and a half). Nor does it obligate the police to prioritize their responsibilities in a certain progression, or perform them at any specific rate of speed, or level of efficiency. See, *e.g.*, *Segura*, 468 U.S. at 812 (police did not act unreasonably because they "focused first on the task of processing those whom they had arrested before turning to the task of securing" a search warrant).

To conclude otherwise would invite second-guessing not only the priority and urgency the police assign to multiple responsibilities, but the manner in and rate at which they perform those tasks. Law enforcement officers would have to constantly review what information they have in an effort to anticipate what a court might consider sufficient. That would likely lead to their prematurely filing numerous warrant applications. It would also unnecessarily burden courts with having to determine precisely when, during a quick-moving series of events, the police obtained probable cause and should have applied for a warrant. In addition, any rule that requires immediate police action has the potential to severely compromise legitimate law enforcement efforts since it will undoubtedly require some officers to interrupt whatever they are doing, regardless how urgent.

In addition, the record establishes that had Officer Perez sought a warrant without the official police reports, or when he merely had the minimum amount of information necessary to establish probable cause, he would have had to disobey the directive of his supervisor and disregard policy. Officer Perez testified that consistent with his personal preference, orders from his supervisor and his division's policy, information provided by patrol officers could not be included in an affidavit unless it was contained in official police reports. E.R. 185, 193, 199, 212, 220, 233. He also explained that because as affiant he must swear to the truth of the information contained in the warrant application, he considers it his duty to review police reports for accuracy and the reliability of sources, and to make certain there are sufficient facts to establish probable cause and to authorize a search of the requested location and specified objects. E.R. 203, 233, 236, 244. Accordingly, the district court clearly erred in concluding that the police acted unreasonably simply because they did not seek a warrant immediately, or could have secured judicial authorization more quickly.

5. The district court erred in concluding that the duration of the seizure was unreasonable because Mr. Cha did not have access to the premises for eleven hours on Sunday. Neither *McArthur* or the record supports that conclusion.

In *McArthur*, the Court ruled that the police acted reasonably in refusing to allow a defendant to enter his residence without a police officer escort during a two-hour seizure in order to prevent the destruction of evidence. It did not hold that the Fourth Amendment requires the police to provide a defendant with unlimited access to premises in order for a seizure to be lawful. To the contrary, the Court merely "conclude[d] that the restriction at issue was reasonable, and hence lawful, *in light of the* * * * *circumstances*, which we consider in combination." *McArthur*, 531 U.S. at 332 (emphasis added). Consequently, *McArthur* clearly does not set the outer limits of what is constitutionally permissible. Nor does it require the existence of any particular circumstance, including access to the premises, in order for a seizure to be reasonable under the Fourth Amendment. See *id*. at 337 (Souter, J., concurring) ("join[ing] the Court's opinion subject to his afterward on two points: the constitutionality of a greater intrusion than the one here and the permissibility of choosing impoundment over immediate search"); *id.* at 954 (Stevens J., dissenting) (explaining that intrusion resulting from seizure of defendant's residence during which police escorted defendant inside premises was "so slight," that the writ of certiorari should have been "dismiss[ed] * * * as improvidently granted").

Moreover, the circumstances here are fundamentally different than those in *McArthur*. Here, unlike in *McArthur*, because the police discovered ongoing criminal activity, the Blue House premises were a crime scene. We know of no case that suggests, much less holds that the Fourth Amendment guarantees a defendant any right of access to a lawfully seized crime scene. See *Dixon*, 336 F.3d at 1017, 1019 ("no Fourth Amendment violation" when the police "declared" tenant's apartment to be a crime scene" and seized it for "a few days").

Even if *McArthur* could be construed to provide a defendant with any right of access to a crime scene, the seizure here was nonetheless lawful. It is undisputed that the police did not learn that Mr. Cha sought medical items from the premises until 3:00 p.m. Sunday and the police escorted him into Blue House at 7:00 p.m. Sunday evening. E.R. 299-300. After that, Mr. Cha never asked to reenter the premises. In addition, his counsel sought to postpone Mr. Cha's access to the premises when he requested the police to delay execution of the warrant for two hours on Monday afternoon. E.R. 323. Consequently, because Mr. Cha was denied access to Blue House at most for only 11 hours and for only four hours once he sought medication, the duration of the seizure was reasonable. See *Dass*, 849 F.2d at 417 (quoting *Colorado* v. *Bertine*, 479 U.S. 367, 374 (1987)) (reasonableness "does not hinge upon a determination that the government

pursued the least intrusive course of action," or what the government "could have achieved," but rather "whether the Fourth Amendment *requires* such steps").

Moreover, it hardly can be disputed that Mr. Cha and his attorney's conduct contributed to Mr. Cha's not gaining entry to the premises earlier than 7:00 p.m. Sunday. After all, Mr. Cha's attorney waited for more than two hours, or until 3:00 p.m., to mention Mr. Cha's need for medicine even though Mr. Cha's appearance at 12:45 p.m. gave him cause for concern and he spoke to three different police officers, two of whom were supervisors, between 1:00 and 2:00 p.m. E.R. 294-295, 297-298, 321-322, 326-327. Similarly, while Mr. Cha was at the police station for several hours Sunday morning, he asked about and got his wife food, he apparently never told an officer at the precinct, or later at the scene, that he needed to retrieve medicine from the premises. E.R. 132-133, 151. Accordingly, under such circumstances, it hardly seems correct to conclude that the police acted unreasonably in violation of the Fourth Amendment merely because Mr. Cha waited four hours once they were finally notified that he sought access to his apartment in order to retrieve medication. See *Henderson* v. *City of Simi Valley*, 305 F.3d 1052, 1060 n.6 (9th Cir. 2002) (concluding that police

conduct did not violate the Fourth Amendment in part because "level of intrusion" "was exacerbated by [defendant's] own actions").[12]

Finally, the police acted reasonably when they provided Mr. Cha access to the premises within 11 hours of requesting entry and within four hours of being told he sought entry to retrieve medical items. The record reflects that the Guam police were incredibly busy from Sunday at 1:30 a.m. until Monday at 4:00 a.m., as a result of their discovering defendants' extensive criminal activities. Throughout that time frame, upwards of 11 officers from two separate divisions diligently carried out time-consuming responsibilities related to defendants' crimes, including interviewing victims, processing Mrs. Cha and three other arrestees, guarding the premises, and preparing the appropriate papers in support of a search warrant. See *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 453-454 (1990) (explaining that "for purposes of Fourth Amendment analysis, the choice among * * * reasonable alternatives remains with * * * governmental officials who have a unique understanding of, and a responsibility for, limited

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[12] Further, the length of the seizure clearly did not prevent or significantly impede Mr. Cha from possessing either of the two items – a glucose monitor and the insulin – he sought to retrieve from the premises. Both items could have been easily purchased inexpensively at any drugstore. In addition, because Mr. Cha was mistaken that he had insulin inside his apartment, the seizure could not have impacted his ability to retrieve his medicine from the premises.

public resources, including a finite number of police officers").[13] Accordingly, the police did not act unreasonably in responding to Mr. Cha's request to gain access to the crime scene.

[13] Nor is there evidence that Mr. Cha was in any distress when he was escorted to his apartment at 7:00 p.m. Sunday, or the next day when he was present while the police executed the search warrant. In fact, at the time Mr. Cha gained entry into the premises Sunday evening, he was helpful to the officer, explaining that the club and residence had two separate addresses and showing him his license so he could obtain the lot number. In addition, the lack of insulin did not prevent Mr. Cha from remaining on the premises with his attorney until at least 1:00 a.m. Monday.

CONCLUSION

For the foregoing reasons, this Court should vacate the magistrate's opinion and reverse the district court's order granting defendants' motions to suppress.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that I am not aware of any other cases that are related to this appeal.

s/ Lisa J. Stark
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B) and 29(d). The brief was prepared using WordPerfect X4 and contains 9,963 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Lisa J. Stark
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Date: May 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2009, I electronically filed the BRIEF FOR THE UNITED STATES AS APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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