No. 09-10147

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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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

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# REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

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In its opening brief the government argued "that the evidence should not be suppressed because it was obtained under a validly issued search warrant that was not the 'fruit' of the earlier [allegedly] unlawful seizure." Br. 35.[1] See U.S. Br. 19-23. Defendants do not challenge that argument on the merits. Rather, they

[1] "Br. __" refers to the page number of defendants' Response Brief filed with this Court. "R. __" refers to the record number listed on the district court docket sheet. "U.S.Supp.E.R.__" refers to the page number of the United States Supplemental Excerpts of Record filed with this Court by the United States under separate cover along with this brief.

contend (Br. 39) that the United States waived that argument by raising it "for the first time in its objections to the [m]agistrate's report and recommendations." If the Court finds that the government has not waived this argument, it should reverse the district court's suppression order.

Defendants' waiver argument should be rejected because it is based on a mischaracterization of the record. In fact, the government argued at the conclusion of the evidentiary hearing before the magistrate that the evidence should not be suppressed because it was seized pursuant to a validly issued search warrant.[2] In any event, defendants' waiver argument is contradicted by this Court's precedent and the plain language of 28 U.S.C. 636(b)(1)(C). Finally, even

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[2] Defendants' waiver argument is also forfeited because defendants did not raise it below. On March 2, 2009, the United States filed timely objections to the magistrate's Report and Recommendation and argued that: (1) the seizure of Blue House was reasonable and did not violate defendants' Fourth Amendment rights; and (2) even if it did, the exclusionary rule should not be applied because the evidence is not a "fruit" of that seizure. R. 152. On March 11, 2009, defendant Song Ja Cha filed a response to the United States' objections, which defendant In Han Cha joined, and did not contend that the government's exclusionary rule argument was untimely. R. 157, 158. Accordingly, because defendants "waived" any issue as to the timeliness of the government's exclusionary rule argument, this Court "should not * * * reach[] the merits" of defendants' claim. *Turner* v. *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998). See, *e.g.*, *Towsend* v. *Knowles*, 562 F.3d 1200, 1204 n.3 (9th Cir. 2009); *Ramirez* v. *City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009). Cf. *Eberhart* v. *United States*, 546 U.S. 12 (2005).

if defendants' waiver argument were correct, a point we do not concede, this Court, under plain error review, should reverse the district court's suppression order.

1. Contrary to defendants' claim, the government argued to the magistrate that the exclusionary rule should not be applied *before* he issued his report and recommendation. At the conclusion of the evidentiary hearing, the magistrate heard argument as to whether the seizure of Blue House violated defendants' Fourth Amendment rights. U.S.Supp.E.R. 1-51. To be sure, both parties focused on the duration of the seizure in arguing whether the seizure was reasonable. Both parties, however, also addressed whether the evidence should be suppressed "as fruit of the illegal seizure." U.S.Supp.E.R. 31. As to that issue, the government maintained "that the warrant was sufficient" to justify the seizure of evidence because "the officers [based on] the *Leon* case * * * objectively relied on the judge's determination that there was probable cause." U.S.Supp.E.R. 50-51.[3] Consequently, the government did not waive the argument that the exclusionary

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[3] In *United States* v. *Leon*, 468 U.S. 897, 905 (1984), which the United States cited in its objections to the magistrate's report, the Supreme Court held the Fourth Amendment exclusionary rule should not be applied when the police seize evidence "in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective."

rule should not be applied because it raised that issue before both the magistrate *and* the district court.

2a. Even if the government had argued for the first time in its objections to the magistrate's report that the evidence should not be suppressed because it was seized pursuant to a valid warrant, defendants' waiver argument is foreclosed by this Court's precedent. A district court has discretion to consider a claim "offered for the first time in a party's objections to a magistrate judge's proposed findings and recommendations * * * [and] 'must actually exercise its discretion' rather than simply ignore [it] or reject it *sub silentio*." *Jones* v. *Blanas*, 393 F.3d 918, 935 (9th Cir. 2004) (quoting *Brown* v. *Roe*, 279 F.3d 742, 744 (9th Cir. 2002)), cert. denied, 546 U.S. 820 (2005). See *United States* v. *Howell*, 231 F.3d 615, 621 (9th Cir. 2000), cert. denied, 534 U.S. 831 (2001) ("[A] district court has discretion * * * to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation"). As a result, this Court has routinely reversed decisions where, as here, a district court denies without explanation a claim raised for the first time in objections to a magistrate's report. See, *e.g.*, *Espinoza-Matthews* v. *California*, 432 F.3d 1021, 1026 n.4 (9th Cir. 2005); *Jones*, 393 F.3d at 935; *Brown*, 279 F.3d at 745. It has also held that the issue the United States now raises – whether evidence should be suppressed "as [a] 'fruit of the

poisonous tree'" – was preserved for review on appeal precisely "[b]ecause [it was] * * * argu[ed] in * * * objections to the magistrate judge's report and recommendation." *United States* v. *Sherwood*, 98 F.3d 402, 409 (9th Cir. 1996). Accordingly, defendants' claim that the United States automatically waived its argument that the exclusionary rule should not be applied by raising it for the first time in its objections to the magistrate's report cannot be squared with this Court's precedent.

2b. Defendants' reliance (Br. 35-36) on *Greenhow* v. *Secretary of Health & Human Services*, 863 F.2d 633 (9th Cir. 1988), overruled on other grounds by *United States* v. *Hardesty*, 977 F.2d 1347 (9th Cir. 1992) (*en banc*), the only Ninth Circuit decision defendants cite in support of their waiver argument, is misplaced.[4] In *Greenhow*, this Court concluded that a district court did not abuse its discretion by refusing to consider an argument raised for the first time in objections to a magistrate's report. 863 F.2d at 638-639. A claimant of social security retirement benefits had argued to a magistrate that he was an employee. Before the district court, however, he contended that he "was entitled to deduct his expenses as a traveling salesman" "from gross income for purposes of computing retirement

[4] Defendants also cite (Br. 36-37) to decisions from other courts of appeals. Because of this Court's precedent, those decisions are not relevant.

benefit overpayments." *Id.* at 638.

Contrary to defendants' suggestion (Br. 35), *Greenhow* does not establish that all "arguments, caselaw[,] or evidentiary material that could have been[,] but were not presented to a [m]agistrate" are untimely, or barred from review on appeal. The holding in *Greenhow* is narrow. This Court merely ruled that because "the district court properly refused to consider *th*[*e*] *issue*" whether the claimant was "entitled to deduct his expenses as a traveling salesman," "we are therefore barred from reviewing *it* on appeal." *Greenhow*, 863 F.2d at 638, 639 (emphasis added). Thus, *Greenhow* does not support defendants' automatic waiver argument.

In any event, *Greenhow* is distinguishable from the instant case in several significant respects.[5] First, in *Greenhow*, 863 F.2d at 638, this Court concluded

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[5] It is questionable whether a single social security case, like *Greenhow*, should dictate the result here, where constitutional claims are at issue. See *United States* v. *Raddatz*, 447 U.S. 667, 680 (1980) ("the due process demands of a motion to suppress evidence makes * * * agency cases relevant, although to be sure we do not suggest that the interests inherent in administrative adjudications are always equivalent to those implicated in a constitutional challenge to the admissibility of evidence in a criminal case"). In addition, since a federal court does not review a social security determination de novo, see *Baxter* v. *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991), the district court's rejection of a claim in *Greenhow* does not raise the same jurisprudential concerns as here, where district court de novo review of objections to a magistrate's report is statutorily required.

(continued...)

that the district court's refusal to address whether the claimant "should be treated as a 'traveling salesman'" "was entirely appropriate," in part because consideration of that issue would "circumvent" a previously entered court order *and* local district court rules – not at issue here – that required all issues be raised in a motion filed with a magistrate.

Second, the instant litigation is in a fundamentally different procedural posture than *Greenhow*. The parties there had fully litigated their claims administratively before their cross-motions for summary judgment were referred to a magistrate. During the lengthy administrative process – which included an evidentiary hearing before an administrative law judge, review by an appeals council, a remand by the district court to the Secretary for a supplemental hearing, and re-review by an appeals council – Greenhow argued first that he was a "commissioned employee[,]" and later that he was an "independent contractor[,]" but had never argued that he was a "traveling salesman." 863 F.2d at 635, 638. Accordingly, as this Court emphasized, the record clearly established that Greenhow's latest contention that "he should be treated as a 'traveling salesman' rather than a mere employee," was but another attempt "to run one version of [his]

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[5](...continued)
See pp. 8-11, *infra*.

case [after] another." *Id.* at 638.

Third, consideration of the United States' argument that the exclusionary rule should not be applied here would not "frustrate the purpose of the Magistrates Act." *Greenhow*, 863 F.2d at 638. That argument, unlike Greenhow's "new legal theory" that he was "entitled to deduct his expenses as a traveling salesman," does not constitute a "change [in] strategy" since it is not inconsistent with, barred by, or mutually exclusive of any of the government's prior claims. *Id*. at 638-639. See, *e.g.*, *United States* v. *Mulder*, 889 F.2d 239, 240 (9th Cir. 1989) (quoting *United States* v. *Gonzales*, 749 F.2d 1329, 1336 (9th Cir. 1984)) (suppression motion claim not "waived" when failure to present issue "was not due to any 'belated decision to change * * * tactics'"). Nor does its consideration require a new hearing, undermine the role of the magistrate, or render anything that the magistrate did superfluous or redundant. Consequently, even if the government had raised the argument "for the first time in its objections to the [m]agistrate's report and recommendations," as defendants claim (Br. 39), there would be no reason for this Court to deem the issue automatically waived. See *Britt* v. *Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983) (review of magistrate's legal conclusions does not undermine the Federal Magistrates Act's "goal of reducing the workload of district court judges").

3. Defendants' waiver argument is also inconsistent with the language of 28 U.S.C. 636(b)(1)(C) of the Federal Magistrates Act. That provision states that upon a party's timely filing of objections to a magistrate's report:

> a [district] judge * * * *shall* make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A [district] judge * * * *may* accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The [district] judge *may* also receive further evidence or recommit the matter to the magistrate judge with instructions.

Section 636(b)(1)(C) (emphasis added).

Section 636(b)(1)(C) on its face "makes it clear that the district judge must review the magistrate['s] * * * findings and recommendations de novo *if objection is made*." *United States* v. *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.), cert. denied, 540 U.S. 900 (2003). See *United States* v. *Remsing*, 874 F.2d 614, 616 (9th Cir. 1989) ("the district court has a statutory obligation to do a de novo determination" as to "specific objections to the magistrates findings and recommendations"). As this Court explained, "[b]y utilizing the words 'shall' and 'may' in consecutive sentences, Congress clearly indicated that district courts are required to make a de novo determination of the portions of the magistrate's * * * report to which a party objects." *Dawson* v. *Marshall*, 561 F.3d 930, 932 (9th Cir. 2009) (quoting *Howell*, 231 F.3d at 622).

In addition, "[b]ecause determinations of law by the magistrate judge are reviewed de novo by both the district court and this [C]ourt," the failure to raise a legal argument before a magistrate, should "not, standing alone, ordinarily constitute a waiver of the issue." *Robbins* v. *Carey*, 481 F.3d 1143, 1147 (9th Cir. 2007) (quoting *Martinez* v. *Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991)). See *United States* v. *Raddatz*, 447 U.S. 667, 675 (1980) ("de novo determination" language in Section 636(b)(1)(C) was added to clarify the intent of Congress that "the district judge * * * give *fresh* consideration to those issues to which *specific objection* has been made by a party") (quoting H.R. Rep. No. 1609, 94th Cong., 2d Sess., 3 (1976)) (emphasis added). Rather, the failure to raise a pure legal issue before a magistrate is only one "factor to be weighed in considering the propriety of finding waiver of an issue on appeal." *Robbins*, 481 F.3d at 1147 (quoting *Martinez*, 951 F.2d at 1156).[6]

Moreover, to conclude that an issue not raised before a magistrate is

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[6] It is also significant that Section 636(b)(1)(C)'s directive is stated without qualification or exception. See *N.L.R.B*. v. *Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573 (1994) (quoting *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, 490 (1947)) ("it is for Congress, not [a court], to create exceptions or qualifications at odds with [a statute's] plain terms"). See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) (concluding that absence of exceptions makes coverage of the statute "unmistak[able]").

automatically waived would circumscribe a district judge's ability to comply with Section 636(b)(1)(C)'s mandate "to accept, reject, or modify" the magistrate's findings and recommendation. *Raddatz*, 447 U.S. at 680. Further, since Section 636(b)(1)(C) expressly allows a district court to consider a new factual claim raised in objections to a magistrate's report even when it necessitates holding an additional evidentiary hearing, it is illogical to conclude that it cannot at least exercise the same discretion with regard to a purely legal issue that does not impose such a burden. Accordingly, defendants' automatic waiver argument is contradicted by the plain language of Section 636(b)(1)(C) in numerous respects.

4. Finally, even if defendants' waiver argument were correct, a point we do not concede, this Court, under plain error review, should reverse the district court's suppression order. Defendants do not take issue with the government's argument that the evidence should not be suppressed because it is not a "fruit" of the allegedly unlawful seizure. See U.S. Br. 19-23.

It also cannot be disputed that the suppression of evidence takes a "costly toll upon truth-seeking" and thereby "offends basic concepts of the criminal justice system[,]" particularly where as here, it is without justification. *Herring* v. *United States*, 129 S. Ct. 695, 701 (2009) (internal quotation marks omitted). See *United States* v. *Leon*, 468 U.S. 897, 908 (1984) ("[i]ndiscriminate application of

the exclusionary rule, * * * may well 'generat(e) disrespect for the law and administration of justice'") (quoting *Stone* v. *Powell*, 428 U.S. 465, 491 (1976)). Accordingly, to avoid clear error that would result in "a miscarriage of justice," this Court should refuse to apply the exclusionary rule and reverse the district court's suppression order. *United States* v. *Clack*, 957 F.2d 659, 661 (9th Cir. 1992).

## 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.

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## CERTIFICATE OF COMPLIANCE

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s/ Lisa J. Stark
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Attorney

Date: July 28, 2009

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I hereby certify that on July 28, 2009, I electronically filed the REPLY 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.

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