

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA**

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA * CRIMINAL NO. 1:17-CR-00204-001
VERSUS * CHIEF JUDGE DRELL
NATHAN BURL CAIN, II, et al * MAGISTRATE JUDGE PEREZ-MONTES

**REPLY MEMORANDUM IN SUPPORT OF MOTION
TO SUPPRESS**

Pursuant to this Court’s Memorandum Order (PACER Doc. 49), undersigned counsel submits this supplemental Memorandum on behalf of Nathan B. Cain, II and Tonia Cain to address the issue of standing.

At the very core of the Fourth Amendment is the right of a man to retreat into his home and there be free from unreasonable Governmental intrusion. *Silverman v. United States*, 635 U.S. 505 (1961). A review of the jurisprudence of both the United States Supreme Court and the Fifth Circuit Court of Appeal leaves no doubt that Mr. and Mrs. Cain have standing to contest this search and seizure.

In *Jones v. United States*, 362 U.S. 257 (1960), the Court held that a defendant who had been given the use of an apartment by his friend had standing. Mr. Jones had clothing in the apartment, had slept there “maybe a night”, and was the sole occupant of the apartment. The search of the apartment violated his Fourth Amendment right. This ruling was upheld in *Minnesota v. Carter*, 525 U.S. 83 (1998).

Although Mr. and Mrs. Cain did not own the residence in which they lived, he still had a possessory interest and a reasonable expectation of privacy. Moreover, this expectation of privacy is one which society would recognize as reasonable. Fourth Amendment rights are individually held and cannot be asserted solely by reference to a particular place. *Rakas v. Illinois*, 439 U.S. 128 (1978) citing *Katz v. United States*, 389 U.S. 347 (1967).

A legitimate expectation of privacy in the home exists whether a person owns or rents the home. In *United States v. Vega*, 221 F.3d 789 (5th Cir. 2000), the Court held that a subjective and legitimate expectation of privacy can be established in the residence of another, citing *Minnesota v. Olson*, 495 U.S. 91 (1990). *Vega* also recognized that the Fourth Amendment protections are “presumptively applicable” to premises owned or used by an individual. The Court held that the defendant Izquierdo, as lessee, had the right to exclude others and was legitimately on the premises.

The residence searched was the home of Mr. and Mrs. Cain. It is of no moment that the house was owned by the State. It was provided to Mr. Cain and his wife for their exclusive use. Undersigned counsel understands that this Court may need to hear additional testimony on the living arrangements and use of the residence which was searched. However, it is anticipated that neither the State of Louisiana, nor the United States Attorney’s Office would contest the following facts: The Cains were given keys to this house. They clearly had the right to exclude others from their residence, and in fact, did exclude others from their residence. It was not a common area where any employee of

Avoyelles Correctional Center could enter. It was treated as their personal residence, not only by the Cains, but by everyone else associated with Avoyelles Correctional Center. Mr. and Mrs. Cain took normal precautions to maintain their privacy. It is where Mr. and Mrs. Cain slept, ate, and raised children. They kept their clothes there and other personal belongings.

There can be no question they had an expectation of privacy, and accordingly they have standing to contest this search. A person can even have a reasonable expectation of privacy in his place at work. In *O'Connor v. Ortega*, 480 U.S. 709 (1987), a psychiatrist employed at a state hospital had a reasonable expectation of privacy in his office.

As this Court noted, the Louisiana Department of Corrections has promulgated at least one regulation relating to this issue. A-06-001 (cited by this Court) provides, among other things, that such housing should be provided rent free to Staff which shall be required to occupy State housing and be available for duty to promote safe, stable, and effective operations on a 24 hour basis. It is up to the warden of each institution to define which Staff will be provided the housing. The Government acknowledges this. On page 2 of their Memorandum in Opposition to Motion to Suppress (PACER Doc. 28) the Government notes: "Since Nathan Cain was Warden of AVC, the Cains received housing on prison grounds in a State-owned house."

The Department of Public Safety and Corrections acknowledged the right of the Cains to remain in their residence *after* they were placed on leave. A letter dated August 10th, 2016 (attached as Exhibit A) addressed to Jill Craft, the attorney for Tonia and

Nathan Cain at the time, stated: “As you are aware, both Mr. and Mrs. Cain were placed on leave pending investigation in February of 2016. **They maintain the right to remain in the Warden’s residence.**” (Emphasis added) The letter goes on to note that the Cains did not pack or move their personal property.

The search warrant in this case was executed on June 8th. On July 1st, again DPS&C wrote to Mrs. Craft (attached as Exhibit B) and stated: “I have not received any communication from either you or Mr. Cain’s new attorney about completing the removal of Mr. and Mrs. Cain’s property from the Avoyelles Correctional Center, recently renamed Raymond Laborde Correctional Center.” In the letter, the attorney for the DPS&C notes that they are trying to get a new Warden at the AVC and needed Mr. and Mrs. Cain to move out of the premises. This letter was sent three weeks after the search warrant.

The Inspector General, in applying for the search warrant, noted the privacy interest of Mr. and Mrs. Cain. In the second paragraph of the application for the search warrant, the IG states:

“That probable cause exists for the issuance of a search warrant authorizing the search of a single family dwelling **customarily used as the personal residence** of the Warden of Avoyelles Correctional Center (ACC), together with a metal building and dog house/pen...” (Emphasis added) (See Exhibit C)

Obviously, the State of Louisiana recognized a reasonable expectation of privacy in this residence. If the Inspector General actually felt like the Cains did not have an expectation of privacy, then no search warrant would have been sought in the first place.

As this Court noted in its Memorandum Order, *United States v. Gomez*, 276 F.3d 694 (5th Cir. 2001) ruled: “To establish standing to contest the validity of a search under the Fourth Amendment, the defendant must prove that he had a reasonable expectation of privacy.” At page 696. *Gomez* went on to hold that “where there is standing to contest the validity of a search depends on (1) whether the defendant is able to establish an actual, subjective expectation of privacy with respect to a place being searched or the items being seized, and (2) whether that expectation of privacy is one which society would recognize as reasonable.” At page 697-98.

In *Gomez*, the question was whether or not Mr. Gomez had an expectation of privacy in a truck that he did not own, but which was parked on his property. The Court noted that the factors to be weighed, included whether the defendant has a possessory interest in the things seized or the place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from Governmental invasion; whether he took normal precautions to maintain his privacy; and whether he was legitimately on the premises. All of these factors weigh heavily in favor of Mr. Cain and Mrs. Cain.

In *United States v. Kye Soo Lee*, 898 F.2d 1034 (5th Cir. 1990), also cited by the Court in its Memorandum, the Fifth Circuit held that where a person has borrowed an automobile from another, the borrower becomes a lawful possessor of the vehicle and thus has standing to challenge its search.

In sum, there can be no doubt that Mr. and Mrs. Cain had an expectation of privacy in their residence. It is of no moment that the house was owned by the State of Louisiana and not personally owned by the Cains. All of the factors discussed in this Memorandum weigh heavily in support of a finding that Mr. and Mrs. Cain have standing.

**RESPECTFULLY SUBMITTED
BY ATTORNEYS:**

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**UNITED STATES DISTRICT COURT
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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, a copy of the foregoing Motion was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

/s/ John S. McLindon

JOHN S. McLINDON

Department of Public Safety & Corrections
State of Louisiana

JOHN BEL EDWARDS
GOVERNOR



JAMES M. LE BLANC
SECRETARY

August 10, 2016

VIA FACSIMILE: (225) 663-2613
Jill L. Craft
Attorney at Law
509 St. Louis Street
Baton Rouge, La. 70802

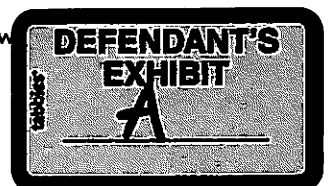
Re: Tonia and Nathan Cain

Dear Ms. Craft:

I am in receipt of your correspondence dated August 3, 2016 concerning the retrieval of your client's and your former client's personal property. I am dismayed at the mischaracterization of events and the re-writing of history contained therein. As you are aware, both Mr. and Mrs. Cain were placed on leave pending investigation in February of 2016. They maintained the right to remain in the Warden's residence. At no time did the Cains attempt to pack or move their personal property that was scattered around Avoyelles Correctional Center. Coincidentally, during this time frame, furniture and other items appeared in areas of the institution purportedly from the Warden's house.

In June, 2016, the Inspector General executed search warrants and seized property from Avoyelles Correctional Center. The Cains then began to remove personal property from the institution. Only the Cains can state what is in fact their personal property and AVC has relied upon the Cains' assertions in this regard. Three planned removals occurred.

During the last removal of property, Mr. Bandy, Mrs. Cain's father, asked specifically for one of the two inversion tables at AVC, and a wench attached to a vehicle previously claimed to be owned by Mr. Cain. At this time, Deputy Warden Poret also attempted to give Mr. Bandy two pair of shoes belonging to Mrs. Cain, black tennis shoes with a purple stripe and brown hard soled shoes. Mr. Bandy later returned to AVC bringing back the wench and the two pairs of shoes.



August 10, 2016
Jill L. Craft
Page 2

While it is unusual for a Warden to purchase footwear for non-security, non-specialized personnel, he had given permission for the purchase of the above described footwear for Mrs. Cain. No one else can use those shoes fitted to Mrs. Cain and thus the shoes were returned to Mr. Bandy by Deputy Warden Poret for Mrs. Cain's use. No one at AVC co-opted the use of either inversion table and no one at AVC was aware that either of the tables were Mr. Cain's personal property.

A large amount of property purportedly belonging to the Cains remains at AVC in the form of used clothing, old papers and junk. Other items may be discovered in the future as the clean up commences. Mr. Bandy advised that the Cains do not want any of the remaining property located in the barn or elsewhere at AVC. The remaining property therefore will be destroyed, disposed of or donated as appropriate. The exchange of property has now been completed. AVC has more than accommodated the Cains in returning any of their desired personal property.

Very truly yours,


Susan Wall Griffin
Attorney for the Secretary

C: Warden Sandy McCain
Deputy Warden Troy Poret
Daryl G. Pupera, Office of the Legislative Auditor
Joe Lotwick, General Counsel for the Inspector General

BOOK PAGE

APPLICATION FOR SEARCH WARRANT

CLERK AND RECORDER
AVOYELLES PARISH LA.

OIG CASE NUMBER 16-0027-I

2016 JUL -6 A 9:49

STATE OF LOUISIANA

PARISH OF AVOYELLES

FILE NO. FILED AND RECORDED

BEFORE ME, Kerry Spruill, Judge of the 12th Judicial District Court in and for the State and Parish aforesaid, personally came and appeared Nicole S. Compton, Criminal Investigator for the Office of State Inspector General, a law enforcement officer in and for the State of Louisiana, who being duly sworn by me deposed and said:

That probable cause exists for the issuance of a search warrant authorizing the search of the single-family dwelling customarily used as the personal residence of the Warden of Avoyelles Correctional Center (ACC), together with a metal building and dog house/pen, all located within the immediate vicinity of the described dwelling and all on the property of the Avoyelles Correctional Center which is located in Avoyelles Parish at 1630 Prison Road, Cottonport, Louisiana, within the jurisdiction of this court. The residence, metal building and dog house/pen to be searched are described as follows: a single-family dwelling with cream-colored siding and a green metal roof with a walkway leading to the front door, the dwelling having flower beds, crêpe myrtle trees and a basketball goal in the front. The nearby metal building is tan with corrugated metal walls and a metal roof and has a large white bay door on its front. The dog house/pen has green metal walls and a green metal roof and is enclosed partially by a chain-link fence. (Photo showing all three structures attached and made part of this affidavit). The above described premises is a place where evidence of the offenses of Theft (La. R.S. 14:67) and Malfesance in Office (La. R.S. 14:134) may be located, to wit:

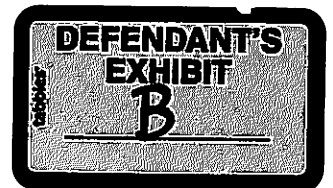
Items (list attached and made part of this affidavit) purchased using a State of Louisiana La Carte purchasing account as well as the computers and/or other electronic devices that are typically used in the online purchase of goods and services in connection with these accounts.

Affiant is currently assigned to the Office of the State Inspector General (OIG) as a Criminal Investigator. The Office of the State Inspector General of the State of Louisiana is a law enforcement agency possessing all investigative powers and privileges appurtenant to a law enforcement agency under state law as necessary and in furtherance of the authority, duties, powers and functions granted to the OIG. The OIG is domiciled in Baton Rouge. La. R.S. 49:220.21 through La. R.S. 49:220.25.

The Inspector General is authorized to examine and investigate the management and affairs of all departments, offices, agencies, boards, commissions, task forces, authorities and divisions of the executive branch of state government ("covered agencies") concerning waste, inefficiencies, mismanagement, misconduct, abuse, fraud, and corruption, and to conduct all necessary investigations into the same. La. R.S. 49:220.21; La. R.S. 49:220.24B. The Department of Corrections, a department of the executive branch, is a "covered agency" and within the jurisdiction of OIG.

At all times material herein, Nathan B. Cain II served as Warden of the ACC, a correctional facility within the Louisiana Department of Corrections (DOC), and at all times material herein, Tonia R. Cain (Warden Cain's wife), served as manager of the Business Office of the same correctional facility.

FILED 7-6-16
ATTEST
A TRUE COPY
[Signature]
Dy. Clerk



The LaCarte Purchasing Card Program assists in the management of purchasing, payment and accounting on behalf of the State of Louisiana. The LaCarte purchasing card (P-card) is a Visa card issued by Bank of America for the State of Louisiana. The program establishes minimum standards for possession and use of a LaCarte purchasing card by an authorized state employee. The card enables an employee to purchase items with the convenience of a credit card while providing management with a means of maintaining control over those purchases. The appropriate state agency must approve issuance of a card to an employee. DOC approved issuance of P-cards to certain employees of ACC including Tonia Cain and other current and former employees of ACC who may be cooperating with this OIG investigation.

Affiant has been assigned to investigate allegations that a number of illegal purchases were made using state funds by the staff of the ACC at the direction of Warden Nathan Cain and his wife, Tonia Cain. The allegations indicate that this activity took place from early 2013 to early 2016 and involved the purchase of multiple items for personal use of state employees and specific acts to conceal and/or falsely represent purchases so that they would appear to be for authorized use.

In recent months OIG investigators have obtained a number of purchasing records from the ACC that indicate that numerous items were purchased that do not appear to be intended to provide for the operational needs of the correctional facility but rather were for the personal use of employees.

Investigators have interviewed a number of cooperating witnesses who are both current and former employees of the ACC. These witnesses hold or have held positions at the correctional facility that would provide them open access to the day-to-day operation of the prison including the administration, purchasing, and records. These witnesses report personal knowledge that Nathan Cain and Tonia Cain had been using state funds for their own benefit in that they had either made or directed that purchases be made for personal items.

The witnesses reported that it had become commonplace at the facility for then Warden Cain and his wife, Tonia Cain, to direct that purchases be made using various employees state La Carte Purchasing Cards (P-cards) for their own personal use and benefit. These witnesses discussed specific purchases with investigators and described them as having been purchased with state funds for personal use by Nathan Cain and/or Tonia Cain. The attached list include many of the items reported by witnesses to have been purchased for the probable personal use of Nathan and/or Tonia Cain but have not yet been accounted for.

Since the initiation of this investigation Warden Nathan Cain and his wife, Tonia Cain, are no longer in positions of authority at the prison and have partially vacated the residence described herein as the location to be searched. It should be noted that the property to be searched is the property of the State of Louisiana which is customarily provided to the facility's Warden and his family as personal housing.

Based on the above, it is believed that items may be located in the search of the single-family dwelling customarily used as the ACC Warden's personal residence, together with a metal building and dog house/pen all located within the immediate vicinity of the described dwelling and all on the property of the ACC, that prove to be evidence of the offense of Theft (La. R.S. 14:67) and Malfesance in Office (La. R.S. 14:134) may be located.

THAT writ to search the aforesaid single-family dwelling customarily used as the ACC Warden's personal residence, together with a metal building and dog house/pen all located within the immediate vicinity of the described dwelling and all on the property of the ACC, is requested and when the thing to be searched is a dwelling or other structure, that the writ to search include all other structures, vehicles, and places of concealment on the premises where the thing(s) may be found.



Nicole S. Compton, Criminal Investigator
Louisiana Office of State Inspector General

SWORN TO AND SUBSCRIBED before me on this 8 day of June, 2016 at Marksville, Louisiana.

Time: 8:35 AM.



JUDGE, 12th JUDICIAL DISTRICT COURT

Department of Public Safety & Corrections
State of Louisiana

JOHN BEL EDWARDS
GOVERNOR



JAMES M. LE BLANC
SECRETARY

July 1, 2016

Via Facsimile
Ms. Jill L. Craft
Attorney at Law
509 St. Louis Street
Baton Rouge, La. 70802

Re: *Tonia Cain*

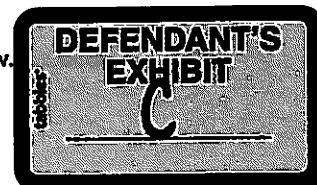
Dear Ms. Craft:

I have not received any communication from either you or Mr. Cain's new attorney about completing the removal of Mr. and Mrs. Cain's property from Avoyelles Correctional Center, recently renamed Raymond Laborde Correctional Center. The State and the Department must proceed forward so as to fulfill their public missions. As such, a posting for a new Warden has been made and interviews have completed. While a new Warden had not yet been announced, it is imminent and that person will be assuming the Warden's duties in the very near future. The Warden's house, office and storage building will be used by the new Warden, other staff, or for other Department purposes depending upon the needs of the new Warden.

I asked you in prior correspondence to choose a date during the week of June 27, 2016 to complete the removal of the immovable property. No response was received. As your client has not made any arrangements for the removal of the property, community and/or separate property, the property is deemed to be abandoned pursuant to Civil Code art. 3433. Therefore, please be advised that any personal property belonging to either Mr. or Mrs. Cain and remaining on the state property as of Friday July 15, 2016 at 4:30 p.m. will be donated, destroyed or otherwise disposed of.

Sincerely,


Susan Wall Griffin
Attorney for the Secretary



C: Thomas C. Bickham, III, Undersecretary
Troy Poret, Warden
Joel Odom, Col. Internal Affairs
Joe Lotwick, General Counsel for the Inspector General
Mrs. Tonia Cain via certified mail
Mr. Nathan Cain via certified mail