IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 15-1316

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

ERIC-ARNAUD BENJAMIN BRIERE DE L'ISLE

Defendant-Appellant

AMENDED BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

The Honorable John M. Gerrard, United States District Court Judge

UNITED STATES OF AMERICA
Plaintiff-Appellee

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

A jury found Eric-Arnaud Benjamin Briere DE L'isle (Briere) guilty of possessing 15 or more counterfeit or unauthorized access devices, with intent to defraud. He appeals and argues the district court erred when it denied his motion to suppress in which he raised a Fourth Amendment challenge to law enforcement's purported "search" of the magnetic strips on the back of credit, debit and gift cards found in his possession.

Briere waived his challenge to the credit card evidence because his motion to suppress was untimely filed, and the district court found he articulated no good cause to excuse the untimely filing. The court, however, decided the motion to suppress, without a hearing, so as not to delay trial. The district court did not err in denying Briere's motion to suppress because Briere had no legitimate expectation of privacy in the information. The retrieval of the information did not constitute a "search" for Fourth Amendment purposes. Even if it is assumed the search was illegal, any evidence obtained from the magnetic strips was admissible under the inevitable discovery doctrine.

The United States suggests the record and briefs of the parties sufficiently apprise the Court of the issue presented in this appeal, and oral argument is not necessary to decide the issue.

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STATEMENT OF THE ISSUES

I. Whether Briere waived his challenge to the credit card evidence.

United States v. Salgado-Campos, 442 F.3d 684 (8th Cir. 2006)

II. Whether the district court properly held the scanning of the magnetic strips on the back of the credit, debit, and gift cards found in Briere's possession was not a "search" for Fourth Amendment purposes.

United States v. Alabi, No. CR 11-2292 JB, 943 F. Supp. 2d 1201 (D.N.M. Apr. 30, 2013)
United States v. Allen, 713 F.3d 382 (8th Cir. 2013)
United States v. Alabi, 597 F. App'x. 991 (10th Cir. 2015) (unpublished)
United States v. Medina, No. 09-20717-CR, 2009 WL 3669636 (S.D. Fla. Oct. 24, 2009)

STATEMENT OF THE CASE

The Stop and Search

Seward County, Nebraska, Sheriff's Sergeant Michael Vance was conducting interdiction efforts on Interstate 80 in Seward County, Nebraska, on June 20, 2014. He had parked his cruiser in the "cross over," and was operating stationary radar for westbound traffic. (TR 28:4-29:10).[1] At approximately 5:00 p.m., he saw a gray vehicle traveling westbound immediately behind a semi-tractor trailer. As the two vehicles passed his location, Sgt. Vance estimated the gray automobile to be traveling less than one car length behind the semi-tractor trailer, at approximately 70-73 miles per hour. (TR 29:11-31:19). After several other vehicles passed his location, Sgt. Vance pulled his cruiser into westbound traffic and caught up with the gray vehicle, a Nissan with Georgia license plates, and stopped the vehicle. (TR 32:2-33:17).

As Sgt. Vance stood outside the vehicle at the doorpost of the driver's door, he explained why he stopped Briere, the sole occupant, for following the semi-tractor trailer too closely. As Sgt. Vance stood outside the car, he could smell the odor of burnt marijuana coming from within the car, and saw three air fresheners on the rearview mirror and dashboard air vents. (TR 35:9-16). From his training

[1] The transcript from the October 27 through 29, 2014, trial is located at District Court Docket (DCD) filings 80, 81, and 82, and is referred to as "TR".

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and experience, Sgt. Vance knew multiple air fresheners often were used to mask the odor of illegal controlled substances. (TR 35:20-36:1).

Briere came to Sgt. Vance's vehicle where he was given a warning citation for following too closely to the semi-tractor. Based upon Briere's demeanor and answers to Sgt. Vance's questions, the sergeant deployed his canine, which alerted to the possible presence of illegal controlled substances within the vehicle. (TR 36:22-40:11). As Sgt. Vance began to search the trunk of the rental vehicle, Briere got out of the police cruiser, and came toward Sgt. Vance, telling the sergeant he would not let him search the vehicle and trunk. After a brief scuffle, Briere was handcuffed and placed into the rear seat of the cruiser of another deputy who had come to assist. (TR 43:6-46:3).

Sergeant Vance and two other officers then resumed their search of the rental vehicle. No narcotics were found. They discovered and seized 51 credit, gift, and debit cards in a duffle bag located in the vehicle's trunk. (TR 46:4-47:3). Ten of the cards were American Express credit cards, all bearing Briere's name, with different account numbers embossed on the fronts of the cards. (TR 49:24-50:16). A number of the debit and gift cards also had account numbers embossed on them, but none bore Briere's name. Some of the cards were in wrapping utilized by the issuing company to display the cards in retail stores. (TR 53:22-61:24). The officers also located clothing, a roll of duct tape, garbage bags, cartons of Newport

cigarettes, and other miscellaneous items within the car. Briere was transported to the Seward County Jail. He declined to be interviewed. (TR 47:10-48:19).

Briere was arrested on state charges of assault and resisting arrest. As the investigation continued, agents of the U.S. Secret Service and Department of Homeland Security/Homeland Security Investigations scanned the plastic cards taken from Briere's rental vehicle. (TR 90:3-92:13). The agents discovered the magnetic strips on the back of the 10 American Express credit cards in Briere's name contained no account holder identification or account information which exists on legitimate American Express cards when they are issued. (TR 92:17-98:13). The agents also provided the embossed account numbers and scanned account information to American Express, VISA, and MasterCard representatives, to attempt to determine whether the embossed account numbers on the front of the cards matched the information on the magnetic strips on the back of the cards. (TR 243:12-244:16).

Motion to Suppress

A single-count indictment was filed on July 22, 2014, charging Briere with possession of 15 or more counterfeit and unauthorized access devices, in violation of 18 U.S.C. §§ 1029(a)(3) and (c)(1)(A)(i). (DCD 14). He entered a not guilty plea at his July 31, 2014, arraignment, and the magistrate filed a progression order requiring any pretrial motions to be filed on or before August 29, 2014. (DCD 24).

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On October 23, 2014, Briere filed a Motion to Suppress (DCD 41) and a supporting brief (DCD 42) asking the district court to enter an order "suppressing any and all credit card evidence discovered by law enforcement after seizing several credit cards from the Defendant." (DCD 41, p. 1). He contended the credit card evidence should be suppressed because the search of the information contained on the cards' magnetic strips "was done without a warrant or an exception to the warrant requirement, and as such, a violation of the Fourth Amendment prohibition against unreasonable searches and seizures without a warrant." *Id.*, p. 2.

The district court held that Briere's motion was filed "well out of time", and that he "articulated no good cause to excuse the untimely filing." (DCD 45, at p. 1). The court, however, examined the motion on the merits, and found the reading of the magnetic strips on the back of the credit, debit, or gift cards was not a "search" for Fourth Amendment purposes. (DCD 45). The case proceeded to trial.

Trial

United States Secret Service agent Nicholas Wadding testified he was assigned to the Omaha resident office, and received training in the investigation of credit card and identity theft violations. (TR 85:22-87:20). He explained that the plastic cards have three tracks of information or data on the magnetic strips located on the back of the cards. The first track is the credit card number; the second track

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has the card holder's name; and the third track contains data specific to the institution. (TR 87:21-88:5). The embossed or raised card holder and account number on the front of the cards should match the information on the magnetic card on the back of the card. (TR 88:10-89:2). "Re-coding" is a term used to describe the re-writing of the track of information or data on the magnetic strips on the back of cards with stolen credit card numbers. (TR 89:3-18).

Agent Wadding examined the cards seized at the June 20, 2014, traffic stop. He compared the embossed account numbers on the front of some of the cards with the account numbers coded onto the magnetic strips on the back of the cards to determine whether the numbers matched. (TR 90:10-92:13). The scans of Exhibits 2-11, the American Express credit cards with different account numbers and in Briere's name, were found to contain no information or data on the strips. (TR 92:17-98:13; Appx 01-10.)[2] Agent Wadding scanned Exhibit 23, a Parker's PumpPal card, and Exhibit 25, a QuikTrip card with printed account numbers on them, and found the account and account holder information on the magnetic strips did not match the printed account numbers, and were linked to legitimate American Express accounts (TR 98:14-102:10; Appx 11-12).

[2] The government's Appendix submitted with this brief is referred to as "Appx." Legitimate card holder information contained within the Appendix has been redacted where applicable.

Agent Wadding also examined Exhibits 31-47, American Express gift cards, Exhibits 48-58, VISA and MasterCard debit and gift cards issued by US Bank, USAA, Wells Fargo, and other financial institutions, and Exhibit 59, a Subway gift card. He discovered the account and account holder information for Exhibits 31-47 and Exhibit 59 were linked to legitimate American Express credit card holders. (TR 102:14-108:14; 106:21-108: 18; Appx 13-29, 41). Exhibits 48-58, the seized VISA and MasterCard debit cards, were found to have account information for legitimate VISA and MasterCard account holders. (TR 103:9-106:20; Appx 30-40).

Peter Grimm, a fraud investigator with American Express testified that American Express issues credit cards that extend a customer a line of credit against which she/he can purchase goods and services. The card holder charges purchases on the card and pays the balance at the end of the month or billing period. (TR 120:21-121:15). Mr. Grimm confirmed the magnetic strip on the back of American Express and other credit cards includes the account number, name of the account holder, and corporate data which should match the information located on the face of the cards. (TR 125:16-126:11).

Mr. Grimm found the absence of encoded data on the magnetic strips of Exhibits 2-11, the American Express credit cards, to be significant in that all credit cards issued by American Express have account numbers and account information

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on them when issued. Mr. Grimm also found the 10 credit cards, all with Briere's name embossed on them, to be significant in that American Express had no existing accounts with Briere. (TR 127:7-19; 136:9-137:18; Appx 1-10).

Mr. Grimm contrasted gift cards which can be either encoded with a fixed dollar amount to be used to purchase items, or "reloaded" or re-used with additional funds placed onto the cards. Legitimate American Express credit cards always have the card holder name, account number, and expiration date embossed on the front of the cards, while gift cards may or may not have that embossed information on the front of the cards. However, Mr. Grimm stated the account number and other identifying information for all legitimately issued gift and credit cards matches the identifying information encoded onto the magnetic strips on the back of the plastic cards. (TR 138:21-141:2). Gift cards re-encoded with account information not originally on the magnetic strips on the back of the cards were counterfeit cards. (TR 141:3-6).

Mr. Grimm testified neither Exhibit 23, the Parker's PumpPal card or Exhibit 25, the Quiktrip card were issued by American Express, but had legitimate American Express account information for cardholders living in Texas and New Jersey re-encoded on the magnetic strips. (TR 141:10-144:1; Appx 11-12). The magnetic strip on the back of Exhibit 59, the Subway gift card, also had been re-encoded with account information of a legitimate American Express credit card

holder living in Massachusetts. (TR 144:11-150:1; Appx 41). Exhibits 31-47, the American Express gift cards, had also been re-encoded with account information of legitimate American Express credit card holders living in New York, Florida, New Jersey, North Carolina, Ohio, and Arizona. (TR 150:4-154:11; Appx 13-29).

Mr. Grimm conducted a search of American Express proprietary database records for the American Express gift cards (Exhibits 31-47), and identified the retail merchants where the cards had been shipped and whether the gift cards had been used or presented for use to purchase merchandise. (TR 158:12-167:9; Appx 13-29). *See also* Exhibit 71; Appx 69-71). He also testified about his search of the business records of American Express company, which he reviewed and utilized to organize, chronologically (Exhibit 69) and by card number (Exhibit 70), the legitimate credit card account numbers for Exhibits 23, 25, 31-47, and 59, where and when those cards were used, and the merchandise purchased with the re-encoded cards (TR 167:17-178:10; Appx 65-68).

Lisa Tennyson, a financial crime investigator with Wells Fargo Bank, testified Wells Fargo Bank issues credit cards, and some of the branches also issue gift cards. She identified Exhibits 49 and 51 as VISA cards with magnetic strips on the back of the cards that had been re-encoded with legitimate card holder and account information for Wells Fargo customers, other than Briere, who lived in California and Florida. (TR 181:18-183:9; 185:10-189:8; Appx 31, 33).

Stephanie Kincaid, a financial crimes investigator with Kroger Food Stores, Atlanta, Georgia, testified she reviewed surveillance video for Kroger Store #259 in Atlanta, Georgia, and identified Briere entering the store (Exhibits 66A-66O; Appx 47-61) and completing three transactions on June 16, 2014 (Exhibits 67A, 67B, 67C; Appx 62-64) using a re-encoded American Express credit card (Exhibit 36; Appx 18) and the Subway re-encoded gift card (Exhibit 59; Appx 41) (TR 193:17-210:22; 213:5-22) to purchase a seaside combo, vegetables, an energy drink, and three Visa gift cards (Exhibits 67A, 67B, 67C; Appx 62-64).

Jared Richardson, a district supervisor of Kum & Go, a convenience store chain, testified he reviewed footage from surveillance cameras located in Kum & Go store #37 in Gretna, Nebraska, for purchases made at the store by two males on June 14, 2014, utilizing American Express gift cards with re-encoded magnetic strips (Exhibits 63A, 64A, 64B, 64C, 64D, 36, 37, and 47) which were seized from the trunk of Briere's rental vehicle on June 20, 2014. (TR 214:19-218:6; Appx 42-46; 18-19; 29). The three American Express gift cards were used to purchase energy drinks, gasoline, alcohol, soda, and Newport cigarettes. (TR 220:10-223:24).

Eric Cardiel, an agent of the Department of Homeland Security/Homeland Security Investigations, testified persons who use re-encoded cards make purchases with the cards, and also attempt to legitimize the money, building layers

of transactions to disguise the illegal source of the money (i.e., stolen credit card account numbers). (TR 230:15-236:9). He testified he contacted American Express and the banking institutions that issued the VISA and MasterCards seized from Briere's rental vehicle, including Wells Fargo Bank, and provided the account numbers and account information obtained from the magnetic strips on the back of the cards. (TR 244:5-16).

Briere testified in his defense. He spoke of his education in Paris and Switzerland, his employment with the French Ministry of Labor, the post office, and as a salesman with Christian Dior. He first came to the United States to visit in 2008, and returned 10 times traveling to a number of states during his visits. (TR 266:8-270:19). He bought the credit, debit, and gift cards while he was in France, from an unknown person who contacted him over the internet, and brought the cards with him when he returned to the United States in May 2014. He said he was traveling to Kearney, Nebraska to meet his half-brother from Belgium, to watch a soccer game when he was stopped by Seward County Sheriff Sgt. Vance. (TR 287:13-24). He claimed he was using the cards lawfully, not knowing the cards were associated with other peoples' accounts. (TR 283:6-25).

On October 29, 2014, the jury returned a guilty verdict against Briere. (DCD 57). On January 23, 2015, Briere was sentenced to the custody of the United States Bureau of Prisons for a term of 15 months, to be followed by 3 years

of supervised release. (DCD 68). Briere was also ordered to make restitution in the amount of $4,736.53, and pay $12,723.57 in costs incurred during the trial. (DCD 62, 68).

Briere filed a timely Notice of Appeal on February 5, 2015, contesting his conviction. Neither his brief nor ours addresses a sentencing issue. (DCD 72).

SUMMARY OF THE ARGUMENT

Briere raised his challenge to a law enforcement agent's scanning of magnetics strips on the back of 51 credit, debit and gift cards in an untimely motion to suppress, filed in violation of the pretrial progression order, and four days before the beginning of trial. His failure to comply with the court's order constitutes a waiver of his claim.

The agent's scanning of the magnetic strips was not a Fourth Amendment search. Briere had no expectation of privacy in the information contained on the back of the contraband cards, and the agent's scan of the cards revealed only whether the cards were legitimate or fraudulent. Even if the agent's actions were unconstitutional, the evidence obtained from the magnetic strips was nevertheless admissible under the inevitable discovery doctrine. Briere's conviction should be affirmed.

ARGUMENT

I. Briere has Waived his Challenge to the Credit Card Evidence.

A. Standard of Review

Waived claims are unreviewable on appeal. *United States v. Green*, 691 F.3d 960, 963-64 (8th Cir. 2012). This court "will reverse a decision declining to consider an untimely pretrial motion only for an abuse of that discretion." *United States v. Salgado-Campos*, 442 F.3d 684, 686 (8th Cir. 2006).

B. Argument

Briere filed his Motion to Suppress and supporting brief on October 23, 2014. (DCD 41, 42). Earlier, on July 31, 2014, the magistrate judge entered a Progression Order requiring that all pretrial motions be filed on or before August 29, 2014. (DCD 24). Briere filed no pretrial motions within the time permitted under the Progression Order, and the Motion to Suppress, filed almost 60 days after the deadline and four days before the beginning of trial, was untimely and in violation of the court's Progression Order.

Pursuant to Rule 12(b)(3), Fed. R. Crim. P., any defense, objection, or request, including to suppress evidence, not raised by a court's pretrial deadline, is considered untimely unless the party shows good cause. In *Salgado-Campos,* the defendant appealed the district court's denial of his motion to extend time for filing

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of pretrial motions, finding the motion to have been filed out of time, and without good cause to justify an extension.

> Under Rule 12(c) of the Federal Rules of Criminal Procedure, a court may set a deadline for the filing of pretrial motions. If a party fails to file a pretrial motion before that deadline, the party waives that issue. *See* Fed.R.Crim.P. 12(e). However, the district court has the discretion to excuse the waiver upon a showing of good cause for the delay. *Id*. We will reverse a decision declining to consider an untimely pretrial motion only for an abuse of that discretion.

Salgado-Campos, 442 F.3d at 686 (citations omitted).[3]

Briere has made no showing to demonstrate his tardiness "was due not to negligence, oversight, or laziness." *United States v. Chavez*, 902 F.2d 259, 263-64 (4th Cir. 1990). While the district court decided the motion on its merits, it noted "[t]he alternative to summarily deciding the motion to suppress would simply be denying it as untimely." (DCD 45, n.1). The denial of Briere's untimely motion was not an abuse of discretion, and Briere's conviction should be affirmed.

II. The District Court Properly Held the Scanning of the Magnetic Strips on the Back of the Credit, Debit, or Gift Cards was Not a "Search" for Fourth Amendment Purposes.

Briere argues the cards contained account balances for legitimate American Express credit card holders, therefore, this information is the type of information concerning a legitimate privacy interest pursuant to Supreme Court precedent.

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[3] Federal Rule of Criminal Procedure 12(e) was amended, effective December 1, 2014, and was relocated to Fed. R. Crim. P. 12(c)(3). *See* Fed. R. Crim. P. advisory committee's note (2014 amends.).

(Briere Br., pp. 10-12). He further argues he had an expectation of privacy in the information on the magnetic strips because he had not used all of the cards found in his possession. (Briere Br., pp. 9, 11-12). Briere's arguments are without merit, and should be rejected by this Court.

A. Standard of Review

This Court reviews a denial of a motion to suppress *de novo*, and any associated factual findings for clear error. *See United States v. Smith*, 715 F.3d 1110, 1114 (8th Cir. 2013) (quoting *United States v. Hollins*, 685 F.3d 703, 705 (8th Cir. 2012)). In its review, this Court gives "due weight" to the inferences of investigators and the district court. *United States v. Robbins*, 682 F.3d 1111, 1115 (8th Cir. 2012). This Court "may affirm the district court's denial of a motion to suppress on any ground the record supports." *United States v. Anderson*, 688 F.3d 339, 343 (8th Cir. 2012). "We will affirm the denial of a suppression motion unless we find that the decision is unsupported by the evidence, based on an erroneous view of the law, or the Court is left with a firm conviction that a mistake has been made." *United States v. Riley*, 684 F.3d 758, 762 (8th Cir. 2012) (citation and internal quotation marks omitted).

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B. Argument

1. The Scanning of the Credit, Debit, and Gift Cards was not a Search Within the Meaning of the Fourth Amendment.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The touchstone of the Fourth Amendment is reasonableness. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness typically requires a judicial warrant. *Id.* "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Id. See also* DCD 45, p. 2.

To establish a Fourth Amendment violation, a defendant must prove either a common-law trespass, *United States v. Jones*, 132 S. Ct. 945, 949-54 (2012), or "a legitimate expectation of privacy" in the place searched. *Id.* at 952 ("reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test"). A Fourth Amendment search takes place under the trespass theory when the government gains evidence by physically intruding on a constitutionally protected area. *See Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013). "Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Illinois v. Caballes*,

543 U.S. 405, 408 (2005) (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

Where defendants sought to suppress examination results while conceding that the examined object's seizure was lawful, their arguments have failed. *See e.g., Jacobsen*, 466 U.S. at 122-23 (field test to determine whether lawfully seized powder was cocaine was not a search within the Fourth Amendment); *United States v. Snyder*, 852 F.2d 471, 474 (9th Cir. 1988) (no additional warrant required to forensically examine blood legally obtained); *Clarke v. Neil*, 427 F.2d 1322, 1325 (6th Cir. 1970) ("We do not consider the laboratory examination of a suit after its seizure by police to constitute a search within the meaning of the Fourth Amendment.")

In *United States v. Medina*, No. 09-20717-CR, 2009 WL 3669636 (S.D. Fla. Oct. 24, 2009), *adopted in part and rejected in part on other grounds sub nom, United States v. Duarte*, 2009 WL 3669537 (S.D. Fla. Nov. 4, 2009), the magistrate judge succinctly defined the purpose of the magnetic strips:

> The magnetic strip on the back of a credit card unlike a hard drive or an external electronic storage device, is designed simply to record the same information that is embossed on the front of the card. On a legitimate card the information will match. A credit card reader merely verifies the information that cannot be read by the naked eye. Using a credit card reader to verify that information is analogous to swiping a driver's license (featuring a magnetic strip with biographical information encoded therein) through a police vehicle computer to run a background check. It is analogous to using an ultraviolet light to detect whether a treasury bill is authentic…"

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Id. at *10.

In this case, the district court emphasized the "effectively identical facts" outlined by the court in *United States v. Alabi*, No. CR 11-2292 JB, 943 F. Supp. 2d 1201 (D.N.M. Apr. 30, 2013). There, the court concluded no search occurred when law enforcement read the magnetic strips on the back of fraudulent credit cards because (1) it did not involve a physical intrusion, and (2) it did not violate a reasonable expectation of privacy. (DCD 45, p. 3) (citing *Alabi*, 943 F. Supp. 2d 1201); *Medina*, 2009 WL 3669636. Here, the scanning of the magnetically-coded information on the credit and debit cards did not constitute a physical intrusion of a constitutionally protected area. The government already had lawful possession of the credit and debit cards. "[R]eading and displaying virtual data encoded on a track does not involve any physical invasion or penetration of space." *Alabi*, 943 F. Supp. 2d at 1265.

Briere claims he had a legitimate privacy interest in the cards he did not actually use. He cites *Alabi* to support his position. (Briere Br., p. 9). In *Alabi*, "[t]here [was] no evidence that any of the thirty-one credit and debit cards found in the Defendants' possession [had] been used." *Alabi*, 943 F. Supp. 2d at 1213. *See also id.* at 1221-22, 1275.

Initially, Briere could not have an expectation of privacy in the 10 American Express credit cards with different account numbers which bore his name. Agent

Wadding and Peter Grimm both testified the magnetic strips on the back of those cards contained no cardholder and account information. (TR 92:17-98:13; 136:9-137:9). Certainly, Briere cannot have an expectation of privacy in the lack of information on those cards.

Briere could also not have had a subjective expectation of privacy in the account information on the magnetic strips on the back of the other debit and gift cards. Certainly, Briere cannot assert an expectation of privacy in someone else's account information. Also, the whole purpose of the magnetic strip, whether on a legitimately issued card or a fraudulently re-encoded card, is for the magnetic strip to be read by a credit card processing device. That is how the card, legitimate or fraudulent, is used to make purchases or obtain cash advances. There is no reason to fraudulently re-encode the back of the cards except for the purpose of presenting it for payment for goods, services, or cash. Because Briere knew the magnetic strips would be read by a processing device when he used the cards, he cannot have had a subjective expectation of privacy therein.

Even if Briere may have some expectation of privacy in the unused cards, this interest is not one society is prepared to endorse. The *Alabi* court concluded the defendants met their burden regarding the subjective component of the two-part reasonable expectation of privacy analysis – that at the time of the search they maintained a subjective expectation of privacy in the electronic information on the

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31 ***unused*** cards' magnetic strips. *Alabi*, 943 F. Supp. 2d at 1275.[4] ***However***, the court proceeded to analyze the second step of the test – whether the subjective privacy interest was "legitimate", that is, one society is prepared to accept as legitimate. *Id.* at 1275-87. The court concluded that it was not:

> the Court cannot soundly conclude that society is prepared to recognize as reasonable the Defendants' subjective expectation of privacy in the information stored on their credit and debit cards' magnetic strips—which the evidence shows would only be different from the information embossed on the outside of the card if the intent is to engage in a crime. The Court does not believe that society would recognize as reasonable a privacy expectation which, at least in contemporary society, would benefit only criminals.

Id. at 1287.

Because an interest in possessing contraband is not legitimate, "governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'" *Caballes*, 543 U.S. at 408 (*quoting Jacobsen*, 466 U.S. at 123). The expectation of privacy that certain facts will not come to law enforcement's attention is not an interest in privacy that society is

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[4] The district court commented on this finding regarding the unused cards: "To find a subjective expectation of privacy, the Court would need to believe that [Briere] never intended to reveal the information encoded on the magnetic strip—that is, that he never intended to use the cards, despite his name being on them. That is a dubious proposition, but the Court will give [Briere] the benefit of the (minimal) doubt." (DCD 45, p. 4, n.2). The *Alabi* court also indicated that it was indeed, "reluctant" to accept the assertion that defendants possessed thirty-one credit cards "many of them in their own names, several of which had information on the magnetic strips that related to persons other than the Defendants, but they nonetheless subjectively intended not to disclose this information to a third party—i.e., intended not to use the cards." *Id.* at 1275.

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prepared to consider reasonable. *See Caballes*, 543 U.S. at 408-09; *Jacobsen*, 466 U.S. at 122-23.

> This case presents an intersection of those principles—that is, between the principle that there is no legitimate privacy interest in already-known information, and that there is no legitimate privacy interest in contraband. And "[a] privacy expectation in the account information stored on credit and debit cards' magnetic strips—separate and beyond the credit and debit cards themselves—is not objectively reasonable." *Alabi*, 943 F. Supp. 2d at 1280. Scanning a card to read the account information reveals only the same information that would be revealed in a private search when the card was used as intended. *Id.* at 1281; *see Medina*, 2009 WL 3669636, at *10-11. And the only time the account-holder's information (as opposed to such details as the lender's routing information) would not also be revealed by a cursory examination of the surface of the card would be when it was inconsistent—that is, when the card was counterfeit and contraband. *Alabi*, 943 F. Supp. 2d at 1282; *see Medina*, 2009 WL 3669636, at *10.

(DCD 45, p. 5).

The government proved at trial that Briere used a number of the cards to make purchases. The district court correctly found Briere had no legitimate expectation of privacy in the magnetic strips on the credit and debit cards. Briere simply cannot establish his expectation of privacy is one society is willing to recognize as reasonable. An expectation of privacy regarding the information encoded on the magnetic strip on the back of the cards is not objectively reasonable. The data contained on the magnetic strip – so long as the card had not been tampered with – should be precisely the same information that appears on the face of the card. The purpose of the magnetic strip is <u>not</u> to keep the data private.

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The purpose is to enable merchants to use a card scanner (similar to the one used by the Secret Service) to transmit the account information to the issuer of the card quickly and accurately, and thereby complete a financial transaction. "It would indeed by [sic] ironic that the government's investigation of that harmful economic fraud would be stifled by an identity thief's invocation of privacy in the very same card numbers that he is not supposed to have." *Medina*, 2009 WL 3669636 , at *11.

The only additional information Agent Wadding learned by scanning the cards through the card reader, that was not apparent on the face of the card, was whether the card had been altered – that is, whether the information on the magnetic strip matched the information on the face of the card, or whether it had been changed so the possessor of the card could defraud either the account holder or the card issuer, or both. Briere did not have a privacy interest in the cards he did not use.

Briere also argues "Agent Wadding testified that the information held in the magnetic strips on the back of American Express Cards includes credit card information and ***account balances*** for credit card holders." (Briere Br., p. 10) (emphasis added). *See also* Briere Br., p. 11. Briere misinterprets Agent Wadding's testimony. During that portion of the trial, Agent Wadding testified regarding Visa debit cards:

> Q. Do you know whether or not they're all issued by Visa or are there other issuing agencies?
>
> A. There's other issuing agencies. The banks have the financial backing to cards. So Visa and MasterCard as well as American Express is the conduit -- let me go -- and I apologize with this.
>
> So the financial -- the money comes from banks. So American Express is a little bit unique because they actually have the credit card information and they hold the account balances for credit card holders.

(TR, p. 103-104). When agent Wadding described how American Express maintained credit card information and account balances for card holders, he was not referring to the information held ***in the magnetic strips*** on the back of American Express cards. Rather, the testimony referred to American Express as different from VISA, MasterCard, and others that serve as "sponsoring" organizations and issue the cards, and the banks and financial institutions that provide financial backing for the credit and debit cards. Agent Wadding was identifying American Express as unique in that it is both a "sponsoring" and issuing agency, and provides both financial backing for the account and also issues the plastic. (TR 103:9-104:17). Briere's argument and reasoning under *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974) is, therefore, without merit.

The scan of the cards revealed only whether the cards were legitimate or fraudulent. Because there is no legitimate privacy interest in possessing fraudulent credit cards, the scan of the credit cards was not a search subject to the Fourth

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Amendment. *Jacobsen*, 466 U.S. at 122-23 ("chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy"). This Court should affirm the district court's holding that the scanning of the credit, debit, and gift cards did not constitute a search within the meaning of the Fourth Amendment.

2. The Exclusionary Rule Should not Apply to the Evidence Obtained from Scanning the Credit and Debit Cards Because the Secret Service Agent Inevitably Would Have Obtained the Evidence.

Even if this Court were to hold the agent's actions constituted an illegal search, any evidence obtained from the magnetic strips nevertheless was admissible under the inevitable discovery doctrine. "If the government 'can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . [then] the evidence should be received.' " *United States v. Allen*, 713 F.3d 382, 387 (8th Cir. 2013) (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)). For the exception to apply the government must show "(1) a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) an active pursuit of a substantial, alternative line of investigation at the time of the constitutional violation." *Id.* (citing *United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997)). *See also United States v. McManaman*, 673 F.3d 841, 846 (8th Cir. 2012).

The district court noted the government would have almost certainly been able to show the evidence would have been inevitably discovered: "[e]ven without reading the magnetic strips, police were able to confirm the nature of the contraband by checking the information on the front of the cards with the financial institutions that purportedly issued them." (DCD 45, p. 6, n.3). *See also* DCD 1. The *Alabi* case offers further guidance on this issue. On January 20, 2015, the Tenth Circuit affirmed the district court's denial of the defendant's motion to suppress the evidence obtained from the cards. *See United States v. Alabi*, 597 F. App'x. 991 (10th Cir. 2015) (unpublished). The court found that, even assuming the warrantless examination of the cards' magnetic strips constituted an illegal search, the evidence was admissible under the inevitable discovery doctrine. *Id.* at 998-1000. The court then analyzed the facts under the four factors recognized by the Tenth Circuit in determining the applicability of the inevitable discovery doctrine. *Id*. at 998-99.

In the instant case, the officers who recovered the evidence from Briere's rental vehicle knew at the time of his arrest he possessed 51 credit, debit, and gift cards of various types issued by various financial institutions and organizations. Some of these cards were in cardboard packaging used to display the cards in retail stores. Also included were 10 American Express credit cards with different account numbers embossed on them, which all bore Briere's name. The officers

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actively pursued their investigation as to the legitimacy of the cards and whether the cards were evidence of a state or federal crime. Central to that determination was whether the information contained on the magnetic strips of the credit, debit, and gift cards was the same as the account and account information that appeared on the faces of the plastic cards, and whether the cards were the property of Briere or, more likely, innocent card holders.

Had they not scanned the cards through the Secret Service card reader, the officers would have pursued their investigation through the alternative line of investigation by contacting the issuing banks, financial institutions, and agencies. Indeed, Agent Cardiel testified he did exactly that, to confirm the account holders's identity and account information they had obtained from their scan of the cards (TR 243:12-244:16).

As the district court noted:

> Even without reading the magnetic strips, police were able to confirm the nature of the contraband by checking the information on the front of the cards with the financial institutions that purportedly issued them. *See* filing 1. And second, "evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge, that the search was unconstitutional." It is unlikely that the "search" conducted here was the sort of "deliberate, reckless, or grossly negligent conduct," or "recurring or systematic negligence" that the exclusionary rule is intended to deter.

(DCD 45, p. 6, n.3) (citation omitted). Even if it is assumed the scan of the cards constituted an illegal search, the evidence is admissible under the inevitable discovery doctrine. [5]

CONCLUSION

For the reasons set forth above, Briere's conviction should be affirmed.

Respectfully submitted,

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[5] The government notes that in the "Conclusion" section of his brief, Briere mentions that he should be "resentenced without the career criminal enhancement." (Briere Br., p. 12). This enhancement, however, was not applied to Briere's sentence. *See* TR 347:5-22.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 19, 2015, the foregoing was electronically filed with the Clerk of the Court for the Eighth Circuit Court of Appeals using the CM/ECF system. A paper copy was served on the following participants in this case by U.S. Mail, postage prepaid on June 18, 2015:

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CERTIFICATION OF VIRUS SCAN

Pursuant to Rule 28A(h)(2) of the Eighth Circuit Rules of Appellate Procedure, I hereby certify the full text of the Appellee's Amended Brief has been scanned for viruses, and is virus-free.

Dated: June 19, 2015.

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CERTIFICATION OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation provided in Rule 32(a)(7)(B)(i) and, relying on the word processor word count feature, contains 6,314 words. The brief was created using Microsoft Word 2010.

Dated: June 19, 2015.

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