
CRIMINAL LAW — FOURTH AMENDMENT — FIFTH CIRCUIT
DELIVERS A NEW LAW ENFORCEMENT FUNCTIONS TEST
FOR IDENTIFYING GOVERNMENT ACTORS. — *United States v.*
Johnlouis, 44 F.4th 331 (5th Cir. 2022).

Subjectivity, like mortality, has seemed not only attainable but inevitable. It is objectivity which is presumed to be the problematic goal of our theories and our attempts at doctrinal interpretation.

— Professor James Boyle¹

Although reasonable minds may disagree about a single right way to view the world — feelings or facts? — legal doctrine can coalesce around a third option: neither. Recently, in *United States v. Johnlouis*,² the Fifth Circuit established a new “law enforcement functions” test for determining whether potential government action falls within the ambit of the Fourth Amendment.³ But while the *Johnlouis* court put forth a fact-based test for determining what a government actor is, it focused primarily on an analysis of mental state and motives.⁴ Lower courts would be remiss to readily adopt this hybrid of objective form and subjective substance, and the Fifth Circuit’s narrow holding will not prevent unpredictable and inequitable Fourth Amendment outcomes.

On November 3, 2017, United States Postal Service (USPS) letter carrier Jasia Girard picked up a package in Louisiana intended for delivery to Alfonzo Johnlouis.⁵ In her testimony, Girard claimed her thumb went through a preexisting “hole” in the side of the package,⁶ through which she felt a plastic bag with little balls of what she thought might be marijuana.⁷ Peering inside a “previously torn” flap of the package, she saw “hard white rock[s].”⁸ Girard then decided she would not deliver the package because she felt morally uncomfortable “leaving it ‘with all those kids around there,’” especially after her past experience

¹ James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489, 489 (1991).

² 44 F.4th 331 (5th Cir. 2022).

³ See *id.* at 337.

⁴ See *id.* Professor Orin Kerr makes a similar observation about the case. Orin Kerr (@OrinKerr), TWITTER (Aug. 17, 2022, 9:41 PM), <https://twitter.com/OrinKerr/status/1560079379882864641> [<https://perma.cc/LX3Q-LQGW>].

⁵ *Johnlouis*, 44 F.4th at 333. While the package was not addressed to Johnlouis, the owner of the addressed residence had been informed by Johnlouis “that the packages would arrive at her address.” *Id.* A “further investigation linked him to the packages,” and Johnlouis “admitted, for the purpose of the guilty plea, that he was the intended recipient of the packages.” Brief on Behalf of Appellee, the United States of America at 7, *Johnlouis* (No. 21-30085), 2021 WL 3164029, at *7 [hereinafter Brief on Behalf of Appellee].

⁶ Original Brief for the Appellant, Alfonzo Johnlouis at 4, *Johnlouis* (No. 21-30085), 2021 WL 2189868, at *4.

⁷ Brief on Behalf of Appellee, *supra* note 5, at 3.

⁸ *Id.*

with a young relative's methamphetamine addiction.⁹ She took the package to the apartment's property manager, warning her about the suspicious material.¹⁰ The manager called the police, and officers found eighteen pounds of methamphetamine.¹¹

Johnlouis was indicted on two counts — (1) conspiracy to distribute and to possess with intent to distribute methamphetamine, and (2) attempted possession of a controlled substance with intent to distribute.¹² Johnlouis moved to suppress the narcotics evidence on a Fourth Amendment–based theory that Girard's thumb slipping through the package's hole had initiated an illegal search.¹³ The U.S. District Court for the Western District of Louisiana denied Johnlouis's motion on the ground that Girard was not a government actor to whom the Fourth Amendment applied.¹⁴ The district court first underscored that “despite her position as a USPS letter carrier, Girard did not carry out *law enforcement action* within the meaning of the Fourth Amendment.”¹⁵ The court added that even if Girard did carry out law enforcement action, her actions had not risen to the level of misconduct warranting application of the exclusionary rule,¹⁶ an objective-reasonableness test used to “forbid[] the use of improperly obtained evidence at trial.”¹⁷

Ultimately, Johnlouis pled guilty to the conspiracy count, and the court dismissed the attempt count pursuant to his plea agreement.¹⁸ The district court sentenced him to ten years of imprisonment and five years of supervised release.¹⁹ Johnlouis then appealed the denial of his motion to suppress to the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit affirmed the district court's holding that the Fourth Amendment did *not* apply to Girard's actions.²⁰ Writing for the majority, Judge Stewart²¹ began by recognizing that this was a case of first impression.²² The Fifth Circuit had never assessed the constitutionality of searches by letter carriers — only those by members of the Postal Inspection Service, the law enforcement arm of USPS.²³

⁹ *Johnlouis*, 44 F.4th at 333.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; see also 21 U.S.C. § 841(a)(1), (b)(1)(A).

¹³ *Johnlouis*, 44 F.4th at 333–34.

¹⁴ See *id.* at 334. The Fourth Amendment's protection against unreasonable searches and seizures applies only if such searches and seizures are conducted by the government. See U.S. CONST. amend. IV.

¹⁵ *Johnlouis*, 44 F.4th at 334 (emphasis added).

¹⁶ *Id.*

¹⁷ *Herring v. United States*, 555 U.S. 135, 139–40 (2009).

¹⁸ *Johnlouis*, 44 F.4th at 334.

¹⁹ *Id.*

²⁰ *Id.* at 333.

²¹ Judge Stewart was joined by Judge Barksdale.

²² *Johnlouis*, 44 F.4th at 332.

²³ *Id.* at 335.

Recognizing the lack of definitive precedent, Judge Stewart suggested that being a government employee does not, by itself, make one a government actor for Fourth Amendment purposes.²⁴ Rather, being a government actor required *something more*: a “connection to law enforcement.”²⁵

The Fifth Circuit began its analysis with *Ferguson v. City of Charleston*,²⁶ in which the Supreme Court held that public hospital staff members were government actors because they had carried out urine tests “for law enforcement purposes,” “law enforcement officials” had helped develop and enforce the testing policy, and there was “extensive involvement of law enforcement officials at every stage.”²⁷ The Fifth Circuit contrasted these three law enforcement–focused factors with the situation in *Johnlouis*: Girard worked as a letter carrier without any law enforcement duties, she had never received law enforcement training, and she had never been involved with law enforcement during her USPS employment.²⁸

Next, the court drew on cases from its sister circuits to “underscore the primacy of law enforcement ties in the Fourth Amendment context.”²⁹ The Tenth Circuit had held that the National Center for Missing and Exploited Children was a government actor because Congress had imbued it with “unique law enforcement powers.”³⁰ And the Eighth Circuit had held that a letter carrier who intercepted a suspicious package was a government actor because he “had been serving also as an undercover agent for the Bureau of Narcotics.”³¹ The Fifth Circuit noted that Girard’s case did not have any “law enforcement ties” that satisfied what these circuits had previously deemed sufficient.³²

Finally, the court described how Girard’s inspection was not an arbitrary invasion by a government official and had not been motivated by any desire to investigate a legal violation.³³ Her thumb had unintentionally slipped through the package’s hole, and her intentional inspection afterwards only happened “because of her concern for children and her experience with a relative.”³⁴ Thus, the court held, Girard was in no way inspecting the package to enforce the law, and the Fourth Amendment did not apply.³⁵ The Fifth Circuit emphasized that it was offering a “narrow holding tailored to the peculiar facts” — though Girard worked for a government agency that separately employs law

²⁴ *Id.* at 333, 335.

²⁵ *Id.* at 335.

²⁶ 532 U.S. 67 (2001).

²⁷ *Johnlouis*, 44 F.4th at 336 (quoting *Ferguson*, 532 U.S. at 69, 73, 84).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (quoting *United States v. Ackerman*, 831 F.3d 1292, 1298 (10th Cir. 2016)).

³¹ *Id.* (quoting *Oliver v. United States*, 239 F.2d 818, 820 (8th Cir. 1957)).

³² *See id.*

³³ *Id.* at 336–37.

³⁴ *Id.* at 337.

³⁵ *Id.*

enforcement inspectors, she was not a government actor.³⁶ The court concluded by recognizing an alternate pathway to a Fourth Amendment claim: *Johnlouis* could still have argued “that Girard was a private person acting in the capacity of a government agent by searching the package with the knowledge of, or in order to assist, law enforcement” — which, if true, would have meant that the search violated the Fourth Amendment.³⁷ However, the Fifth Circuit did not evaluate this alternative argument because *Johnlouis* expressly disclaimed it.³⁸

Judge Dennis penned a concurrence. He stated that he assumed without further discussion that Girard was a government actor who searched a package in “the scope and course of her official duties,” but that he concurred in the judgment based only on an alternate ground — the independent source doctrine.³⁹ He also warned that “the majority’s ‘connection to law enforcement’ test [could] prove unworkable for district courts” and lead to “confusion rather than clarity in our case law.”⁴⁰

Johnlouis, in establishing a new “law enforcement functions” test for determining whether potential government action falls within the scope of the Fourth Amendment, gives rise to two key issues: First, interpretations of the new test will be difficult given the test’s unmapped blend of objectivity and subjectivity. Second, the majority’s “narrow” reasoning will not prevent the risks posed by these difficulties.

First and foremost, the *Johnlouis* court hid the subjectivity of its test in objective language, and lower courts may struggle to apply the different elements of this new approach. At a high level, the hybrid test appears to be two-pronged. There is an initial inquiry as to whether the government employee had any objective ties to law enforcement. Then, there is a second inquiry as to whether the government employee had any subjective intent to enforce the law. The court, however, offers no guidance as to whether both prongs must be satisfied for the employee to have been a government actor, or if satisfying one prong is sufficient.

As applied, the *Johnlouis* court’s implementation of its two-pronged test melded the two prongs together. To go from a government employee to a government actor, the court declared, requires “something more” — a connection to law enforcement.⁴¹ The Fifth Circuit brought to the fore at least five objective indicators: (1) the employee worked in the pursuit of explicit law enforcement purposes/duties; (2) the employee received training developed by law enforcement officials; (3) the employee

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 338 (Dennis, J., concurring in the judgment). The independent source doctrine establishes that the exclusion of evidence is unwarranted even where an actor’s search violated the Fourth Amendment if an independent source furnished legal grounds to admit the evidence. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 335 (majority opinion).

interacted with other law enforcement officials during the specific incident; (4) the agency employing the employee was congressionally imbued with law enforcement powers; and (5) the employee knowingly acted as an undercover law enforcement agent.⁴² All five factors are facially objective inquiries (that is, a court applying the test would supposedly look at external, factual evidence of duties, training, cross-law enforcement interactions, congressionally granted powers, and knowing undercover action).

The *Johnlouis* court, however, also considered subjective factors in determining whether Girard was a government actor to whom the Fourth Amendment applies. It noted that Girard had not been “even motivated by a desire to investigate a legal violation.”⁴³ She “was not inspecting the package to enforce law”; she inspected it “because of her concern for children and her experience with a relative.”⁴⁴ In other words, she inspected because of her moral and family concerns — that is, her state of mind.

These hybrid approaches are typical of Fourth Amendment law, which can purport to be objective but is often actually subjective.⁴⁵ The traditional concept of objectivity in law holds that facts — “objectively true” assertions — are not matters of the mind but a “function of the way things are.”⁴⁶ In Fourth Amendment law, the objectivist would argue that the government-actor decision depends entirely on what a person actually does, not what they think.⁴⁷ The actor’s subjective intent or state of mind, as the Supreme Court once wrote, would “play no role” in the analysis.⁴⁸ But in practice, “an officer’s subjective state of mind is often relevant to existing Fourth Amendment doctrine.”⁴⁹ Subjectivity analysis, as Professor Orin Kerr notes, involves “any legal test, rule, or standard that incorporates a government official’s actual state of mind.”⁵⁰ In *Johnlouis*, by outlining several objective factors in much of its analytical approach but then looking to subjective elements, the court may have quietly modified what — at first blush — was the objectivity of its Fourth Amendment inquiry.

However, subjectivity — as Judge Dennis wrote in this case — “may prove unworkable for district courts and could lead to confusion rather

⁴² See *id.* at 336.

⁴³ *Id.* at 337.

⁴⁴ *Id.*

⁴⁵ Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEX. L. REV. 447, 449 (2021).

⁴⁶ See Dennis Patterson, *Normativity and Objectivity in Law*, 43 WM. & MARY L. REV. 325, 327 (2001).

⁴⁷ See Kerr, *supra* note 45, at 451.

⁴⁸ *Whren v. United States*, 517 U.S. 806, 813 (1996).

⁴⁹ Kerr, *supra* note 45, at 451.

⁵⁰ *Id.* (comparing legal tests that consider what government agents “were thinking rather than focus exclusively on objective facts like what an officer was doing”).

than clarity in our case law.”⁵¹ Justice Scalia once wrote that state of mind “is irrelevant to the existence of probable cause” because “[e]ven-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”⁵² The Supreme Court has also long shown a “hostility towards subjective components of Fourth Amendment standards.”⁵³ At the same time, though, Fourth Amendment law has a fundamentally subjective component — the requirement of intent is implicit in the notion of seizure, which must be done knowingly.⁵⁴ Moreover, the law’s conception of what is subjective can “actually pervade[] and inform[], in multiple ways, what is thought to be objective.”⁵⁵ As Professor R. George Wright argues, the objective and the subjective in the law “unavoidably help define and comprise each other,” and it can be an “inevitably fruitless” effort to differentiate between the two.⁵⁶

On this view, perhaps the difference between objectivity and subjectivity is not such a black-and-white dichotomy as one might think upon reading Judge Dennis’s concurrence in a vacuum. Indeed, the *Johnlouis* court could perhaps have adopted a more outwardly subjective analysis had *Johnlouis* made the alternative argument mentioned by the majority in passing. To review that “non-agent of the government” argument, the court would have considered whether Girard “intended to assist law enforcement efforts or to further [her] own ends,” which would have required analysis with much more subjective valence.⁵⁷ On the specific reasoning of the majority here, though, what is troubling is not so much the melding of the objective and subjective as it is the confusion that such melding may cause.

How might future courts interpret *Johnlouis*? The answer seems to be “with difficulty.” To be sure, reliance on subjectivity can at times help “avoid overly broad rules that would otherwise permit a great deal of harmful conduct or prohibit government acts that serve the public interest in enforcing the law.”⁵⁸ But in practice, “government states of mind can be difficult to measure,” and there are many practical challenges in identifying potential government actors’ mental states that can “weaken or even subvert the benefits of subjectivity.”⁵⁹ From a judicial economy standpoint, it can also be very impractical for courts to conduct

⁵¹ *Johnlouis*, 44 F.4th at 338 (Dennis, J., concurring in the judgment).

⁵² *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)).

⁵³ George E. Dix, *Subjective “Intent” as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 374 (2006) (citing *Scott v. United States*, 436 U.S. 128 (1978); *Whren*, 517 U.S. 806; *Devenpeck*, 543 U.S. 146; *Brigham City v. Stuart*, 547 U.S. 398 (2006)).

⁵⁴ *See id.* at 377.

⁵⁵ R. George Wright, *Objective and Subjective Tests in the Law*, 16 U.N.H.L. REV. 121, 124 (2017).

⁵⁶ *Id.*

⁵⁷ *Johnlouis*, 44 F.4th at 337.

⁵⁸ Kerr, *supra* note 45, at 450.

⁵⁹ *Id.*

subjectivity analyses — “sending state and federal courts on an expedition into the minds of police officers [will] produce a grave and fruitless misallocation of judicial resources.”⁶⁰ The way courts resolve factual disputes in Fourth Amendment cases leads to “an environment [not] particularly conducive to revealing the truth” because if the lawfulness of a government investigation “hinges on officer subjectivity, the officer is likely to be keenly aware of which states of mind will lead to victory . . . and which ones may lead to defeat.”⁶¹ As to the reasonableness inquiry of the Fourth Amendment, subjective tests would require that “policemen act on necessary spurs of the moment with all the knowledge and acuity of constitutional lawyers.”⁶² Subjectivity imposes a heavy burden on both court administrability and law enforcement.

Are mail carriers better equipped to serve as constitutional lawyers than policemen are? What a subjective government-action inquiry demands of mail carriers may resemble what a subjective reasonableness inquiry would demand of police officers: in a post-*Johnlouis* world, courts’ attempted applications of the Fourth Amendment will raise questions about the legal acuity of various suspected actors. Whether or not mail carriers are actually better equipped, then, is not the right question to ask. Rather, one must ask about the extent to which this case could impose high burdens on other actors that are or become related to the government in the course of their conduct. If *Johnlouis* had been but the latest in an established line of cases about mail carriers and the Fourth Amendment, these potential burdens would not be as concerning.⁶³ However, the majority’s self-declared narrow holding could still extend further than the majority seems to think it will — courts may still find ways to analogize other situations to the facts of *Johnlouis*.

Narrow holdings are far from a perfect solution. Professor Clay Calvert emphasizes that while there “is nothing inherently wrong with a narrow holding, especially when an area of law is nascent,” such cabined holdings can cause a court to give “short shrift to other important

⁶⁰ *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting).

⁶¹ Kerr, *supra* note 45, at 475–76.

⁶² WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.4(d) (4th ed. 2004) (quoting *State v. Romeo*, 203 A.2d 23, 32 (N.J. 1964)).

⁶³ There could also be less concern if the law enforcement functions test of *Johnlouis* turns out to be a phantom doctrine — a test existing on paper but with no impact on outcomes. An example of such a doctrine is the subjective expectation of privacy test from *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). From his empirical study of 540 cases that were decided in 2012 and applied *Katz*, Kerr finds that only forty-three percent of cases even mentioned the subjective-expectations test, only twelve percent applied it, and not a single case’s outcome was controlled by the subjective inquiry. Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 114 (2015). The Fifth Circuit in *Johnlouis* began its analysis by declaring that none of its existing Fourth Amendment precedent involved searches by USPS letter carriers. *Johnlouis*, 44 F.4th at 335. This was a case of first impression, so the effects of the *Johnlouis* court’s new approach are yet to be seen.

issues.”⁶⁴ In *City of Ontario v. Quon*,⁶⁵ Justice Kennedy declared that the majority’s narrow holding came amidst “[r]apid changes in the dynamics of communication,” and because it was “not so clear that courts at present are on so sure a ground[,] [p]rudence counsels caution before the facts in the instant case are used to establish far-reaching premises.”⁶⁶ Considering the unsteadiness of choosing between objectivity and subjectivity in Fourth Amendment law, especially concerning the government-actor question, Justice Kennedy’s warning rings true — far-reaching premises can still arise from narrow holdings. At a systems level, emphasis on narrow holdings can undermine the judicial “guidance function for lower courts and legislators alike.”⁶⁷

Looking forward and considering Kerr’s warning of a hypothetical police officer who is aware of “which states of mind will lead to victory,”⁶⁸ what would stop a knowledgeable government actor from pretending to have a state of mind required to win in a court they know will apply the *Johnlouis* style of inquiry? And even putting aside this hypothetical, most concerning is that the Fifth Circuit in *Johnlouis* offered no blueprint for navigating the possible permutations of its new test. In this case, neither prong was satisfied, and thus Girard was not a government actor. Would it have made a difference if one prong had been satisfied? And if only one prong was satisfied, would satisfying only the objective prong mean Girard was a government actor, whereas satisfying only the subjective prong would mean she was not? Or could it be that the court requires the satisfaction of both prongs? The application of the test in future cases is uncertain.

The *Johnlouis* court’s new law enforcement functions test entails an objective approach that, when applied, breathes with a subjective tenor. While such hybrid approaches are increasingly seen in Fourth Amendment law, courts could struggle to navigate this new test without a blueprint for accurately implementing this kind of objectivity/subjectivity amalgam. In its quest for “something more,” the court takes Fourth Amendment law into its own hands — and the lower courts may not be suited to apply this new law. The danger of this move could be exacerbated by the insufficiency of the narrow holding as a safeguard. Though legal doctrine may not converge upon either subjectivity or objectivity, it can be precarious for courts to infuse duality with uncertainty.

⁶⁴ Clay Calvert, *Too Narrow of a Holding? How — And Perhaps Why — Chief Justice John Roberts Turned Snyder v. Phelps into an Easy Case*, 64 OKLA. L. REV. 111, 129 (2012).

⁶⁵ 560 U.S. 746 (2010).

⁶⁶ *Id.* at 759.

⁶⁷ See William J. Rinner, *Roberts Court Jurisprudence and Legislative Enactment Costs*, 118 YALE. L.J. POCKET PART 177, 177 (2009).

⁶⁸ Kerr, *supra* note 45, at 475.