No. _____-_____

IN THE

Supreme Court of the United States

RYAN CANFIELD,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 1, 2019

QUESTION PRESENTED

The warrantless impoundment of an arrested person's car is permissible only when it is "totally divorced" from any investigation of criminal activity. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). Impoundment may be undertaken only for the purpose of "public safety" or "community caretaking." *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976);

Must impoundment be reasonable under the Fourth Amendment, as some circuit courts have held, or conducted pursuant to standardized procedures, as others have held, or both, as still others have held?

Can law enforcement impound a vehicle at their discretion, unconstrained by any specific and reasonable standard operating procedures, where public safety or community caretaking needs are illusory at best?

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ryan Canfield respectfully petitions for a writ of *certiorari* to review the judgment of the Second Circuit Court of Appeals.

OPINIONS BELOW

The Second Circuit's unpublished Summary Order is attached to this Petition at pages la to 15a of Petitioner's Appendix ("Pet. App."). The Second Circuit's Denial of Rehearing is attached at page 16a. The Decision and Order of the District Court for the Northern District of New York is attached at pages 17a to 43a.

JURISDICTION

The summary order of the Court of Appeals was entered on December 11, 2018. The Court's Denial of Rehearing was entered on January 31, 2019. This Petition is timely filed. The Court of Appeals had jurisdiction over Petitioner's appeal pursuant to 18 U.S.C. §3742 and §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides the right "to be secure . . . against unreasonable searches and seizures." U.S. Const. amend IV. The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

INTRODUCTION

The Second Circuit's decision in this case, and decisions of other circuits, conflict with this Court's precedent. There are also conflicts among the Circuits, and there is little consistency to the standards applied by each camp. The lower court decisions, state and federal, are adrift and rudderless.

Impoundment of vehicles and attendant inventory searches have become a convenient alternative when other exceptions to the Fourth Amendment, such as exigency or search-incident-to-arrest, are too

onerous to establish. In Petitioner's case, the Second Circuit held that law enforcement agents could seize his car "for safekeeping" upon his arrest, even though it was creating no hazards, because it was parked in a hotel parking lot where he was not staying and did not have permission to park there. The Court did not examine the procedures the police employed or the reasonableness of the seizure. Pet. App. At page 12a. This and other circuits have created another, *de facto*, Fourth Amendment exception – impoundment-incident-to-arrest. Because this Court has not heard a safekeeping/community caretaking case in over thirty years, the scope of the doctrine and theories vary widely across different circuits and states. This Court has the opportunity to provide citizens, police officers and courts throughout the country with a more uniform, comprehensible and employable, and lawful procedure for police impoundments. The girders supporting the Fourth Amendment will continue to erode without the maintenance only this Court can provide.

STATEMENT OF THE CASE

Petitioner Canfield was indicted in March 2015 and charged with conspiracy to distribute and possess with intent to distribute a

controlled substance, mythelone, a substance that had recently been added to the Federal controlled substance schedules and was not illegal under New York State Law. *See* 21 U.S.C. §846 and 841(b)(1)(C). He was also charged with eight counts of use of a communication facility to facilitate the commission of a felony drug offense, in violation of 21 U.S.C. §843(b). (A24).[1] A jury found him guilty on all counts and he was sentenced to 144 months' imprisonment.

Prior to trial, Canfield moved to suppress two laptops that had been seized when, upon his arrest, DEA agents impounded his car from a motel parking lot.

Canfield was arrested pursuant to an arrest warrant. On that day, he had contacted a confidential informant acting at the behest of the DEA and told her that the police were looking for him and he needed a place to stay. She invited him to Albany (he lived in Connecticut) and to stay with her in a DEA-arranged hotel room. SA17, 150. When Canfield arrived at the motel, parked his car in the motel parking lot, and knocked on the door to the room where he was to meet her, he was arrested. (SA18-19).

[1] The prefix "A" refers to the Appendix Petitioner filed in his appeal to the Second Circuit. The prefix "SA" refers to the Supplemental Appendix filed therein.

An agent proceeded to unlock Canfield's car with a key taken from Canfield and he drove it to the DEA offices. SA24. The agent claimed that he believed the car was "abandoned," that it had been used for criminal activity, and that it was DEA policy to take abandoned property into custody. SA25. He impounded the car, he said, because he could not leave it unattended, as well as to "safeguard" the DEA from claims of missing property. SA180. He did not ask Canfield if someone could retrieve it and he did not know or inquire into the hotel's policies regarding cars left in the parking lot. The car was not blocking traffic or parked in an otherwise illegal manner. At the DEA office, agents conducted an inventory search of the vehicle. (SA29). They powered on the two laptops found in the car to determine if they were operable. SA35-36, 50.

According to the agent, a few days after Canfield's arrest he received information indicating that the laptops may have been used for financial transactions conducted over the internet. Several weeks later, he sought and obtained a warrant to search the computers. SA37-38, 52, 85-88. A search of the laptops revealed evidence of methylone sales.

In the district court, Canfield argued that the seizure and search of his car were not pursuant to any exception to the warrant requirement, or any standard procedure, and the subsequent search warrant was not supported by probable cause, and was overbroad. ECF#49. The government relied on a DEA policy statement that did not address impoundment, but only the procedure for conducting inventories thereafter. SA171.

The district court, in its decision on Canfield's motion to suppress (ECF#49), concluded that "[the Agent's] decision to impound and drive the Saab for safekeeping was made pursuant to standard criteria and was reasonable under the circumstances," Pet. App. at 31a. The court also found that Canfield had failed to establish that the agents did not act in good faith. *Id.* at 21.[2] Without mentioning any particular procedure, let alone a standard one, the Second Circuit affirmed, finding that law enforcement agents could seize his car "for

[2] The court stated, however, that it was "deeply concerned" that the DEA turned on Canfield's laptops without a warrant. The court was equally concerned that the DEA turned over a thumb drive that they determined to contain music to Canfield's mother, since they did not have a warrant to search the search the material. **Pet. App. at** [33a, 35a fn 9]

safekeeping" because it was parked in a hotel parking lot where he was not staying and did not have permission to park.[3]

REASONS FOR GRANTING THE WRIT

The impoundment of an automobile is a seizure within the meaning of the Fourth Amendment. *Soldal v. Cook County*, 506 U.S. 56, 61 (1992). Warrantless searches and seizures by law enforcement officers are "'*per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions'" that are "'jealously and carefully drawn.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971), quoting *Katz v. United States,* 389 U.S. 347, 357 (1967); *Jones v. United States,* 357 U.S. 493, 499.

One such exception is the "community caretaking" function. Under that exception, police may impound a vehicle and inventory its contents in furtherance of "public safety" or "community caretaking functions." Examples of such functions are the removal of "disabled or damaged vehicles" and "automobiles which violate parking ordinances, and which thereby jeopardize both the public safety and the efficient

[3] Canfield had been invited to the motel by a registered guest, and therefore *did* have derivative permission to park there. There was no testimony that there were any signs in the lot stating that it was for registered guests only.

movement of vehicular traffic." *South Dakota v. Opperman*, 428 U.S. at 368 (internal citation omitted). Impounding cannot be done on the basis of "suspicion of evidence of criminal activity," *Colorado v. Bertine*, 479 U.S. 367, 375 (1987), and the reason must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. at 441.

A. There are Multiple Conflicts Amongst the Circuits

There are conflicts between decisions of this Court and decisions of Circuit Courts of Appeal, as well as between the Circuits. State Court decisions diverge from those of federal circuits, and the lower court decisions are all over the place. The case law is not just disparate in terms of outcomes on comparable fact patterns, but the courts employ varying and inconsistent theories. A splintering would be a more accurate term that just a split. *See* Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1150 (2012) (circuits' split regarding the scope of the community caretaking exception).

There is a revealing parallel between the constriction of the Fourth Amendment exception for searches incident to arrest and the expansion of the impoundment/inventory exception.

In *Arizona v. Gant,* 556 U.S. 332, 344 (2009), this Court recognized that warrantless automobile search exceptions seriously jeopardize the privacy interests of motorists. *Gant* essentially overruled the nearly thirty-year-old precedent of *New York v. Belton,* 453 U.S. 454 (1981), that allowed warrantless vehicle searches in "the area within the immediate control of the arrestee." *See* Jennifer Kirby-McLemore, Comment, *Finishing What Gant Started: Protecting Motorists' Privacy Rights by Restricting Vehicle Impoundments and Inventory Searches*, 84 Miss. L.J. 179, 180-181 (2014). Under *Belton*, the exception had been transformed into a "police entitlement" to search the entire passenger compartment of vehicles contemporaneously with an arrest. *Id., quoting Thornton v. United States,* 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part).

In *Gant,* this Court refined the boundaries of warrantless searches-permitting searches only when an "arrestee [was] unsecured and within reaching distance of the passenger compartment at the time

of the search." The Court recognized the legitimate goals of law enforcement by permitting searches when "it [was] reasonable to believe the vehicle contain [ed] evidence of the offense of arrest." *Gant,* 556 U.S. at 343, 351; Kirby-McLemore, *Finishing What Gant Started* at 180-181.

Commentators have been agitating for this Court to revisit, in similar fashion, the exception allowing the impoundment of motorists' vehicles upon arrest of the driver. *See* David Fox, *The Community Caretaking Exception: How the Courts Can Allow the Police to Keep Us Safe Without Opening the Floodgates to Abuse,* 63 Wayne L. Rev. 407 (Winter 2018); Jennifer Kirby-McLemore, Comment, *Finishing What Gant Started: Protecting Motorists' Privacy Rights by Restricting Vehicle Impoundments and Inventory Searches*, 84 Miss. L.J. 179 (2014); Chad Carr, Comment, *To Impound or Not to Impound: Why Courts Need to Define Legitimate Impoundment Purposes to Restore Fourth Amendment Privacy Rights to Motorists*, 33 HAMLINE L. REV. 95 (2010); Nicholas B. Stampfli, Comment, *After Thirty Years, Is It Time To Change the Vehicle Inventory Search Doctrine?,* 30 SEATTLE U. L. REV. 1031, 1034-36, 1040-44 (2007); Jason S. Marks, *Taking Stock of the Inventory Search: Has the Exception Swallowed the Rule?,* CRIM. JUST., Spring

1995, at 11; *Mary Elisabeth Naumann, Note, The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception,* 26 AM. J. CRIM. L. 325 (1999)*;* Shauna S. Brennan, Note, *The Automobile Inventory Search Exception: The Supreme Court Disregards Fourth Amendment Rights in Colorado v. Bertine-The States Must Protect the Motorist,* 62 NOTRE DAME L. REV. 366 (1987); Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Safety Pretext Doctrine,* 79 KY. L.J. 1 (1990).

When *Gant* reined in warrantless vehicle searches, other exceptions to the warrant requirement stepped into the breach to accommodate otherwise prohibited searches. When searches incident to arrest became harder to come by, law enforcement migrated to the impoundment/inventory exception. *See* Kirby-McLemore, *Finishing What Gant Started* at 180-181.

In *South Dakota v. Opperman,* 428 U.S. at 368-69, the Court had created an exception permitting police to conduct warrantless searches of lawfully impounded vehicles in order to (1) protect motorist's property while in police custody, (2) protect police against claims of lost

or stolen property, and (3) protect police from danger (referred to as safety and caretaking functions). The Court focused on the Fourth Amendment reasonableness of a searches conducted for these purposes.[4]

In *Colorado v. Bertine,* 479 U.S. 367 (1987), the Court introduced a new standard and upheld inventory searches if standardized procedures were followed and criminal investigation was not the "sole purpose[s]" of the search. The Court did not analyse the reasonableness of the standardized procedures themselves. *See* Kirby-McLemore, *Finishing What Gant Started* at 180-181.[5]

Because of a confusion, or fusion, of *Opperman's* focus on reasonableness and *Bertine's* narrower focus on "standardized procedures," courts have relied on one or the other, or both, resulting in inconsistent analyses and results.

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[4] There has never been a clear definition of "community caretaking" in connection with motorists, but it would certainly include assisting a driver who appears drunk or intoxicated or was in a car accident. Case law has gone far afield of these clearly caretaking responsibilities.

[5] The concept of "standard procedure" had been introduced by the Court in *Cady v. Dombrowski*, 413 U.S. at 443. The case involved an intoxicated police officer whose vehicle was disabled along a highway as result of an accident. He was taken to the hospital and became comatose, and could not make arrangements to have the vehicle towed and stored. Police believed the officer's service revolver was in the car and searched for it pursuant to standard procedure.

1. The Reasonableness Standard

The First, Third, Fourth, Fifth, and Tenth Circuits have employed the reasonableness standard, invoking Constitutional principles; impoundments are constitutional only if they are reasonable within the meaning of the Fourth Amendment prohibition against unreasonable searches and seizures. *See See* Kirby-McLemore, *Finishing What Gant Started* at 190-191; citing *United States v. McKinnon,* 681 F.3d 203, 208 (5th Cir. 2012) (reading *Opperman* and *Bertine* to mean that "inquiry [into] the reasonableness of the vehicle impoundment for ... community caretaking purpose [s] [does not require] reference to any standardized criteria"); *United States v. Smith,* 522 F.3d 305, 312 (3d Cir. 2008) (comparing the First Circuit's reasonableness approach to the D.C. and Eighth Circuits' accordance with standardized procedures approach, and siding with the reasonableness standard); *United States v. Moraga,* 76 F. App'x 223, 227-28 (10th Cir. 2003) (upholding the district court's ruling that impoundment is "justified [under officer's] caretaking responsibilities" without an inquiry into the existence of a standardized procedure). In *United States v. Coccia*, 446 F.3d 233, 239 (1st Cir. 2006), the First Circuit held that, while the existence of standardized

criteria is a relevant consideration, "whether a decision to impound is reasonable under the Fourth Amendment is based on all the facts and circumstances of a given case."

2. The Standard Operating Procedures Standard

In contrast, the D.C., Sixth, Seventh, Eighth, and Eleventh Circuits apply the *Bertine*, standard-operating-procedure requirement. The D.C. Circuit rejected the proposition that "impoundment is reasonable so long as it 'serves the government's ""community caretaking" interests,'" and instead interpreted *Bertine* to require existing standardized impoundment procedures. *United States v. Proctor*, 489 F.3d 1348, 1354 (D.C. Cir. 2007); *See* Kirby-McLemore, *Finishing What Gant Started* at 193. According to the Sixth Circuit, *Bertine* means that impoundments are allowed "so long [as the decision is made] according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *United States v. Richards*, 56 F. App'x 667, 670 (6th Cir. 2003) (unpub.), quoting *Bertine*, 479 U.S. at 375. *See United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004); *United States v. Duguay*, 93 F.3d 346, 351 (7th Cir. 1996).

3. The Loosely Standardized Procedures Approach

Other Circuits have taken a loose approach to the "standardized procedures" requirement; some seem to hold that a "standardized" exercise of an officer's discretion, based on some informal criteria, is sufficient. The Eighth Circuit has held that "[t]estimony can be sufficient to establish police [impoundment] procedures .... So long as the officer's residual judgment is exercised based on legitimate concerns related to the purposes of an impoundment, his decision to impound a particular vehicle does not run afoul of the Constitution." *United States v. Arrocha*, 713 F.3d 1159, 1163 (8th Cir. 2013) (quoting *United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004)). The Sixth Circuit upheld a search despite the fact that the standard policy left "it to the towing officer's discretion to either remove the property, or document it on the inventory supplement form." *United States v. Hughes*, 420 F. App'x 533, 540 (6th Cir. 2011) (unpub). The Eleventh Circuit has held that the "government must ... demonstrate that 'an established routine' ... exists authorizing impoundment," but "need not show that a written policy, city ordinance, or state law supports the impoundment." *United States v. Foskey*, 455 F. App'x 884, 890 (11th Cir. 2012). The Fourth Circuit

ruled that an officer is "not required to follow the ... procedures word-for-word." *United States v. Battle*, 370 F. App'x 426, 429-30 (4th Cir. 2010) (unpub.). *See* Kirby-McLemore, *Finishing What Gant Started* at 192-194.

4. The Reasonableness and Standardized Procedures Standard

The Ninth Circuit has combined the two approaches, requiring that decisions to impound be both reasonable *and* in compliance with standard operating procedures. In *United States v. Cervantes,* 703 F.3d 1135, 1142 (9th Cir. 2012), the Court held that mere compliance with standard operating procedure "is insufficient to justify an impoundment under the community caretaking exception." The Court said that "the decision to impound" must undergo a balancing test of the community caretaking functions and privacy interests at stake. This fusion approach led to a rational conclusion – the officers "must consider the location of the vehicle, and whether the vehicle was actually 'impeding traffic or threatening public safety and convenience." *Id.; see Miranda v. City of Cornelius,* 429 F.3d 858, 864 (9th Cir. 2005) ("[T]he decision to impound pursuant to the authority of a city ordinance and state statute does not, in and of itself, determine the reasonableness of the seizure

under the Fourth Amendment ...."); *see* Kirby-McLemore, *Finishing What Gant Started* at 194.

The Tenth Circuit has more recently moved into the combination camp despite earlier, contrary decisions. In *United States v. Sanders*, 796 F.3d 1241, 1244–45 (10th Cir. 2015), the Court held that warrantless impoundments are constitutional only if "required by the community-caretaking functions of protecting public safety and promoting the efficient movement of traffic"; they're unconstitutional if "justified by police discretion that is either exercised as a pretext for criminal investigation or not exercised according to standardized criteria." The Court found that impoundment of car in store parking lot after the arrest of the driver was unlawful; "impoundment of a vehicle located on private property that is neither obstructing traffic nor creating an imminent threat to public safety is constitutional only if justified by both a standardized policy and a reasonable, non-pretextual community-caretaking rationale." *Id.* at 1248.

5. The Second Circuit?

In the Second Circuit, it is not clear that there is particular standard. In *United States v. Barrios*, 374 F. App'x 56, 57 (2d Cir. 2010)

(summary order), the Second Circuit recognized that there was "a split among the circuits" (that it had not yet addressed): "the law of this Court does not clearly establish that vehicle impoundments under the police community caretaking function must be made pursuant to standardized procedures." *Id.* Two years earlier, in *United States v. Lopez*, 547 F.3d 364, 367 (2d Cir. 2008), the police had impounded a vehicle after both occupants were arrested. The car was parked on a New York City street at 3:30 a.m., and Lopez was arrested for driving while intoxicated. *Id*. at 366. Even though there was no indication that the car was blocking traffic, had been involved in an accident, or otherwise was in a position hazardous to public safety, the Court found that "the circumstances called for the impoundment of his car." *Id.* at 372.

The Second Circuit in Canfield's case cited *Lopez,* summarizing its holding as follows; the "arrest of both occupants of a car 'called for the impoundment ' of [the] car, which was parked on [a] city street." Pet. App. at 15. In other words, the Panel distilled *Lopez* down to automatic impoundment of an arrestee's vehicle. The Panel did not mention standardized procedures or reasonableness. Although Second

Circuit Law has been unclear as to whether standardized procedures are *required, see Barrios,* 374 F. App'x at 57, such procedures do not appear to be a necessary consideration, let alone a requirement. Without a reasonableness inquiry or consideration of standardized procedures, the result is automatic impoundment or pure officer discretion.[6]

6. Stateside

On the State side, the Minnesota Supreme Court emphasized that impoundment is for actual safety and community caretaking. In *State v. Gauster*, 752 N.W.2d 496, 504–05 (Minn. 2008), the Minnesota High Court found that an impoundment of an arrestee's car would have been justified if it had not moved in four hours. The Court held that until those four hours passed, impoundment was unlawful. "The question in this case is whether, at the time of the impoundment, [the officer] was authorized to impound [the arrestee's] vehicle. We conclude that it was not." *Id.*

[6] *Canfield* and *Barrios* are unpublished decisions, leaving the Second Circuit, per *Lopez,* in the loosely standardized procedures camp.

7. Conflation of Impoundment and Inventory

Canfield's case also exemplifies the tendency to conflate impoundments and inventory searches.

Both *Opperman*, 428 U.S. at 369, and *Bertine*, 479 U.S. at 381, focused on the inventory and not the antecedent impoundment. In *Bertine,* this Court did not separately analyze the two. As a result, some circuits, taking their cue from *Bertine,* combine the analysis of what are distinct practices that implicate different concerns. *See* Fox, *The Community Caretaking Exception* 63 Wayne L. Rev. at 414; *See* Kirby-McLemore, *Finishing What Gant Started* at 195; *United States v. Arrocha*, 713 F.3d 1159, 1164 (8th Cir. 2013) (quoting *United States v. Frasher*, 632 F.3d 450, 454 (8th Cir. 2011)). The First Circuit assumed that *Bertine* was "concerned primarily with the constitutionality of an inventory search," *Coccia*, 446 F.3d at 238, a reasonable assumption since an inventory seems more amenable to "standard procedure" than a seizure does. *See United States v. Duguay*, 93 F.3d 346, 352 (7th Cir. 1996) ("While protection of the arrestee's property and municipal liability are both valid reasons to conduct an inventory after a legal impoundment, they do not establish the *a priori* legitimacy of the

impoundment.") (citing *Opperman*, 428 U.S. at 368–69; *Bertine*, 479 U.S. at 372).

B. <u>The Upshot – It's Time</u>

This Court should look again at the seizure of vehicles as a function of law-enforcement community caretaking. Law enforcement officers provide a vast range of safety and community caretaking assistance, and they obviously must prioritize. If the police routinely impound cars of arrested persons -- that are not creating any hazard -- they should be equally willing to impound cars in private parking lots upon being contacted by the proprietors. Why impound one and not the other; of course it will turn on whether there is suspicion of criminal activity. Yet this Court has said that impoundment of an arrested person's car must be "totally divorced" from any investigation of criminal activity. *Cady v. Dombrowski*, 413 U.S. at 441.

Regarding the function of protecting the arrestee's property – should not it be the arrestee's decision whether to surrender his Fourth Amendment rights or have his property safeguarded?

Regarding police officer liability for damage or theft of the property -- if the officers are acting within the scope of their

employment, respecting the arrestee's Constitutional rights, and allowing the motorist to decide what to do with his property, where is the liability?

If the arrestee can make other arrangements for his vehicle, where is the need for community caretaking? But most Courts have not embraced the idea that officers should make that inquiry. They should. *See* Kirby-McLemore, *Finishing What Gant Started* at 203.

CONCLUSION

There is a split, perhaps better described as chaos, in the Circuits regarding the seizure of an arrested person's vehicle. Cases diverge, to varying degrees, from this Court's three cases addressing the "community caretaking function," and they splinter on the questions of whether impoundment requires reasonableness, or standardized procedures, or both, or neither. Petitioner Canfield urges this Court to grant certiorari and vacate the Second Circuit's decision. He urges the Court to adopt a standard that requires reasonableness within the meaning of the Fourth Amendment, and reasonable standardized procedures.

Dated: New York, New York
May 1, 2019

Respectfully submitted,

/S/ Susan C. Wolfe

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CERTIFICATION

I, SUSAN C. WOLFE, attorney for the Petitioner, do hereby certify that the foregoing Petition complies with the type-volume limitation pursuant to the rules of this Court, in that the Petition is 4,145 words.

/S/ Susan C. Wolfe
SUSAN C. WOLFE

APPENDIX

16-3473-cr
United States v. Canfield

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of December, two thousand eighteen.

PRESENT: DENNY CHIN,
RAYMOND J. LOHIER, JR.,
Circuit Judges,
JOHN F. KEENAN,
District Judge.[*]

- -x

UNITED STATES OF AMERICA,
Appellee,

v. 16-3473-cr

RYAN CANFIELD,
Defendant-Appellant.

- -x

FOR APPELLEE: RAJIT S. DOSANJH, Assistant United States Attorney (Wayne A. Myers, Assistant United

[*] Judge John F. Keenan, of the United States District Court for the Southern District of New York, sitting by designation.

States Attorney, *on the brief*), *for* Grant C. Jaquith, United States Attorney for the Northern District of New York, Syracuse, New York.

FOR DEFENDANT-APPELLANT: SUSAN C. WOLFE, Law Office of Susan C. Wolfe, New York, New York.

Appeal from the United States District Court for the Northern District of New York (Hurd, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Defendant-appellant Ryan Canfield appeals from a judgment entered October 6, 2016, after a jury trial, convicting him of one count of conspiracy to distribute and possess with intent to distribute methylone, in violation of 21 U.S.C. § 846, and eight counts of use of a communication facility to facilitate commission of a controlled substance felony, in violation of 21 U.S.C. § 843(b). He was sentenced principally to 144 months' imprisonment. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

On appeal, Canfield argues: (1) the trial evidence was insufficient to show that any coconspirator knew that methylone was a controlled substance; (2) the trial evidence was insufficient to show that the text messages charged in Counts 2 through 9 (the "phone counts") were used to facilitate a drug offense; (3) venue was not proper in the Northern District of New York (the "NDNY") for the phone counts and the trial

court erred in failing to charge the jury on venue; (4) the communications facility statute is unconstitutionally vague and the phone counts were multiplicitous; (5) the government committed misconduct in summation; (6) Canfield's Fourth Amendment rights were violated by the search and seizure of his automobile and laptops; and (7) his sentence was procedurally unreasonable. We address each issue in turn.

DISCUSSION

1. Sufficiency of Evidence of Knowledge that Methylone Was a Controlled Substance

Canfield argues that the evidence was insufficient to prove that any of his coconspirators knew that methylone was a controlled substance. In particular, he contends that at the time of the charged conspiracy, methylone was not illegal under New York law and it was not added to the federal controlled substance schedules until October 21, 2011. *See* 21 U.S.C. § 811(h)(2); 21 C.F.R. § 1308.11; Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones Into Schedule I, 76 Fed. Reg. 65,371 (Oct. 21, 2011) (to be codified at 21 C.F.R. pt. 1308). We review a claim of insufficiency of the evidence *de novo*. *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004).[1]

[1] The government contends that plain error review applies to this argument as well as others because Canfield failed to raise the precise issues below. We assume, without deciding, that Canfield preserved for review the issues he raises now on appeal.

The Controlled Substance Act makes it unlawful for a person "knowingly" to, *inter alia*, distribute or possess with intent to distribute "a controlled substance." 21 U.S.C. § 841(a)(1). In *McFadden v. United States*, the Supreme Court made clear that the knowledge requirement is met when the government shows that (1) "the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was," or (2) "the defendant knew the identity of the substance he possessed." ---U.S.---, 135 S. Ct. 2298, 2304 (2015); *see also United States v. Demott*, 906 F.3d 231, 240-44 (2d Cir. 2018).

Canfield's sufficiency challenge fails, for the government presented direct and circumstantial evidence that his coconspirators, including M.D., Dan Conti, and John Chin, knew they were trafficking in methylone and that methylone was a controlled substance. For example, M.D., a cooperator, testified that she and Conti purchased methylone from Canfield, in December 2011, to resell. M.D. marketed the methylone to her customers as ecstasy, referring to it as MDMA or "Molly." She engaged in additional methylone transactions with Canfield in 2012, prior to her cooperation in August 2012. The government also presented evidence that Canfield and Chin exchanged emails in October 2011 about the impending "ban" on methylone, and that they exchanged further emails in January 2013, after the ban was imposed, discussing Chin's sale of additional methylone to Canfield.

There was also evidence that M.D., Conti, and Canfield engaged in convoluted arrangements to receive methylone and used code words in their communications, showing that they knew it was a controlled substance. *See, e.g.*, *McFadden*, 135 S. Ct. at 2304 n.1 (noting that defendant's "concealment of his activities" and "evasive behavior with respect to law enforcement" was circumstantial evidence of knowledge the substance was controlled); *United States v. Agueci*, 310 F.2d 817, 828-29 (2d Cir. 1962) (holding district court properly charged jury that, *inter alia*, "code words" constituted circumstantial evidence that material in question was narcotics).

Accordingly, Canfield's sufficiency challenge to his conviction on Count 1 fails.

2. Sufficiency of Evidence as to the Phone Counts

Canfield contends that the government failed to prove that the eight text messages charged in the phone counts were sent to facilitate a federal drug trafficking felony in violation of 21 U.S.C. § 843(b).[2] In particular, he argues that the texts were between Canfield and M.D., and that because M.D. was cooperating with the

[2] Section 843(b) makes it a crime for any person to "knowingly or intentionally . . . use any communication facility" to facilitate a controlled substance crime. 21 U.S.C. § 843(b). It provides that "[e]ach separate use of a communication facility shall be a separate offense under this subsection." *Id*. It defines a "communication facility" to include "any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication." *Id*.

government, the text messages were not in furtherance of the conspiracy. We are not persuaded, for we agree with the government that even though M.D. was a government informant at the time the text messages were exchanged, a reasonable jury could have found that the text messages facilitated Canfield's ongoing methylone trafficking with others, including Conti, Chin, and an individual using the email address beginning "bish0p9."

The evidence established that Canfield was using the text messages to set up a meeting with M.D. (in Connecticut) on January 3, 2013, in part so that she could pay him money she owed him for a lost shipment of methylone and to sell her additional methylone. Indeed, at the meeting Canfield gave her a beer can containing methylone. Even assuming that Canfield could not have conspired with M.D. that day because she was acting at the behest of the government, the text messages facilitated his ongoing dealings with other coconspirators as the meeting provided him with an opportunity to sell additional methylone, which he obtained from his suppliers, and money to purchase yet more methylone. *See United States v. Miranda-Ortiz*, 926 F.2d 172, 175 (2d Cir. 1991) ("Since the essence of any conspiracy is agreement, rather than the success of the venture, a defendant may be convicted of conspiracy even if the intended substantive crime could not occur because the person he and his coconspirators thought would participate in it was actually an agent of the government.") (citations omitted); *see also United States v. Valencia*, 226 F. Supp. 2d 503,

511-12 (S.D.N.Y. 2002) (convicting defendant of narcotics conspiracy where he sold drugs to government cooperator, where evidence established that defendant conspired with others, including suppliers), *aff'd*, 100 F. App'x 17 (2d Cir. 2004). Even assuming Canfield could not conspire with M.D. on January 3, 2013, the meeting was still in furtherance of his ongoing narcotics trafficking with others.

3. Venue

Canfield raises two issues relating to venue with respect to the phone counts: he argues that, first, venue did not lie in the NDNY; and, second, the trial court erred in failing to give a venue instruction to the jury. Both arguments fail.

First, venue was proper in the NDNY. Venue need be proven by only a preponderance of the evidence, *United States v. Rommy*, 506 F.3d 108, 119 (2d Cir. 2007), and "a telephone call placed by a government actor within a district to a conspirator outside the district can establish venue within the district provided the conspirator uses the call to further the conspiracy," *id*. at 122; *see also United States v. Kirk Tang Yuk*, 885 F.3d 57, 71 (2d Cir. 2018) ("A telephone call placed by someone within the Southern District of New York -- even a person acting at the government's direction -- to a co-conspirator outside the Southern District can render venue proper as to the out-of-district co-conspirator so long as that co-conspirator 'uses the call to further the conspiracy.'") (quoting *Rommy*, 506 F.3d at 122). Here, M.D. was in the NDNY when

she exchanged the texts with Canfield, and Canfield knew that she lived in the Albany area, which is in the NDNY.

Second, Canfield waived his claim that the district court erred in not charging venue. He did not propose a venue instruction in his requests to charge. Although he did raise the issue at the close of the government's case, he did not object, after the district court completed its charge, to the absence of a jury instruction on venue. In any event, venue is not an element of the crime, *Kirk Tang Yuk*, 885 F.3d at 71, and any error in not charging the jury on venue would be harmless, *see Rommy*, 506 F.3d at 123-24 & n.10 (finding harmless error in district court's failure to instruct jury as to foreseeability of venue in the Southern District of New York, and observing that "harmless error analysis can be applied to a possible charging omission with respect to venue, which is not an element of the crime and requires only proof by a preponderance of the evidence").

4. The Communication Facility Statute

Next, Canfield argues that the communication facility statute is unconstitutionally vague as applied to text messages and, relatedly, that the phone counts fail because they are multiplicitous. He argues that the statute is vague because it does not define "use" of a communication device, and notes that text messaging did not exist when the statute was enacted. He also contends that the eight phone counts

charge a single offense multiple times, as the various messages purportedly are part of one continuing conversation.

The Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). Ordinary people would surely understand that § 843(b) prohibits the use of a cellular telephone to send or receive text messages to further narcotics trafficking. Numerous federal criminal statutes employ the word "use" without defining it, *see, e.g.*, 18 U.S.C. § 924(c), and where a statute does not define the term "use," we "supply it with its ordinary meaning," *United States v. Desposito*, 704 F.3d 221, 226-27 (2d Cir. 2013) ("The verb 'use' means 'to put into action or service,' 'to avail oneself of,' or 'to carry out a purpose or action by means of.'" (quoting Merriam-Webster's Collegiate Dictionary 1378 (11th ed. 2004))). The statute also defines "communication facility" to include a "telephone," and it encompasses "the transmission of writing, signs, signals, pictures, or sounds of all kinds." 21 U.S.C. § 843(b); s*ee United States v. Rodgers*, 755 F.2d 533, 544 (7th Cir. 1985) ("Section 843(b) is no more, and possibly less, vague than other broadly-phrased federal criminal statutes that we have consistently upheld over vagueness and overbreadth challenges.").

The multiplicitousness argument presents a somewhat closer call, as some counts charge what appear to be different parts of the same conversation (Counts 2 and 3, Counts 4 and 5) and one count is based on a one-word text (Count 3: "Ok."). But we are not persuaded. The statute explicitly provides that "[e]ach separate use of a communication facility shall be a separate offense," 21 U.S.C. § 843(b), and the government charged here each transmission -- whether it was one word (Count 3) or thirty-two words (Count 8) -- as a "use" of a telephone and a separate count, with the exception that certain transmissions that occurred at the same time were included in one count (Counts 6 and 7). Indeed, except for the transmissions combined into Counts 6 and 7, the transmissions occurred minutes if not hours apart. We have upheld charges of separate counts under § 843(b) for each telephone call made or placed by a defendant, *see, e.g.*, *United States v. Jaramillo-Montoya*, 834 F.2d 276, 279 (2d Cir. 1987) ("Under 21 U.S.C. § 843(b), each telephone call is a separate offense punishable by a sentence of four years' imprisonment."), and courts have held that "nondescript conversation" and even "hanging up after a busy signal" can be communications facilitating a drug transaction, *United States v. Roberts*, 14 F.3d 502, 519 (10th Cir. 1993).

5. Prosecutorial Misconduct

Canfield argues that the government engaged in prosecutorial misconduct by referencing his incarceration and commenting on the credibility of M.D. in closing arguments. The arguments are rejected.

The reference to Canfield's incarceration was clearly inadvertent, as the prosecutor simply referred in rebuttal summation to Canfield's "letter from 2014 when he was in jail." App'x 115. Defense counsel did not object, and at the conclusion of the argument, the prosecutor himself brought the matter to the attention of the district court, saying: "I regret it and I didn't realize it until after the fact, I mentioned, I believe, that the letter sent by the defendant was, I think the words I used were, while he was in jail." App'x 116. Defense counsel declined a limiting instruction. The single, inadvertent remark did not so substantially prejudice Canfield as to deny him a fair trial. *See United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005); *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999).

Nor did the prosecutor's comments on M.D.'s credibility cross the line. Obviously, M.D. was a critical witness, and both sides addressed her credibility at various points in the trial. *See United States v. Perez*, 144 F.3d 204, 210 (2d Cir. 1998) ("Prosecutors have greater leeway in commenting on the credibility of their witnesses when the defense has attacked that credibility."). The prosecutor's comments, if they were improper at all, did not rise to the level of "flagrant abuse," *United States v.*

Germosen, 139 F.3d 120, 128 (2d Cir. 1998), nor did they cause Canfield "substantial prejudice," *Carr*, 424 F.3d at 227.

6. The Automobile and Laptop Searches

Canfield raises several issues related to the seizure and search of his automobile, when he was arrested by Drug Enforcement Administration ("DEA") agents on April 11, 2013, and the subsequent seizure and search of two laptops found in the car. After Canfield moved to suppress, the district court held an evidentiary hearing and issued a written decision on July 23, 2014, denying the motion. We review the district court's legal conclusions *de novo* and its findings of fact for clear error. *United States v. Bershchansky*, 788 F.3d 102, 108 (2d Cir. 2015).

On the day of his arrest, Canfield had traveled alone in a Connecticut-registered car to a motel in Latham, New York. After he was arrested, the car was sitting in the motel parking lot. Canfield was not registered as a guest and had not sought permission to leave the car in the motel parking lot. In the circumstances of this case, it was appropriate for the agents to seize the vehicle for safekeeping. *See South Dakota v. Opperman*, 428 U.S. 364, 368 (1976) (law enforcement officials may seize and impound vehicles of arrested individuals, without a warrant, "[i]n the interests of public safety and as part of . . . 'community caretaking functions'" (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973))); *United States v. Lopez*, 547 F.3d 364, 366-67, 372

(2d Cir. 2008) (arrest of both occupants of car "called for the impoundment" of car, which was parked on city street).

Once the vehicle was taken into custody, the agents were permitted to "search the vehicle and make an inventory of its contents without need for a search warrant and without regard to whether there is probable cause." *Lopez*, 547 F.3d at 369-70. As the district court found, the inventory search here complied with DEA written policy. *See United States v. Thompson*, 29 F.3d 62, 65 (2d Cir. 1994) (law enforcement agents must act in accordance with "standardized" procedures in conducting inventory searches).

As for the laptops found in the car, the DEA agents obtained a warrant to perform a forensic analysis of them. We discern no error in the district court's findings or conclusions with respect to the search of the laptops.

7. Sentencing Issues

Finally, Canfield raises two claims of procedural error in his sentence: he contends that, first, the record does not establish that the district court knew it had authority to vary from the applicable 500:1 ratio for marijuana equivalency; and, second, the district court failed to resolve the issue of drug quantity.

We review a sentence for procedural reasonableness under a "deferential abuse-of-discretion standard." *United States v. Thavaraja*, 740 F.3d 253, 258 (2d Cir. 2014) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). A sentence is procedurally

unreasonable if the district court "fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the [18 U.S.C.] § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence." *United States v. Chu*, 714 F.3d 742, 746 (2d Cir. 2013) (internal quotation marks omitted).

As for the first claim of procedural error, there is nothing in the record to suggest that the experienced district judge failed to understand that he had discretion to reject the 500:1 ratio based on policy grounds. It has been well established since 2007 that district judges may reject a drug ratio in a guidelines calculation based on a policy disagreement. *See Kimbrough v. United States*, 552 U.S. 85, 109-10 (2007); *see also Spears v. United States*, 555 U.S. 261, 265 (2009) ("A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity."). We have held that "we are 'entitled to assume that the sentencing judge understood all the available sentencing options, including whatever departure authority existed in the circumstances of the case,'" unless the district court's sentencing remarks "create ambiguity as to whether the judge correctly understood an available [sentencing] option." *United States v. Sanchez*, 517 F.3d 651, 665 (2d Cir. 2008) (citations omitted and alternation in the original). No ambiguity exists here, where the parties argued the issue and both sides cited cases recognizing that district courts have authority to

depart based on disagreements with the applicability of equivalency ratios. *See United States v. Kamper*, 748 F.3d 728, 740-41 (6th Cir. 2014). Significantly, in the end, Canfield was sentenced to 144 months' imprisonment, which was substantially below the recommended 360-744 months guidelines range.

As for the second claim of procedural error, the district court expressly adopted the factual findings of the presentence report as well as its guidelines calculations. Hence, the district court adopted the Probation Office's finding that Canfield was responsible for 13.4596 kilograms of methylone. *See Thompson*, 76 F.3d at 456 (district court's adoption of presentence report at sentencing satisfies requirement to make factual findings). There was no procedural error.

* * * * *

We have considered Canfield's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of January, two thousand nineteen.

United States of America,

Appellee,

v.

Ryan Canfield,

Defendant - Appellant.

ORDER

Docket No: 16-3473

Appellant, Ryan Canfield, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against- 1:13-CR-00274 (LEK)

RYAN CANFIELD,

Defendant.

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

Defendant Ryan Canfield ("Defendant") is charged with conspiring to distribute and possess with intent to distribute a controlled substance, and use of a communication facility to facilitate the commission of a felony under the Controlled Substance Act, in violation of 21 U.S.C. §§ 841(a)(1), 843(b), and 846. Dkt. No. 8 ("Indictment"). Defendant entered a not-guilty plea at an August 1, 2013, arraignment held by U.S. Magistrate Judge Randolph F. Treece. Dkt. No. 10 ("Arraignment"). Defendant filed a Motion to suppress evidence found in the vehicle he was operating prior to his arrest. Dkt. No. 16 ("Motion"). The government opposed the Motion, and Defendant filed a reply. Dkt. Nos. 19 ("Response"); 25 ("Reply"). An evidentiary hearing was held on May 8, 2014, Dkt. Nos. 36; 40 (collectively, "Transcript"),[1] after which, both parties filed supplemental Memorandums of law, Dkt. Nos. 45 ("Def. Supp."); 47 ("Gov't Supp."). For the following reasons, the Motion to suppress is denied.

[1] The evidentiary hearing was continued on May 14, 2014; however, no witnesses were called, and only scheduling matters were discussed. See Dkt. Nos. 37; 41. Additionally, Defendant previously filed a Motion to compel disclosure of redacted portions of investigatory reports and the Drug Enforcement Agency's ("DEA") manual pertaining to conveyance seizures and searches. Dkt. No. 29. The Motion to compel was denied in the Court's Decision and Order dated June 5, 2014. Dkt. No. 39.

II. BACKGROUND

A. Investigation

In August 2012, DEA Task Force Officer Robert Georgia ("Georgia") was informed by a DEA confidential source ("CS") that "an individual . . . known as [Defendant was] distribut[ing] large amounts of 'bath salts'[2] in and around the Capital District of New York." Dkt. No. 1 ("Complaint") ¶ 2. Georgia "reviewed numerous consensual communications between [CS] and [Defendant] made between July 2012 and January 2013, via email and cellular phone, which detail[ed] conversations between them discussing their pre-existing relationship relating to 'bath salts' trafficking." Id. ¶ 3.

CS "estimates that since January 2012, he/she has traveled to meet [Defendant] approximately 32 times" to purchase bath salts. Dkt. No. 16-4 ("Report of Investigation") ¶ 7. In March 2012, CS visited Defendant at his drug "factory" in New Haven, CT, where Defendant appeared to also reside. Id. ¶¶ 7, 9. CS states that Defendant "was obtaining chemical materials from China[] via the internet and would arrange for friends to receive shipments at various [post office] [b]oxes throughout Connecticut . . .[and] he would track those packages via the internet." Id. ¶ 9. In October 2012, CS consented to a search of his/her personal computer, in which Georgia witnessed CS and Defendant engaging in an online chat regarding payments for bath salts. Id. ¶ 11.

On or around January 2013, an undercover DEA agent accompanied CS to a pre-arranged location to complete a drug transaction with Defendant in New Haven, CT. Compl. ¶ 4; Tr. at 9. DEA agents subsequently examined the substance sold to CS by Defendant and found that it tested

[2] "Bath salts" refers to the chemical compound 3,4-Methylenedioxy-N-methylcathinone, which is a federally scheduled substance. Dkt. No. 16-4 at ¶ 5.

positive for the presence of bath salts. See Compl. ¶ 5.

B. Arrest

On February 7, 2013, Magistrate Judge Treece signed a criminal complaint charging Defendant with conspiracy to possess with intent to distribute bath salts. ROI ¶ 17. An arrest warrant was issued and the United States Marshals Service ("USMS") attempted to apprehend Defendant at his apartment on February 26, 2013, but Defendant was not present. Dkt. No 29-4 ("Feb. DEA-6") at 6. Subsequent attempts to locate and apprehend Defendant were also unsuccessful. Tr. at 12-13.

In April 2013, a confidential informant ("CI") informed Georgia that Defendant had recently contacted her and "[Defendant] informed her that he was on the run from the police and requested a place to stay." Tr. at 17. Georgia and fellow DEA agents arranged a "set up," whereby CI would invite Defendant to stay with her at a designated hotel room, at which point the DEA could arrest him. Id. 17-18. Defendant confirmed via text message with CI that he would arrive on April 11, 2013. Id. at 17.

On that day, Georgia, along with USMS members and other law enforcement personnel, placed themselves at various locations surrounding the Microtel Motel ("Microtel") in Latham, NY. See Tr. at 18. Defendant was observed approaching the Microtel driving a 2003 silver Saab ("Saab"). Id. at 18, 58. Defendant entered the hotel parking lot, parked the vehicle, and proceeded towards CI's hotel room. Id. The USMS members were stationed across from CI's room, and when Defendant knocked on the door where he believed CI to be located, they immediately arrested him without incident. Id. at 18-19.

USMS members searched Defendant's person and uncovered a wallet containing a Connecticut-issued driver's licence, social security card, and two debit cards, none of which was issued in Defendant's name. Tr. at 19-20. Defendant did not posses any documents on his person reflecting his true name. Id. at 20. USMS members delivered Defendant's personal property to Georgia in a clear, plastic bag, and Defendant was immediately transported to the Albany County Jail. Id. at 22.

C. Impoundment and Search of the Vehicle

Defendant arrived at the Microtel in the Saab unaccompanied, and it is undisputed that he did not own the vehicle.[3] Tr. at 24, 40, 137. Following Defendant's arrest, Georgia believed the car to be abandoned and decided to impound the vehicle because "we can't leave it unattended and it is also to safeguard us" from claims of theft or vandalism. Id. at 25-26, 28-29. Georgia used the keys obtained from Defendant during the post-arrest search to unlock the vehicle and proceeded to drive it to a DEA office in Latham, NY. Id. at 24-26, 29, 60, 71, 91. The vehicle was not searched at the Microtel or while in transit. Id. at 92.

Immediately upon arrival at the DEA's office, Georgia, DEA agent Gilroy ("Gilroy"), and a local police officer conducted an inventory search of the vehicle. Tr. at 92. In accordance with DEA policy, the agents completed a DEA-12 form, which details the contents of the inventory search, and a DEA-6 form, which recounts the events of the inventory search. Id. at 29-31. The agents performed a complete search of every item in the car and found "[a] whole host of personal

[3] Georgia believed that the Saab's registration was run by a local police officer on the day of Defendant's arrest, which revealed that the vehicle was registered to and owned by Ann Ngyuen ("Nguyen"), a Connecticut resident. Tr. at 40, 61. The registration search revealed that the car had not been reported stolen. Id. at 46. Georgia did not attempt to contact Ms. Ngyuen immediately following Defendant's arrest, but did so the following day through defense counsel. Id. at 61.

items . . . including several cell phones, laptops, dishes, [and a] vacuum cleaner." Id. at 29, 70.

Pursuant to DEA policy, Georgia attempted to turn on each laptop to determine "if they had any value whatsoever, if they were inoperable or didn't work." Tr. at 36, 50. One laptop turned on immediately, but the other did not. Id. Having no reason to believe the computers had any evidentiary value, the agents placed the laptops back in the car, which was then secured in the DEA's basement garage facility. Id. at 35-36. Subsequently, "[o]n April 15th [Georgia] was provided some intelligence from one of the agents in [his] task force that indicated that there was a lot of financial activity and overseas purchases that were done through the Internet and some other financial investigations that were conducted that led [them] to believe that those laptops were used in the commission of those crimes." Id. at 37.

On April 16, 2013, Georgia retrieved the laptops from the vehicle and processed them as evidence. Tr. at 38. Before applying for a warrant, Georgia wanted to ensure that each laptop was "operable," so he attempted to power on each computer. Id. at 52, 85-88. Georgia turned on the laptop that previously worked and then quickly shut it off. Id. at 39. Georgia then plugged in the other laptop to allow it to charge for a few minutes, after which it successfully turned on. Id. Georgia did not access any files on either computer. Id. After determining that each laptop was operable, Georgia applied for, and received, a search warrant for the two laptops, and proceeded to transfer them to the Secret Service in Albany for forensic examination. Id.

D. Forensic Analysis of the Laptops

Secret Service Special Agent Constance Leege ("Leege") performed a computer forensic analysis on the two laptops. Tr. at 98, 106. First, she removed the hard drive and attached a "write-locking device" to prevent transfer of data. Id. at 106-07. Leege then made a "mirror" copy—i.e. an

exact replica—of the hard drives, so that she could safely search for evidence without risking corruption of the original hard drives. Id.

Pursuant to the search warrant, Leege then examined the contents of the (mirrored) hard drives for evidence specifically related to conspiracy to distribute bath salts, including, *inter alia*, information related to overseas transactions, customer lists, types of drugs, financial transactions, and other evidence relating to the acquisition or distribution of controlled substances. Tr. at 112-13. The warrant did not restrict Leege's ability to search by file type. Id. at 114-15, 128. Leege explained that it would not be practical to limit a hard drive search to a particular file type because file types can be easily manipulated, and the file name is not necessarily indicative of its contents. Id. at 126-27. She also stated that, in her experience, narcotics traffickers often store image files depicting illegal drug activity on their computers. Id. at 129. Finally, Leege testified that when the computers were turned on, both on April 11 and April 16, no "user files" were accessed, and each was turned on from "30 seconds to a minute." Id. at 123-24.

III. LEGAL STANDARD

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. A "search" occurs when the government acquires information by either "physically intruding on persons, houses, papers, or effects," or otherwise invades an area in which an individual has a reasonable expectation of privacy. See Florida v. Jardines, 133 S. Ct. 1409, 1412 (2013); see also Katz v. United States, 389 U.S. 347, 360-61 (1991). A "seizure" occurs when the government interferes in some meaningful way with an individual's possession of property. See

United States v. Jones, 132 S. Ct. 945, 951 n.5 (2012).

Subject to certain exceptions, a search or seizure conducted without a warrant is presumptively unreasonable. See Kyllo v. United States, 533 U.S. 27, 31 (2001). However, "[t]he [Fourth] Amendment says nothing about suppressing evidence obtained in violation of this command. That rule—the exclusionary rule—is a 'prudential' doctrine, created by th[e] [Supreme] Court to compel respect for the constitutional guaranty. Davis v. United States, 131 S. Ct. 2419, 2426 (2011) (citations omitted); see Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961). Thus, "[e]ven where a search or seizure violates the Fourth Amendment the [g]overnment is not automatically precluded from using the unlawfully obtained evidence in a criminal prosecution." United States v. Julius, 610 F.3d 60, 600 (2d Cir. 2010). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring v. United States, 555 U.S. 135, 144 (2009).

IV. DISCUSSION

Defendant argues that evidence obtained from the Saab, including the contents of the two laptop computers, should be suppressed because (1) he had a legitimate expectation of privacy in the Saab and its contents; (2) the warrantless search and seizure of the Saab were not supported by probable cause; (3) the DEA's decision to impound the Saab and inventory its contents was unreasonable and not performed according to standardized criteria; and (4) the search warrant for the computers was not supported by probable cause and was overbroad, in that it permitted a search of image files. See Mot.; Reply; Def. Supp.

A. Standing

"Fourth Amendment rights are personal rights . . . and may not be vicariously asserted." Rakas v. Illinois, 439 U.S. 128, 133-34 (1978). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." Id. at 134 (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)). As such, "it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule's protections." Rakas, 439 U.S. at 134.

To "mount a challenge to a search of a vehicle, defendants must show, among other things, a legitimate basis for being in it, such as permission from the owner." United States v. Ponce, 947 F.2d 646, 649 (2d Cir. 1991). Defendants "who do not have a legitimate basis for being in a car that is not registered in the name of any of the car's occupants cannot object to the search of the vehicle." Id. Further, "the burden is not on the police to show that defendants were in the car illegitimately. The burden is on the defendants to show a legitimate basis for being in the car." Id.

The government argues that Defendant has not pled sufficient facts to establish that he had a legitimate basis for being in the Saab. Resp. at 4-6. "It is well established that in order to challenge a search, a defendant must submit an affidavit from someone with personal knowledge demonstrating sufficient facts to show that he had a legally cognizable privacy interest in the searched premises at the time of the search." United States v. Ruggiero, 824 F. Supp. 379, 391 (S.D.N.Y. 1993); see also United States v. Rubio-Rivera, 917 F.2d 1271, 1275 (10th Cir. 1990) ("Where the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and

standing to challenge the search of the vehicle."); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); United States v. Paulino, 850 F.2d 93, 96 (2d Cir. 1988); United States v. Arboleda, 633 F.2d 985, 991 (2d Cir. 1980). While mere control over a vehicle does not establish standing, see, e.g., United States v. Sanchez, 635 F.2d 47, 64 (2d Cir. 1980), "where the defendant can demonstrate that he had the keys to the car and permission from the owner to drive it, he has standing to challenge the search of the car." United States v. Triana-Mateus, No. 98 CR. 958, 2002 WL 562649, at *3 (S.D.N.Y. Apr. 15, 2002); see also United States v. Ochs, 595 F.2d 1247, 1253 (2d Cir. 1979).

Here, Defendant provided an affidavit from Nguyen, the car's owner, who states that Defendant had permission to possess and operate her Saab "for as long as he needed it," and Defendant "had sole possession of the car, it[s] contents and the keys which provided access to the car." Dkt. No 25-1 ("Nguyen Affidavit"). The government contends that "[t]he reliability of Nguyen's affidavit is significantly undercut by (1) her contradictory statements to the DEA concerning whether the defendant had permission to use her Saab[4] and (2) the fact that she willfully ignored a court subpoena compelling her testimony at the suppression hearing."[5] Gov't Supp. at 2.

As stated *supra*, sufficient evidence is found where a defendant has provided an affidavit from someone with personal knowledge establishing that the defendant had permission to use the car. Ruggiero, 824 F. Supp. at 391. It is undisputed that Nguyen owned the vehicle, and her

[4] Georgia testified that he previously questioned Nguyen, and she stated that she had not given Defendant permission to use her car. Gov't Supp. at 2; Tr. at 45. The government also states that DEA Special Agent Ron Arp ("Arp"), who did not testify at the evidentiary hearing, previously spoke with Nguyen, and that Nguyen indicated to Arp that she had only given Defendant permission to use her vehicle to visit his mother in CT for one day. Gov't Supp. at 2 n. 1.

[5] Nguyen informed the DEA on the morning of the evidentiary hearing that she would not be appearing before the Court. Tr. at 2-3.

affirmation is clear that she had given Defendant sole permission to use the vehicle for as long as he needed it. Nguyen Aff. Moreover, Defendant was in sole possession of the vehicle and its keys, and it had not been reported stolen, further corroborating Nguyen's affidavit. See Triana-Mateus, 2002 WL 562649, at *3. Therefore, the Court finds that, regardless of Nguyen's failure to comply with the subpoena, her affidavit establishes sufficient evidence of Defendant's permission to use her vehicle. Accordingly, Defendant has standing to challenge the search of the Saab.

B. Seizure of the Saab

As stated *supra*, a "seizure" occurs when the government interferes with an individual's possession of property, see Jones, 132 S. Ct. at 951 n.5, and, subject to certain exceptions, a seizure conducted without a warrant is presumptively unreasonable, see Kyllo, 533 U.S. at 31. However, a well-recognized exception to the warrant requirement permits law enforcement officials to impound vehicles of arrested individuals "[i]n the interests of public safety and as part of what the [Supreme] Court has called 'community caretaking functions.'" South Dakota v. Opperman, 428 U.S. 364, 368 (1976) (quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973)). Safeguarding individuals and their property from harm is the essence of the "community caretaking function" of the police. See United States v. Miner, 956 F.2d 397, 399 (2d Cir. 1992) (finding it is part of the "community caretaking function" of the police to protect a motor vehicle from vandalism); United States v. Markland, 635 F.2d 174, 176 (2d Cir. 1980) ("Police have a duty to protect both the lives and the property of citizens."); Dombrowski, 413 U.S. at 441 (noting that police are authorized to seize an automobile not in control of its driver as part of a "community caretaking function").

Police officers may exercise discretion in deciding whether to impound a vehicle, so long as that discretion is "exercised according to standard criteria and on the basis of something other than

suspicion of evidence of criminal activity." United States v. Best, 415 F. Supp. 2d 50, 53 (D. Conn. 2006) (quoting Colorado v. Bertine, 479 U.S. 367, 375 (1987)). "Courts give deference to police caretaking procedures designed to . . . protect vehicles . . . in police custody. This rule is particularly important where a car would be unattended, even if legally parked, and the police . . . believe that a suspect will be separated from his vehicle for a long period of time." United States v. Mundy, 806 F.Supp. 373 (E.D.N.Y. 1992) (citing Bertine, 479 U.S. at 372).

1. Standard Criteria for Impounding a Vehicle

Defendant argues that Georgia and Gilroy offered "varied" responses to methods for seizing vehicles, particularly with regards to the decision whether to tow or have an agent drive the vehicle, and these inconsistencies establish a lack of a standardized seizure policy. Def. Supp. at 21. Defendant asserts that "[a]bsent the [sic] compliance with the written policy, the unwritten practices do not provide a standardized de facto policy against which the officers acted." Id.

Defendant's argument is without merit. At the hearing, while Georgia could not confirm whether there was a written policy directing that an agent drive a car to be impounded, as opposed to calling a tow truck, he indicated that "[o]f all the arrests and/or situations similar to this[,] we have always driven, never once I have I ever seen it towed." Tr. at 66. Gilroy testified that tow trucks are called "sometimes," but that there is no requirement that a tow truck be called. Id. at 144, 146. Gilroy also stated that it would be consistent with DEA policy to drive an operable vehicle rather than tow it. Id. at 146. Thus, contrary to Defendant's assertion, the agents' testimonies are not inconsistent.

Additionally, while a written policy is not required to establish a standard procedure, see United States v. Thompson, 29 F.3d 62, 65 (2d Cir. 1994) ("The existence of such a valid procedure

may be proven by reference to either written rules and regulations or testimony regarding standard practices."), the government has provided a portion of the DEA's written manual concerning "a conveyance seized for safekeeping," Gov't Ex. A. As only "some degree of 'standardized criteria' or 'established routine'" is required, United States v. Petty, 367 F.3d 1009 (8th Cir. 2004) (quoting Florida v. Wells, 495 U.S. 1, 4 (1990)), the Court finds that the agents' testimonies and the DEA written manual collectively meet that threshold.

2. Reasonableness of Georgia's Decision to Impound the Saab

Defendant next argues that Georgia's determination was improper because "assessment of the propriety of the community caretaking exception involves addressing the location of the vehicle when it is seized." Def. Supp. at 18. "The touchstone of the Fourth Amendment [analysis] is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991)). The government contends that Georgia and DEA reasonably exercised their discretion in determining to impound the vehicle based on the following: Defendant resided in Connecticut and had just traveled to New York; the Saab was registered to a Connecticut resident with no indication that its owner or someone with authority was available to take possession of the vehicle and remove it; it was parked in a private parking lot for use only by registered Microtel guests; Defendant was not a registered guest and did not indicate that he had permission from Microtel to leave his car there; the hotel was in a densely-populated area near major highways; the Microtel parking lot was easily accessed by the public and not secured, as evidenced by Defendant's ability to park the vehicle without registering; because of Defendant's fugitive status, it was likely that Defendant would be detained for a significant time and thus be unable to timely retrieve the Saab; and the Saab was full of Defendant's personal belongings, making it a particularly appealing target for vandalism or theft. Resp. at 4-9; Gov't

Supp. at 9-11.

Defendant argues that these facts are insufficient to justify an exercise of the community caretaking function. Def. Supp. at 18. In support of his argument, Defendant relies on United States v. Cervantes, 703 F.3d 1135 (9th Cir. 2012), where the court "held that the government failed to demonstrate that the community caretaking exception applied to the impoundment of the defendant's car because the government presented no evidence that the vehicle impeded traffic, posed a safety hazard, or was vulnerable to vandalism or theft." Id. (quoting Cervantes, 703 F.3d at 1141-42).

Defendant's reliance on Cervantes is misplaced. First, in Cervantes, the defendant's car was parked on a residential street, not a publicly-accessible parking lot, as was the Saab in this case. See Cervantes, 703 F.3d at 1142. Moreover, the Cervantes court explicitly recognized the propriety of seizing a car from a publicly-accessible parking lot as opposed to a residential street, and distinguished the case from prior Ninth Circuit decisions accordingly. Id. ("[T]he government presented no evidence that the vehicle would be vulnerable to vandalism or theft if it were left in its residential location . . . and thus failed to meet its burden to show that the community caretaking exception applied."). Furthermore, and perhaps most importantly, the defendant in Cervantes was not arrested until *after* his car was impounded, raising the implication that the decision to impound the vehicle was a pretext for searching for criminal evidence, rather than for safekeeping. See id. at 1143; see also Bertine, 479 U.S. at 375 (holding that law enforcement may not exercise discretion to impound a vehicle based solely on "suspicion of evidence of criminal activity"). Thus, Cervantes is distinguishable from this case, and does not lend support to Defendant's argument that Georgia's decision was improper.

The Court finds that, based on the numerous factors outlined *supra*, Gerogia's exercise of the community caretaking function was reasonable. See Bertine, 479 U.S. at 372; United States v. Staller, 616 F.2d 1284, 1290 (5th Cir. 1980) (approving impoundment where the vehicle's out-of-state owner had just been arrested and taken to jail and the car was parked in a mall parking lot with appreciable risk of vandalism or theft); Mundy, 806 F. Supp. at 376-77 (upholding impoundment of a vehicle in an "open lot" where it would be "easy prey for vandals" and "the agents had no way of knowing how long the defendants would be detained"); United States v. Kanatzar, 370 F.3d 810, 813 (8th Cir. 2004) (finding that a reasonable risk of damage or vandalism is sufficient to justify police impoundment of a vehicle following the arrest of the driver); United States v. Johnson, 734 F.2d 503 (10th Cir. 1984) (finding reasonable decision to impound a vehicle lawfully parked in a commercial parking lot based on concerns with vandalism); Best, 415 F. Supp. 2d at 56-57 ("[T]he vehicle [the defendant] was driving was at risk of theft or vandalism even in the commercial lot in which it was parked. Moreover, the police had no indication that the owners of the [parking lot] were willing to have [the defendant] leave his vehicle in their lot indefinitely while he dealt with his arrest and its aftermath."); Miner, 956 F.2d at 399 (2d Cir. 1992); United States v. Markland, 635 F.2d 174, 176 (2d Cir. 1980).[6]

[6] Defendant also argues that "impoundment based solely on an arrestee's status as a driver, owner, or passenger is irrational and inconsistent with the 'caretaking' functions because a universal policy of impoundment would increase the liability to the arresting authorities." Mot. at 6 (citing United States v. Duguay, 93 F.3d 346, 351 (7th Cir. 2010)). Defendant's argument is without merit, as he has not shown that the DEA employs a categorical policy of automatically impounding all vehicles following an arrest. Rather, in this case, Georgia exercised his discretion based on the circumstances described *supra* and pursuant to standardized DEA policies, in deciding to impound the vehicle for safekeeping. Tr. at 24-26; Gov't Supp. at 6. There is no evidence on the record that Georgia acted pursuant to a universal policy of impounding all vehicles irrespective of the surrounding circumstances.

Accordingly, the Court finds that Georiga's decision to impound and drive the Saab for safekeeping was made pursuant to standard criteria and was reasonable under the circumstances. Therefore, the seizure and impoundment of the vehicle following Defendant's arrest did not violate the Fourth Amendment.

C. Inventory Search of the Saab

"It is well recognized in Supreme Court precedent that, when law enforcement officials take a vehicle into custody, they may search the vehicle and make an inventory of its contents without need for a search warrant and without regard to whether there is probable cause to suspect that the vehicle contains contraband or evidence of criminal conduct." United States v. Lopez, 547 F.3d 364, 369-70 (2d Cir. 2008) (citing Illinois v. Lafayette, 462 U.S. 640, 643 (1983) ("[An] inventory search constitutes a well-defined exception to the warrant requirement" under the Fourth Amendment)). This exception is permissible because "[t]he policies behind the warrant requirement are not implicated in an inventory search, nor is the related concept of probable cause." Bertine, 479 U.S. at 371 (internal citation omitted). "Such a search is not done to detect crime or to serve criminal prosecutions. It is done for quite different reasons: (1) to protect the owner's property while it is in police custody; (2) to protect the police against spurious claims of lost or stolen property; and (3) to protect the police from potential danger." Lopez, 547 F.3d at 369-70 (citing Opperman, 428 U.S. at 369); see also Bertine, 479 U.S. at 372.

"The Supreme Court has, however, recognized the danger to privacy interests protected by the Fourth Amendment if officers were at liberty in their discretion to conduct warrantless investigative searches when they suspected criminal activity, which searches they would subsequently justify by labeling them as 'inventory searches.'" Lopez, 547 F.3d at 369-70 (quoting

Wells, 495 U.S. at 4.) "Accordingly, the Court has stressed the importance, in determining the lawfulness of an inventory search, that officials conducting the search 'act in good faith pursuant to standardized criteria . . . or established routine.'" Thompson, 29 F.3d at 65 (quoting Wells, 495 U.S. at 4). Good faith adherence to a standardized policy is required so that inventory searches do not become "a ruse for a general rummaging in order to discover incriminating evidence." Wells, 495 U.S. at 4. "So long as the search is done in accordance with an established policy or practice designed to produce an inventory, police officers retain discretion in the scope and conduct of an inventory search." United States v. Caraway, No. 08-CR-117, 2010 WL 1544396, at *10 (W.D.N.Y. Jan. 14, 2010) (citing Wells, 495 U.S. at 4). "The existence of such a valid procedure may be proven by reference to either written rules and regulations or testimony regarding standard practices." Thompson, 29 F.3d at 65.

1. DEA Inventory Search Policy

Here, the relevant DEA manual policy, "6651.7 Inventory Searches," states that:

> A complete inventory shall be made of all property that is taken into custody by DEA for safekeeping, regardless of whether probable cause exists to search the property. Inventory searches are made to identify items of value in order to protect DEA personnel from claims of theft or loss of property that enters DEA custody. Inventory searches need not be made contemporaneous with the arrest of any person or at the time of seizure, but must be made as soon as practical after the property to be searched has been transported to a DEA or other law enforcement facility. Inventory searches shall be made of all containers, whether locked or unlocked, that are lawfully seized for safekeeping. All items shall be inventoried on a DEA-12 . . . and the details of the inventory shall be reported in the DEA-6 that reports the related enforcement activity.

Gov't Ex. A.

Defendant argues that "[t]he inventory policy [i]s so lacking in procedure and methodology that it incorporate[s] 'general rummaging' as [a] natural consequence of the inventorying of the car." Def. Supp. at 22 (citation omitted). Specifically, Defendant argues that the DEA policy is

overly generalized because "[n]o procedures are outlined for the pursuit of the inventory: how items are to be recorded, writing or photo. How [sic] items are to be treated, potential evidence, items of monetary value, significant monetary value. Where [sic] items are located so that possession or claim of possession may be determined." Id. at 23.

The government responds that the policy is neither lacking in specificity nor allows for general rummaging; rather, the policy is clear that the entire conveyance shall be searched, all items of value are to be inventoried on a DEA-12, and the event of inventorying recorded on a DEA-6. Gov't Supp. at 12. At the hearing, Georgia testified that he complied with these procedures, searching the entire vehicle immediately upon its arrival at the DEA's facility, identifying items of value, and properly filling out the required DEA-12 and DEA-6 forms documenting the search. Id. at 10; Tr. at 30-31, 70. Gilroy further corroborated the same course of events that the agents complied with DEA policy. Gov't Supp. at 10; Tr. at 143.

As an initial matter, the Court notes that is deeply concerned by the DEA's policy, or practice, of turning on a laptop computer for purposes of determining its value, prior to the issuance of a search warrant. First, turning on the computer could irreparably alter or damage evidence contained on its hard drive. See Tr. at 107 (where Leege testified that Secret Service policy is *not* to turn on a computer before it is copied because "by just turning [the computer] on" it can corrupt or otherwise "change data in a computer"). Second, not only can turning on a computer damage its evidentiary value, it is also unnecessary. See id. (where Leege testified that, pursuant to Secret Service policy, the hard drive is "mirrored"—i.e. copied—*before* the computer is turned on).

Finally, and perhaps most importantly, turning on a computer without a warrant (or applicable warrant exception) could very well infringe on an individual's privacy rights under the

Fourth Amendment.[7] "Courts routinely recognize that individuals possess objectively reasonable expectations of privacy in the contents of their computers." See, e.g. United States v. Howe, 09-CR-6076L, 2011 WL 2160472, at *7 (W.D.N.Y. May 27, 2011) report and recommendation adopted, No. 09-CR-6076L, 2012 WL 1565708, at *1 (W.D.N.Y. May 1, 2012) (listing cases). The most common scenario involves law enforcement officials opening a computer and proceeding to click through files in an attempt to locate incriminating evidence, and courts have universally held that such conduct implicates privacy rights under the Fourth Amendment. See, e.g. United States v. Arnold, 454 F. Supp. 2d 999, 1003 (C.D. Cal. 2006) ("[O]pening and viewing confidential computer files implicates dignity and privacy interests."); United States v. Cain, No. CRIM-08-26, 2008 WL 2498176, at *7 n. 4 (D. Minn. May 21, 2008) (finding a violation of a protectable privacy interest where agents opened and powered on a computer and proceeded to click into one of the folders in an attempt to locate incriminating evidence). However, the precise issue before the Court—whether protectable privacy interests are implicated when law enforcement merely turns on a computer to determine if it is operable but does not search the desktop screen or click on any files—appears to be of first impression.

The Court need not decide whether, as a matter of law, turning on a computer without a search warrant (and without an applicable exception to the warrant requirement) constitutes an impermissible search because, in this case, no evidence was gathered when the computers were powered on. It is undisputed that Georgia turned on each computer only for a matter of seconds, did

[7] When a computer is turned on, it may potentially display icons, pictures or even the last program or file accessed by the user before the computer was turned off without the inspecting officer having to "click" on any files to access them. See Tr. at 53.

not click on any files or otherwise access any "user files,"[8] and he did not view any private or personal information on the computers' screens. See Tr. at 52-54. Furthermore, Defendant does not argue that any evidence was impermissibly obtained by turning on the computers. Accordingly, while the Court expresses deep concern regarding the DEA's practice of turning on laptops to determine their value, here, it cannot serve as a basis to suppress evidence. See Herring, 555 U.S. at 139 (noting that in a motion to suppress the exclusionary rule "forbids the use of improperly denied *evidence* at trial) (emphasis added).[9]

Despite this questionable practice, the Court finds that, nonetheless, Georgia and his fellow DEA agents properly complied with written, standardized DEA procedures by promptly conducting an inventory of the contents of the vehicle once it was secured at DEA's facility, identifying items of value, and properly filling out the required forms. See Gov't Ex. D ("DEA-12"). Further, contrary to Defendant's assertion that the DEA policy does not specify how items are to be

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[8] At the hearing, Leege explained the important distinction between a "user" file and a "default system " file. Tr. at 123-24. A "user" file is a file directly accessed by the person operating the computer, and may contain meaningful content, such as documents or images. Id. Default system files, also called "startup" files, are files accessed simply when the computer is powered on. Id. at 124.

[9] Somewhat relatedly, the Court is also deeply concerned that a thumb drive—a small device used to store digital data—found in the Saab was returned to Defendant's mother because it was determined that it only contained music files. Tr. at 80-81, 134. It is unclear how the DEA knew that the thumb drive only contained music. Georgia testified that he did not personally review the contents of the thumb drive and that "one of the unlicensed DEA agents may have [had] access to the thumb drive but [he] c[ouldn]'t be sure." Id. at 80-81. Moreover, no warrant was issued to search the thumb drive. See id. As there is no way to confirm the contents of a thumb drive without opening its files, the Court is troubled that the government returned it to Defendant's mother based on its determination that it contained only music files. Id. at 81. The only reasonable inferences are that either the contents of the thumb drive were viewed without a warrant, or it was returned prematurely without properly assessing whether it may have contained evidentiary value. However, because Defendant has not alleged a Fourth Amendment violation with regard to the thumb drive, the Court need not reach a decision on this issue.

recorded, the requirements for completing a DEA-6 and DEA-12, both of which were done here, do just that. Defendant has provided no legal authority for the proposition that DEA personnel conducting an inventory search are required to take additional steps, such as taking photographs of the items or the condition of the vehicle, or to specify how items of potential evidentiary or monetary value are to be treated. Rather, the only requirement is that law enforcement personnel act in accordance with standardized procedures in conducting an inventory search. See Thompson, 29 F.3d at 65. Here, Georgia's and Gilroy's testimonies establish that they complied with the written policy, and are further corroborated by the DEA-12. See Lopez, 547 F.3d at 370 (finding testimonies from two police officers about the policy for conducting an inventory search, even in the absence of a written policy, sufficient to establish standard criteria). Accordingly, Defendant's argument that the DEA policy is so generalized as to allow for general rummaging is without merit.

2. Good Faith Requirement

Good faith adherence to a standardized policy is required so that inventory searches do not become "a ruse for a general rummaging in order to discover incriminating evidence." Wells, 495 U.S. at 4. Defendant argues that "one example that the inventory was a ruse for rummaging was apparent in the attempt and actual turning on of the MacBook laptops." Def. Supp. at 23.

The Court does not agree that Georgia's act of turning on of the laptops without a warrant evinces general rummaging for incriminating evidence. As stated *supra*, no user files were accessed, nor was any personal information obtained from the short amount of time in which the computer was turned on. Further, while the computers were initially accessed on April 11, 2013, the search warrant was not applied for until May 8, 2013, nearly a month later, based on independent evidence gained subsequent to the arrest and inventory search. Tr. at 37. That DEA

agents did not apply for a warrant until a significant period of time had elapsed, and did so based on evidence entirely independent from the inventory search, further corroborates that turning on the computers was not a ruse to circumvent the warrant requirement and "rummage" for incriminating evidence.

Accordingly, Defendant has failed to establish that the agents did not act in good faith in conducting the inventory search. Therefore, the Court finds that the warrantless inventory search of the Saab was not in violation of the Fourth Amendment.[10]

C. Search Warrant

"The central concern underlying the Fourth Amendment [is] . . . giving police officers unbridled discretion to rummage at will among a person's private effects." Arizona v. Gant, 556 U.S. 332, 345 (2009). To prevent such "general, exploratory rummaging in a person's belongings" in which that person holds a privacy interest, Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971), the Fourth Amendment provides that "a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity," Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).

Defendant argues that (1) the warrant was not supported by sufficient probable cause that the computers contained images related to the alleged crime of conspiracy to distribute bath salts and (2) the warrant was overbroad in that it permitted forensic analysis of image files without sufficient

[10] In the alternative, the parties also dispute whether DEA agents had probable cause for a warrantless search and seizure of the Saab. Mot. at 3-4; Resp. at 6-9; Reply at 5-6; Gov't Supp. at 12-13; Def. Supp. at 14-15. Because the Court finds that law enforcement reasonably exercised its community caretaking function, it does not reach the issue of whether probable cause independently would have justified the warrantless search and seizure.

probable cause that such files were relevant to the charged crime. Mot. at 8.[11]

1. Probable Cause to Search Image Files

Defendant argues that the warrant was not supported by probable cause of finding image files related to distribution of bath salts because "[i]n no part of the application and affidavit in support of the search warrant for the two Apple computers is there any reference to activities related to image files, the need to search for image files or other types of data associated with image files." Mot. at 11; Def. Supp. at 24 ("If there is reason to believe that pictures are suspected of being on a computer and evidence of the crime for which they are sought, the Fourth Amendment requires a probable cause determination supported by facts that such evidence will be found and a warrant specifying that the search should be for those types of items.").

The Second Circuit has explained that "probable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules. . . . While probable cause requires more than a mere suspicion of wrongdoing, its focus is on probabilities, not hard certainties." Walczyk v. Rio, 496 F.3d 139, 156 (2d Cir. 2007) (internal quotation marks and citation omitted). Probable cause "requires only such facts as make wrongdoing or the discovery of evidence thereof probable." Id. at 157. Moreover, the issuance of a warrant by a neutral magistrate "is presumed reasonable because such warrants may issue only upon a showing of probable cause." Id. at 155-56. To rebut this

[11] Defendant does not argue that there was insufficient probable cause supporting the warrant to search the laptop computers. Mot. at 13. Rather, Defendant argues that there was insufficient probable cause to search specifically for image files, and as such, the warrant failed to restrict the search of image files. See id. ("The police may have had probable cause to search the computers but the reasonableness of that search was limited to the information sought as evidence connected to the controlled substance crimes. . . . Any files related to photos, videos or other files with known suffixes related to image files (i.e. .gif, .jpeg, .tif) should not have been searched as such search would have been unsupported by the affidavit, beyond the scope of the warrant and without probable cause. . . .").

presumption, a defendant must show that "the officer submitting the probable cause affidavit knowingly and intentionally, or with reckless disregard for the truth, made a false statement in his affidavit or omitted material information, and that such false or omitted information was necessary to the finding of probable cause." Soares v. State of Conn., 8 F.3d 917, 920 (2d Cir. 1993) (internal quotations omitted). While "reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause," see United States v. Leon, 468 U.S. 897, 915 (1984), "a [p]laintiff who argues that a warrant was issued on less than probable cause faces a heavy burden," Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991) (internal citations omitted).

Here, there was evidence that Defendant had engaged in internet activity to purchase chemical materials from China, track those shipments, and engage in online chat to discuss drug transactions. See Compl. ¶ 9; Dkt. 16-4 ("Georgia Affidavit") at ¶¶ 9-11. Moreover, Leege testified at the hearing that file types and extensions are easily manipulated—*e.g.*, changing a text file contained in a Microsoft Word .doc file to appear as an image by altering its file name to a .jpg file. Tr. at 126. Leege also testified that drug dealers often store pictures of illegal drug activity on electronic devices, as evident here where she discovered image files on Defendant's computers named "largechunk.jpg" and "smallcrystal.jpg." Resp. at 16; Tr. at 126. As the magistrate judge is entitled to "great deference," see Illinois v. Gates, 462 U.S. 213, 236, 232 (1983) (citation omitted), the Court finds that there were sufficient facts to support a "fair probability" that evidence of bath salts distribution may be found in image files on Defendant's laptop computers, id. at 238.

2. Particularity Requirement

The Fourth Amendment requires that warrants "particularly describ[e] . . . the persons or things to be seized." U.S. CONST. amend. IV. "This particularity requirement serves three related purposes: preventing general searches, preventing the seizure of objects upon the mistaken assumption that they fall within the magistrate's authorization, and preventing the issuance of warrants without a substantial factual basis." United States v. Young, 745 F.2d 733, 758-59 (2d Cir. 1984) (citation omitted). A warrant is sufficiently particular if it "enable[s] the executing officer to ascertain and identify with reasonable certainty those items that the magistrate has authorized him to seize." United States v. George, 975 F.2d 72, 75 (2d Cir. 1992) (citing cases). Specifically, "[t]he particularity requirement has three components: (1) the warrant must identify the specific offense for which law enforcement personnel have established probable cause; (2) the warrant must describe the place to be searched; and (3) the warrant must specify the items to be seized by their relation to designated crimes." United States v. Galpin, 720 F.3d 436, 445 (2d Cir. 2013) (citations omitted).

Here, the warrant authorized the search of the two laptop computers for:

> All records and evidence located on the Devices . . . that relate to a violation of a conspiracy to possess with intent to distribute and distribute [bath salts] . . . in violation of 21 U.S.C. §§ 846 and 841(a)(1)[, including] . . . lists of customers and related identifying information; . . . any information related to sources of drugs (including names, addresses, phone numbers, or any other identifying information); . . . [and] evidence pertaining to the acquisition and distribution of controlled substances.

Def. Ex. 10.

In support of his argument that the warrant was overbroad, Defendant relies on two Second Circuit decisions. First, Defendant cites United States v. Ganias, No. 12-240-CR, 2014 WL 2722618, at *1 (2d Cir. June 17, 2014), as an example of a "wide scale search of a mirrored hard drive." Def. Supp. at 24. However, Defendant's reliance on Ganias is entirely misplaced. That

case concerned a search of digital files retained for a year and a half after the initial, authorized search, and it did not reach the issue of the particularity requirement. See Ganias, 2014 WL 272268, at *10. Specifically, the court stated, "we consider a more limited question: whether the Fourth Amendment permits officials executing a warrant for the seizure of particular data on a computer to seize and indefinitely retain every file on that computer for use in future criminal investigations." Id. at *10. Moreover, the court explicitly stated "we need not address whether: (1) the description of the computer files to be seized in the . . . warrant was stated with sufficient particularity." Id. at *9. Accordingly, Ganias is inapplicable to this case.

Defendant next relies on United States v. Galpin, 720 F.3d 436 (2d Cir. 2013), where the Second Circuit called for "heightened sensitivity" in the application of the particularity requirement in the context of digital searches, since there may be no way to determine the actual content of any given digital file without opening the file and viewing its contents. 720 F.3d at 447; Def. Supp. at 25. Defendant asserts the "Galpin court concluded that the warrant failed the particularity requirement because it purported to authorize a general digital search for *any* evidence of *any* crime," and, here, the warrant is equally defective since Leege was not limited in the "content, manner or means in which she could search the hard drive." Def. Supp. at 26.

Indeed, in Galpin, the court noted that "[w]here, as here, the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance. As numerous courts and commentators have observed, advances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain." 720 F.3d at 446. However, the court continued that "because there is currently no way to ascertain the content of a file without opening it

and because files containing evidence of a crime may be intermingled with millions of innocuous files, by necessity, government efforts to locate particular files will require examining a great many other files to exclude the possibility that the sought-after data are concealed there." Id. at 447 (citing United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010)).

Galpin does not support Defendant's argument, as it is wholly consistent with the testimony offered by Leege, discussed *supra*, that it would be impractical to limit a forensic digital search to a specific file type.[12] Furthermore, the Galpin court never stated that a warrant must specify the exact file types to be searched to satisfy the particularity requirement. Rather, in Galpin, although it discussed the particularity requirement with regard to digital file searches, the central issue, and the basis for the court's holding, was that the warrant did not specify the "specific offense for which law enforcement personnel ha[d] established probable cause." 720 F.3d at 447-48. There, the warrant permitted law enforcement to search for evidence of "violations of NYS Penal Law and or Federal Statutes." Id. at 447. The court found the warrant to be facially overbroad because it failed to refer to a specific offense for which law enforcement had probable cause. Id. at 448. In contrast, here, the warrant specifically refers to a violation of 21 U.S.C. §§ 846 and 841(a)(1), and is thus distinguishable from Galpin. Therefore, Galpin does not establish that the warrant in this case was

[12] See also Rivera v. United States, 928 F.2d 592, 602 (2d Cir. 1991) ("Computer searches . . . are technical and complex and cannot be limited to precise, specific steps or only one permissible method. Directories and files can be encrypted, hidden or misleadingly titled, stored in unusual formats, and commingled with unrelated and innocuous files that have no relation to the crimes under investigation. Descriptive file names or file extensions such as ".jpg" cannot be relied on to determine the type of file because a computer user can save a file with any name or extension he chooses. Thus, a person who wanted to hide textual data could save it in a manner that indicated it was a graphics or image file."). Id. (finding that the forensic agent "acted reasonably and within the scope of the warrant by opening, screening and manually reviewing data and files in all areas of the hard drive, including image files . . . that most likely contained evidence and information relating to the alleged crimes and contracts under investigation").

overbroad by permitting Leege to search for image files.

Accordingly, the Court finds that there was sufficient probable cause to support a search for image files, and the warrant did not fail the particularity requirement under the Fourth Amendment.

V. CONCLUSION

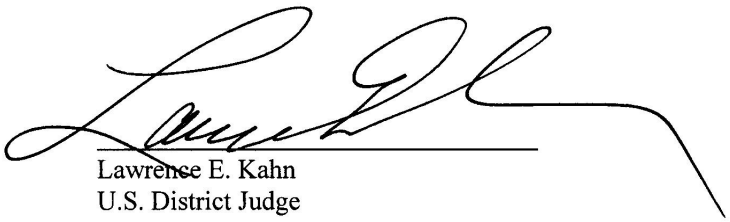
Accordingly, it is hereby:

ORDERED, that Defendant's Motion (Dkt. No. 16) to suppress evidence is **DENIED**; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: July 23, 2014
Albany, NY



Lawrence E. Kahn
U.S. District Judge