No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA CHAPMAN-SEXTON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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SUBMITTED: May 14, 2019

QUESTION PRESENTED

I. Whether the inevitable discovery exception to the Fourth Amendment exclusionary rule applies to a warrantless search of a flash drive finding child pornography, where, without the illegal search, the officer himself (1) doubted that he had probable cause to perform the search, (2) admitted that a search warrant would likely not have been issued, and that (3) the flash drive would have been returned to the suspect without search or incident.

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CONSTITUTIONAL PROVISIONS

PETITION FOR A WRIT OF CERTIORARI

Joshua Chapman-Sexton, the Petitioner, respectfully asks this Court to grant a Writ of Certiorari to review the decision of the Sixth Circuit Court of Appeals rendered in its Opinion entered on December 18, 2018, affirming his conviction and sentence.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals in *United States v. Joshua Chapman-Sexton* was rendered on December 18, 2018, in an unpublished opinion attached hereto as Appendix A at Appendix 1a.

The United States District Court for the Southern District of Ohio entered its Judgment in a Criminal Case on September 06, 2017, attached hereto as Appendix B at Appendix 31a. This followed the district court's denial of Mr. Chapman-Sexton's Motion to Suppress, attached hereto as Appendix C at Appendix 43a.

On February 15, 2019, the Sixth Circuit Court of Appeals denied a Petition for Rehearing *En Banc* filed in the case by Mr. Chapman-Sexton. The Order is attached hereto as Appendix D at Appendix 55a.

JURISDICTION

This Petition seeks review of the Opinion of the Sixth Circuit Court of Appeals, entered on December 18, 2018, affirming the Petitioner's conviction pursuant to the trial court's judgment of conviction entered on September 06, 2017. A Petition for Rehearing and Rehearing *En Banc* was timely filed with the United

States Court of Appeals for the Sixth Circuit by Mr. Chapman-Sexton, and was denied by Order dated February 15, 2019.

Jurisdiction was generally conferred upon the Court of Appeals pursuant to 28 U.S.C. §1291. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 and United States Supreme Court Rule 12.

This petition is timely filed pursuant to Supreme Court Rule 13.1 and 13.3.

CONSTITIUTIONAL PROVISIONS APPLICABLE TO ISSUES RAISED

The Fourth Amendment to the United States Constitution provides:

> 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.

STATEMENT OF THE CASE

A. Introduction

This case arises out of the denial of a Motion to Suppress the fruits of a warrantless search of a flash drive allegedly belonging to the Petitioner, Joshua Chapman-Sexton. Several facts are critical at the outset of this Court's review. First, the district court and the entirety of the panel below unanimously agree that the warrantless search in this case was unconstitutional. Second, the entirety of the Court of Appeals panel below agrees that the district court erred in finding that the exclusionary rule does not apply based on the independent source exception. Third, out of the four judges to review the warrantless search in this case, there have been three different opinions and applications of the exceptions to the exclusionary rule.

As a result of the items discovered during this illegal search, Mr. Chapman-Sexton is serving 292 months' imprisonment.

> As the First Circuit opined:
>
> > There are three basic concerns which surface in an inevitable discovery analysis: are the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and *does the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection? United States v. Silvestri,* 787 F.2d 736, 739 (1st Cir.1986)

If the lower Courts' decisions stand, the search in this case will act to significantly weaken Fourth Amendment protections.

B. The underlying case

D.J., a minor, Deven Coleman, and Christian Gullet, stole items, including a flash drive and Playstation 4, from Joshua Chapman-Sexton, an individual who was on supervised release because he had a prior conviction for possessing child pornography. Officer Chief Jim Hanzey spoke to Deven Coleman who told him that the flash drive and Playstation 4 both had child pornography on them, that he had viewed it. In the past, Mr. Coleman had been untruthful and given police unrelated information that was not reliable. Because he was on supervised release, Mr. Chapman-Sexton was required to notify his probation officer within 72 hours of being arrested or questioned by law enforcement. He did so after Officer Hanzey spoke to him about the stolen items.

Officer Hanzey then decided to conduct a warrantless search of the flash drive to confirm Coleman's claims. While doing so, he observed three images depicting

naked male children or male children engaged in sex acts, at which point he stopped searching the flash drive.

A search warrant affidavit was then completed which outlined the events including the warrantless search of the flash drive's contents. The warrant was issued and additional items of child pornography were located on the flash drive. Officer Hanzey then contacted Mr. Chapman-Sexton's probation officer to discuss the findings and allegations. The FBI Child Exploitation Task Force was also notified and searched the items, finding images and videos.

The Petitioner was indicted on three counts for receipt and possession of child pornography. He moved to suppress the evidence obtained from the warrantless search. At the suppression hearing, Officer Hanzey admitted that he looked at the flash drive prior to seeking a search warrant "to see if there was any child porn on the flash drive." He also admitted that he "knew you had to bring something to the table before they would entertain the search warrant." He further acknowledged that had he not looked at the contents of the flash drive, the police "more than likely would have gave it back to" Mr. Chapman-Sexton. He even stated that he did not believe he had probable cause until performing the warrantless search.

C. The District Court

The district court denied Mr. Chapman-Sexton's motion to suppress the evidence obtained from the flash drive by relying on the independent-source doctrine. In doing so, the district court determined that probable cause existed to support the search even without considering the tainted initial search of the flash drive by

Officer Hanzey. The court did not inquire into whether or not the law-enforcement officer was prompted to obtain the warrant by what [he] observed during the initial entry as required by this Court in *Murray v. United States*, 487 U.S. 533, 542 & n. 3 (1988).

D. The Appeal Majority

. On direct appeal, Mr. Chapman-Sexton challenged the district court's denial of his motion to suppress, and thus, his conviction.

The Sixth Circuit Court of Appeals affirmed Mr. Chapman-Sexton's conviction. However, the three-judge panel of the Court of Appeals, when addressing the validity of the search, disagreed with the district court's application of the independent-source doctrine and each other about how the warrantless search could avoid the exclusionary rule. The Sixth Circuit panel expressed "grave" concerns as to whether Officer Hanzey was prompted to obtain the warrant by what he observed during the initial entry, as he admitted that the prosecutor's office would not seek a search warrant unless he first confirmed that the flash drive had child pornography on it.

Nevertheless, the majority of the panel affirmed the judgment based on the inevitable-discovery exception, finding that Officer Hanzey had more than enough facts to contact Mr. Chapman-Sexton's probation officer even before looking at the contents of the flash drive. In addition, the Court expressed that Mr. Chapman-Sexton himself had independently contacted his probation officer as required by the terms of his supervised release, who, the majority explained, "would have inevitably

wanted to examine both the PlayStation and the flash drive that had been stolen..." In fact, the majority relied on the fact that the probation officer promptly contacted federal authorities who took over the investigation, obtained a warrant and then "lawfully conducted a search of the PlayStation and the flash drive." Thus, the majority concluded that the inevitable-discovery exception applied because "routine procedures that police would have used regardless of the illegal search would have resulted in the discovery of the disputed evidence." As a result, the majority affirmed the judgment of the district court.

E. The Appeal Concurring decision

One of the panel members concurred with the majority's judgment that the district court's reliance on the independent-source doctrine was faulty, but disagreed with the majority's conclusion that the evidence obtained from the warrantless search was admissible under the inevitable-discovery exception to the exclusionary rule. Instead, that Judge relied on the good-faith exception.

F. Rehearing

With the three differing opinions on which exception applies in this case, Mr. Chapman-Sexton filed a Petition for Rehearing and Rehearing *En Banc*. That Petition for Rehearing and Rehearing *En Banc* was denied by Order dated February 15, 2019.

As a result, this Petition follows.

REASONS FOR GRANTING THE PETITION

I. The question presented is of exceptional importance and this Court should grant this Petition to clarify the appropriate criteria for admitting evidence discovered during warrantless searches.

This Court has acknowledged "the importance of deterring police conduct that may invade the constitutional rights of individuals throughout the community." *United States v. Caceres*, 440 U.S. 741, 754 (1979). The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The exclusionary rule was created to require trial courts to exclude unlawfully seized evidence (seized without a warrant) in a criminal trial as the principal judicial remedy to deter Fourth Amendment violations. See, *e.g., Mapp v. Ohio,* 367 U.S. 643, 655 (1961); See also *Utah v. Strieff*, 136 S. Ct. 2056, 2060–61 (2016).

Courts have recognized several exceptions to the exclusionary rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. See *Murray v. United States,* 487 U.S. 533, 537 (1988). Second, and at issue here, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. See *Nix v. Williams,* 467 U.S. 431, 443–444 (1984). Third, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been

interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson v. Michigan,* 547 U.S. 586, 593 (2006).

This case involves a question of exceptional importance to law enforcement, individuals, and the Courts concerning the proper application of the Fourth Amendment warrant requirement, the exclusionary rule and the exceptions thereto. This Court has previously decided that an individual's privacy is an, if not the uppermost, explicit protection afforded by the Fourth Amendment. See, e.g., *United States v. Karo,* 468 U.S. 705, 714 (1984); and *Payton v. New York,* 445 U.S. 573 (1980). That explicit protection, however, is being eroded. Recent jurisprudence illustrates how courts are struggling to administer a uniform system of justice when it comes to the admission of evidence unlawfully seized. As a result, the exclusionary rule seems to be coming the exception despite blatant violations of an individual's constitutional rights. In this case alone, three of the four judges struggle and argue over three different exceptions to the exclusionary rule rather than just omit the evidence under the exclusionary rule. This Petition should be granted to allow not only the parties and the Courts in this case to understand the proper scope of Fourth Amendment protections, but also to act as guidance for future Courts and parties alike.

II. The decision of the Sixth Circuit conflicts with this Court's opinion in Nix v. Williams, 467 U.S. 431, and thus, the opinion of the Sixth Circuit is erroneous.

In *Nix,* this Court explained that the inquiry for whether the Fourth Amendment has been violated, whether the exclusionary rule should be applied, or whether an exception is warranted, must focus on "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Nix v. Williams*, 467 U.S. 431, 442, (1984). In other words, this Court created an exception to the exclusionary rule "if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means..." *Id.*, at p. 444. As the dissent summarizes, this doctrine allows that "unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred." *Id.*, at p. 458-459, Brennan, dissenting. The dissent clarifies that when the inevitable discovery exception applies, "the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed." *Id.* at p. 459, Brennan, dissenting.

1. **The decisions below fail to inquire into what would have happened had the unlawful search never occurred.**

In *Nix,* a search or investigation was already ongoing and the question before the court was whether or not the continued investigation, when conducted in a routine fashion, would have discovered the evidence. Here, no investigation started until Officer Hanzey looked at the flash drive meaning that the entire investigation was tainted from the beginning. Had the Courts below properly investigated what would have happened without that illegal viewing, they would have seen that there was no other, contemporaneous investigation of Mr. Chapman-Sexton that would have inevitably led to the discovery of the evidence.

In fact, the record below shows the following undisputed facts:

1. The source of the allegation regarding the contents of the flash drive originated with Deven Coleman, an individual who had been untruthful with Officer Hanzey in the past and who had a reputation for being unreliable.
2. Officer Hanzey did not believe he had probable cause to search the flash drive until after performing the unlawful search.
3. Officer Hanzey viewed the flash drive without a warrant on February 29, 2016.
4. Officer Hanzey "knew you had to bring something to the table before they would entertain the search warrant."
5. Officer Hanzey admitted that had he not unlawfully viewed the contents of the flash drive, he "more than likely would have gave it back to" Mr. Chapman-Sexton.

Thus, Officer Hanzey himself exemplifies that had he not unlawfully viewed the flash drive, then it is highly unlikely that a warrant would have been issued, likely that the flash drive would have been returned to Mr. Chapman-Sexton and unlikely that the contents of the flash drive would have been discovered. As such, had the unlawful search never occurred, it is unlikely that any of the current charges brought against Mr. Chapman-Sexton would have occurred.

2. The decisions below fail to focus on demonstrated, historical facts.

Case law is clear that "proof of inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." See *Nix v. Williams*, 467 U.S. 431, 444 n. 5 (1984). Stated differently, certain "demonstrated historical facts" must prove that lawful means, independent of any unconstitutional conduct, would have revealed the evidence. Based on the language of *Nix*, it would appear that **no** speculative elements can be considered by the trial court when deciding whether or not to employ the "inevitable discovery" exception. But obviously, based on the record below, speculation occurred by the courts. Thus, this Court should grant this Petition to address the question of how much speculation, if any, a trial court can use in order to rely on the inevitable discovery exception.

Here, the Court of Appeals speculated with regularity. For instance, the Court speculates that Officer Hanzey would have had probable cause to seek the warrant even without the unlawful search. But the demonstrated, historical facts before the court, by the officer's own testimony, were that he believed he did not have probable

cause until he viewed the flash drive and discovered the child pornography on it. Another fact of record was that he "knew he you had to bring something to the table before they would entertain the search warrant."

Next, the Court speculated that the probation officer would have inevitably wanted to examine the flash drive, but there are no demonstrated, historical facts to support that position. In addition, despite the demonstrated, historical fact that Coleman's reliability was in doubt, the Court nevertheless speculated that the prosecutor may have sought a warrant based on that information. This violates the requirement that the "inevitable-discovery" analysis focus on demonstrated, objective facts. Such an analysis is inherently speculative, and the district court's conclusions were not based on "demonstrated historical facts capable of ready verification." *Nix*, 467 U.S. at 444 n. 5.

3. The Opinion of the Sixth Circuit is erroneous.

The Sixth Circuit Court of Appeals was correct to disagree with the trial court over its reliance on the independent source exception. However, the majority was wrong to rely on the inevitable discovery exception. This Court has explained that the independent source exception and inevitable discovery exception are connected. The *Nix* decision stated:

> there is a functional similarity between these two doctrines in that the exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule. *Nix*, at 443–44.

Thus, unless the challenged evidence would have been obtained anyway absent the alleged misconduct, the exceptions do not apply.

Justice Breyer's dissenting opinion in *Hudson v. Michigan*, 547 U.S. 586 (2006) explains the inevitable discovery adopted in *Nix*. He clarifies that the inevitable discovery doctrine "does not refer to discovery that would have taken place if the police behavior in question had been lawful. The doctrine does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place." *Hudson v. Michigan*, 547 U.S. 586, 616 (2006). Justice Breyer continues to illustrate:

> The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one. See, *e.g., Coolidge v. New Hampshire,* 403 U.S. 443, 450–451 (1971). Instead, it must show that the same evidence "inevitably *would* have been discovered *by lawful means*." *Nix v. Williams,* 467 U.S., at 444 (emphasis added). "What a man *could* do is not at all the same as what he *would* do." Austin, Ifs And Cans, 42 Proceedings of the British Academy 109, 111–112 (1956). *Id.*

In fact, he points out that "The inevitable discovery exception rests upon the principle that the remedial purposes of the exclusionary rule are not served by suppressing evidence discovered through a "later, *lawful* seizure" that is "*genuinely independent* of an earlier, tainted one." *Id.,* citing *Murray v. United States,* 487 U.S. 533, 542 (1988).

Here, the Court of Appeals below errors in applying the inevitable discovery exception to Officer Hanzey's view of the flash drive. In fact, the court seemingly focuses on the discovery that would have taken place without the unlawful search,

and reaches the wrong conclusions. The Court also emphasizes what hypothetically could have happened if Officer Hanzey acted lawfully in the first place.

For instance, the majority below determined that Officer Hanzey had enough facts to contact the probation officer prior to illegally viewing the contents on the flash drive. The Court assumes that had the unlawful search by Officer Hanzey never occurred, he still would have had probable cause to seek the warrant. But the record below refutes this position. In fact, even Officer Hanzey himself admitted that he did not believe that he had probable cause to search until after unlawfully viewing three pictures on the flash drive. He also admitted that "I needed to have probable cause. That's why I looked..." Thus, in his own words, without the unlawful search, the officer doubted if he would have had probable cause to obtain a warrant.

The Court decision below also overlooks the testimony from Officer Hanzey himself that he could not go to the magistrate and apply for a warrant in his jurisdiction without more evidence than just the flash drive. In fact, he thought that the prosecutor would want more than Coleman's allegation and the knowledge of Mr. Chapman-Sexton's prior offense before requesting a warrant from the magistrate. He testified that he "knew you had to bring something to the table before they would entertain the search warrant." Thus, without the illegal search, Officer Hanzey would have still had the flash drive, but he admitted that he would have likely given it back to Mr. Chapman-Sexton without any further action taking place.

Next, the Court below offered that even if the illegal search did not occur, Mr. Chapman- Sexton still independently contacted his probation officer as required per the terms of his supervised release for another offense. While this is true, the nature of the initial contact was only to report that he had interacted with Officer Hanzey, and that he was a victim of a robbery of his "PlayStation and maybe games." In fact, there is nothing to support that the probation officer knew anything about the flash drive or the child pornography contained thereon. Contact informing the probation officer of the child pornography did not occur until days after the warrantless search took place.

The Court's claim below that the probation officer would have inevitably wanted to examine the flash drive because they would likely suspect that it would have child pornography on it, is unsupported. In fact, the record shows that the probation officer was not initially even aware of flash drive's existence. In addition, the record supports that it was federal officers who initiated contact with the probation officer, not the other way around. Thus, without the illegal search, this would never have occurred.

The "inevitable" discovery "refers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior." *Hudson v. Michigan*, 547 U.S. 586, 616 (2006). Here, without the illegal search, Officer Hanzey acknowledged that the flash drive would have been returned to Mr. Chapman-Sexton, likely without any further incident. Thus, had the illegal search never occurred, Mr. Chapman-Sexton would

have likely notified his probation officer about the robbery, recovered his flash drive from police, and moved on with his life.

III. The facts of this case present an ideal context for resolution of the issue.

This case presents a clear example of an officer participating in an unlawful search, thereby violating Mr. Chapman-Sexton's constitutional rights. The district court and Court of Appeals all agree that Mr. Chapman-Sexton's constitutional rights were violated. Thus, resolution is not clouded by that question.

In addition, this case presents this court with the perfect vehicle to address and clarify the proper standards for all of the exceptions to the exclusionary rule. Three of the four judges walk through explanations of why and how three differing exceptions save the search in this case from the exclusionary rule. In addition, Mr. Chapman-Sexton continues to advocate that his motion to suppress should have been granted. Therefore, Certiorari should be granted, giving this Court the perfect opportunity to clarify all principles of Fourth Amendment jurisprudence.

CONCLUSION

This case presents important issues involving fundamental rights under the Fourth Amendment to the United States Constitution. This Court can resolve the question presented, bringing clarity to the proper application and scope of the exclusionary rule and exceptions thereto. This Petition for Writ of Certiorari, should be granted.

Respectfully Submitted,

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Submitted: May 14, 2019

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SUBMITTED: May 14, 2019

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Re: Case No. 17-3933, *USA v. Joshua Chapman-Sexton*
Originating Case No. : 2:16-cr-00141-1

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. Richard W. Nagel

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 18a0624n.06

Case No. 17-3933

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
	)	
v.	)	
	)	
JOSHUA CHAPMAN-SEXTON,	)	
	)	
Defendant-Appellant.	)	OPINION
	)	

BEFORE: GILMAN, KETHLEDGE, and BUSH, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. Joshua Chapman-Sexton was convicted of receiving and possessing child pornography. He challenges the district court's denial of his motion to suppress evidence and the court's application of a sentencing enhancement. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. INTRODUCTION

A. Factual background

On February 28, 2016, officers from the Buckeye Lake Police Department (BLPD) attempted to stop D.J., a minor, from engaging in a fistfight with another individual. D.J. was with his two adult friends, Deven Coleman and Christian Gullett. The officers arrested D.J., who then

confessed that he, Coleman, and Gullett had stolen items from Chapman-Sexton's apartment. Among those items was a flash drive.

BLPD Chief Jim Hanzey later spoke with Chapman-Sexton, who confirmed that his PlayStation 4 and a few other items had been stolen. Because Chapman-Sexton had a prior conviction for possessing child pornography, he was required as a condition of his supervised release to notify his probation officer within 72 hours of being arrested or questioned by a law-enforcement officer. Chapman-Sexton accordingly called his probation officer after speaking with Chief Hanzey.

When Chief Hanzey subsequently spoke with Coleman, Coleman informed Chief Hanzey that both the PlayStation 4 and the flash drive contained child pornography. Coleman claimed that he had watched child pornography on these devices with Chapman-Sexton. He also said that Chapman-Sexton had engaged in sexual conduct with C.B., a 13-year-old boy, and that the boy's boxers were still in Chapman-Sexton's apartment.

The BLPD and Chief Hanzey had previously received incriminating information from Coleman regarding the illegal activity of others, some of which was not reliable. Nevertheless, Chief Hanzey testified that he found Coleman's statements regarding Chapman-Sexton credible because he knew that Chapman-Sexton was a registered sex offender with a federal conviction for possessing child pornography.

After speaking with Chapman-Sexton and Coleman, Chief Hanzey conducted a limited search of the flash drive to confirm Coleman's accusations. He observed three images depicting naked male children or male children engaged in sex acts, at which point he stopped searching the flash drive. Chapman-Sexton then came to the police station and confirmed that the PlayStation 4 and the flash drive belonged to him.

A state prosecutor subsequently drafted an affidavit in support of a warrant to search Chapman-Sexton's apartment. The affidavit set forth that Coleman and others had stolen electronic devices from Chapman-Sexton, that Chapman-Sexton confirmed that these devices were his, that Coleman alleged that the devices contained child pornography, and that Coleman claimed to have watched child pornography on these devices with Chapman-Sexton. It also stated that Chapman-Sexton had been recently released from prison for possessing child pornography and that Coleman had accused Chapman-Sexton of engaging in sexual activity with C.B. Moreover, the affidavit disclosed Chief Hanzey's limited review of the flash drive's contents. A state-court judge issued a search warrant later that day and the police promptly searched Chapman-Sexton's apartment.

The police obtained a second warrant two days later to search the flash drive and other electronic devices gathered from both the burglary and the apartment. Chief Hanzey then resumed his review of the flash drive and observed 13 photographs depicting young males "naked and performing oral sex on adults." He subsequently called Chapman-Sexton's probation officer and discussed the child-pornography allegations.

The above actions caused law-enforcement agents to contact the FBI Child Exploitation Task Force. This in turn prompted the FBI to obtain a federal warrant to search the electronic devices in question. Upon searching Chapman-Sexton's devices, the FBI discovered repeated visits to a Russian child-pornography website, videos of young males masturbating, images of naked children and children engaged in sex acts, and text messages between Chapman-Sexton and C.B. that suggested sexual contact. Among those messages was one where Chapman-Sexton told C.B.: "I love you too, now delete these messages," and C.B. replied: "We are really just friends with benefits, not a couple, okay?"

B. Procedural background

A grand jury indicted Chapman-Sexton on two counts of receiving child pornography and on one count of possessing child pornography. All of the video and images supporting the indictment were on the flash drive. Chapman-Sexton moved to suppress any evidence obtained from the forensic examination of his flash drive, arguing that Chief Hanzey's initial review violated Chapman-Sexton's constitutional rights and that all subsequent searches were inadmissible as "fruit of the poisonous tree." His motion was denied. *United States v. Chapman-Sexton*, No. 2:16-cr-141, 2017 WL 476737 (S.D. Ohio Feb. 3, 2017). The district court found that Chief Hanzey's warrantless review of the flash drive was indeed unlawful, but concluded that the evidence was nevertheless admissible under the independent-source doctrine. *Id.* at *4–6.

Chapman-Sexton was convicted by a jury on all three counts. At sentencing, the district court found that Chapman-Sexton had "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." It thus applied a five-level sentencing enhancement under U.S.S.G. § 2G2.2(b)(5). This pattern-of-activity finding was based on evidence that Chapman-Sexton had previously sexually abused Coleman and had recently sexually abused C.B. These accusations were supported by Coleman's trial testimony, FBI interviews of Coleman and C.B., an officer's interview of C.B.'s mother, and text messages sent between Chapman-Sexton and C.B.

Chapman-Sexton received two 292-month sentences and one 120-month sentence, to be served concurrently. This timely appeal followed.

II. ANALYSIS

A. Standard of review

1. Motion to suppress evidence

When a defendant appeals the denial of a motion to suppress evidence, we "review the district court's findings of fact under the clear-error standard and its conclusions of law de novo." *United States v. Quinney*, 583 F.3d 891, 893 (6th Cir. 2009). "A factual finding is clearly erroneous when, although there may be evidence to support it, the reviewing court, utilizing the entire evidence, is left with the definite and firm conviction that a mistake has been committed." *United States v. Sanford*, 476 F.3d 391, 394 (6th Cir. 2007) (citation and internal quotation marks omitted).

2. Sentencing

"Sentences in criminal cases are reviewed for both procedural and substantive reasonableness." *United States v. Morgan*, 687 F.3d 688, 693 (6th Cir. 2012). When reviewing a sentence for procedural reasonableness, we evaluate whether the district court

> (1) properly calculated the applicable advisory Guidelines range; (2) considered the § 3553(a) factors as well as the parties' arguments for a sentence outside the Guidelines range; and (3) adequately articulated its reasoning for imposing the chosen sentence, including any rejection of the parties' arguments for an outside-Guidelines sentence and any decision to deviate from the advisory Guidelines range.

United States v. Petrus, 588 F.3d 347, 351–52 (6th Cir. 2009). "The sentence may be substantively unreasonable if the district court chooses the sentence arbitrarily, grounds the sentence on impermissible factors, or unreasonably weighs a pertinent factor." *United States v. Brooks*, 628 F.3d 791, 796 (6th Cir. 2011). We generally apply the abuse-of-discretion standard to review

sentences for procedural and substantive reasonableness. *United States v. Bass*, 785 F.3d 1043, 1050 (6th Cir. 2015).

B. Motion to suppress evidence

The district court denied Chapman-Sexton's motion to suppress the evidence from the flash drive, relying on the independent-source doctrine. This doctrine "holds that evidence will be admitted if the government shows that it was discovered through sources 'wholly independent of any constitutional violation.'" *United States v. Jenkins*, 396 F.3d 751, 757 (6th Cir. 2005) (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)). So evidence obtained pursuant to a search warrant that relied, in part, on unlawfully obtained information may nevertheless be admissible under the independent-source doctrine. As explained in *Jenkins*, "[i]f the application for a warrant 'contains probable cause apart from the improper information, then the warrant is lawful and the independent source doctrine applies, providing that the officers were not prompted to obtain the warrant by what they observed during the initial entry.'" 396 F.3d at 758 (quoting *United States v. Herrold*, 962 F.2d 1131, 1141–42 (3d Cir. 1992)); *see also Murray v. United States*, 487 U.S. 533, 542 & n.3 (1988) ("To determine whether the warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred . . . .").

The district court analyzed the first prong of *Jenkins* and determined that probable cause existed to support the search even without considering the tainted initial search of the flash drive by Chief Hanzey. But the court failed to consider the second prong of *Jenkins*—i.e., whether the law-enforcement officer was "prompted to obtain the warrant by what [he] observed during the initial entry." *See Jenkins*, 396 F.3d at 758. We have grave doubts as to whether this second prong was met because Chief Hanzey expressed concern that the prosecutor's office would not seek a search warrant unless he first confirmed that the flash drive contained child pornography.

But we are free to affirm the judgment of the district court on any ground supported by the record, including a ground not articulated by the lower court. *United States v. Binford*, 818 F.3d 261, 267 (6th Cir. 2016). One alternate ground to support the decision denying Chapman-Sexton's motion to suppress is the inevitable-discovery exception. As articulated in *United States v. Keszthelyi*, 308 F.3d 557 (6th Cir. 2002), the inevitable-discovery exception "applies when . . . evidence discovered during an illegal search would have been discovered during a later legal search and the second search inevitably would have occurred in the absence of the first." *Id.* at 574.

The record supports the application of this exception because Chief Hanzey had more than enough facts to contact Chapman-Sexton's probation officer even before he looked at the contents of the flash drive, and Chief Hanzey had every reason to do so. Chapman-Sexton, moreover, had independently contacted his probation officer as he was required to do by the terms of his supervised release.

The probation officer, in turn, would have inevitably wanted to examine both the PlayStation and the flash drive that had been stolen from Chapman-Sexton's residence and that were now in Chief Hanzey's possession. A flash drive "is readily usable as a means to conceal prohibited images from discovery," *United States v. Makeeff*, 820 F.3d 995, 1001–02 (8th Cir. 2016), and the probation officer would likely suspect that Chapman-Sexton was concealing child pornography.

The probation officer, in fact, promptly contacted federal law-enforcement authorities. After this contact, a federal prosecutor and the FBI Child Exploitation Task Force took over the investigation from Chief Hanzey, obtained a warrant from a federal magistrate judge, and then lawfully conducted a search of the PlayStation and the flash drive.

The inevitable discovery exception therefore applies in this case because "routine procedures that police would have used regardless of the illegal search would have resulted in the discovery of the disputed evidence." *See Keszthelyi*, 308 F.3d at 574 (quoting *United States v. Ford*, 184 F.3d 566, 577 (6th Cir. 1999)). We thus conclude that the incriminating evidence against Chapman-Sexton would have been inevitably discovered by the government even without Chief Hanzey's initial prewarrant search of the flash drive.

C. Sentencing enhancement

Next we evaluate Chapman-Sexton's challenges to his sentence. First, he argues that the district court inappropriately applied a five-level sentencing enhancement for engaging in a "pattern of activity involving the sexual abuse or exploitation of a minor." Second, Chapman-Sexton claims that the consideration of uncharged conduct in determining his sentence is inconsistent with the holding in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

1. Procedural challenge

Chapman-Sexton argues that his sentence is procedurally unreasonable because the district court applied the pattern-of-activity enhancement under U.S.S.G. § 2G2.2(b)(5). Under the Sentencing Guidelines, an individual convicted of a child-pornography charge may receive a five-level sentencing enhancement if the court finds, by a preponderance of the evidence, that he has "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." *Id.* This is defined as "any combination of two or more separate instances of the sexual abuse or exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct." *Id.* cmt. 1.

Chapman-Sexton claims that the government did not prove by a preponderance of the evidence that Chapman-Sexton engaged in such a pattern of activity. To establish the pattern-of-activity enhancement, the district court considered the statements and information provided by Coleman, statements from C.B., and text messages between C.B. and Chapman-Sexton. Chapman-Sexton argues that these statements and information are not credible and do not provide sufficient support for the enhancement. Disputed facts, however, "do not make evidence insufficient." *United States v. Paull*, 551 F.3d 516, 527 (6th Cir. 2009). The district court made factual findings based largely on witness credibility, and "this court affords great deference to such credibility determinations." *United States v. Navarro-Camacho*, 186 F.3d 701, 705 (6th Cir. 1999). For those reasons, we do not find any error in the court's procedural determination of Chapman-Sexton's sentence.

*2. **Constitutional challenge***

Chapman-Sexton also posits that the application of the pattern-of-activity sentencing enhancement conflicts with the Supreme Court's rationale in *Nelson*. The defendants in *Nelson* were found guilty of crimes involving sexual assault, sentenced to jail, and ordered to pay court costs, fees, and restitution. On appeal, their convictions were either overturned or vacated. Following that, the defendants were acquitted on retrial or not retried at all. The state, however, retained a portion of the defendants' money and would not return the funds unless a defendant could prove his or her innocence by clear and convincing evidence. The Supreme Court concluded that this procedure violated a defendant's due process rights: "[O]nce those convictions were erased, the presumption of innocence was restored." *Nelson*, 137 S. Ct. at 1255. As a result, the state had to return the defendants' money and could not impose any burden of proof on them.

Chapman-Sexton points to *Nelson* for the proposition that "the presumption of innocence lies at the foundation of our criminal law" and that the state "may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." *Id.* at 1256 (internal quotation marks omitted and emphasis in original). That proposition, however, does not bar criminal punishment for individuals convicted of a crime. *Nelson* provides that criminal punishment cannot be imposed on individuals found guilty of "no crime" at all. Chapman-Sexton, on the other hand, has been convicted of several crimes, and he thus may be criminally punished.

Nelson, moreover, does not *sub silentio* overrule *United States v. Watts*, 519 U.S. 148 (1997), which holds that a jury's verdict of acquittal on one of multiple charges "does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. This is part of a sentencing judge's role in considering the defendant's character and conduct when determining a sentence. *Id.* at 154–55. In sum, the district court properly applied the Sentencing Guidelines in this case.

III. CONCLUSION

For all the reasons set forth above, we **AFFIRM** the judgment of the district court.

JOHN K. BUSH, Circuit Judge, concurring in part and concurring in the judgment. I concur in the majority's judgment and its underlying reasoning that the district court properly applied the Sentencing Guidelines to calculate Chapman-Sexton's sentence. However, I do not agree with the majority's conclusion that the evidence obtained as a result of Chief Hanzey's warrantless viewing of the flash drive is admissible under the inevitable-discovery exception to the exclusionary rule. Nonetheless, that evidence is admissible under the good-faith exception, and therefore I concur in the judgment with respect to the suppression issue, because a reasonable officer could have believed the private-search doctrine applied.

I.

The majority correctly concludes that we cannot affirm based on the independent-source doctrine, because the district court failed to analyze the second, subjective element from *United States v. Jenkins*, 396 F.3d 751, 758 (6th Cir. 2005): whether Chief Hanzey would have sought a search warrant absent the information obtained through his pre-warrant search of the flash drive. But the majority believes the inevitable-discovery doctrine dictates affirmance. I respectfully disagree.

The modern statement of the inevitable-discovery doctrine comes from *Nix v. Williams*, 467 U.S. 431 (1984), which involved a search for a murder victim's body. Police officers unlawfully persuaded the defendant to direct them to the corpse, *id.* at 435–36, but the Supreme Court held the evidence thus obtained was nevertheless admissible, *id.* at 449–50. The Court's rationale was that when police questioned the defendant and obtained his cooperation, volunteer search teams were within two and a half miles of the body. *Id.* at 448–50. Therefore, the Court concluded, the corpse would inevitably have been discovered, even if discovery would have taken longer, in the absence of the illegally obtained confession. *Id.*

Even though the independent-source exception did not apply in *Nix*, the Court noted that the rationale for that doctrine is similar to that of the inevitable-discovery exception:

> When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place.

Id. at 443–44. Thus, the two doctrines are linked: neither exception applies unless the challenged evidence would have been obtained anyway absent the alleged misconduct. *See id.* at 444.

To rephrase this point based on the facts here, a necessary prerequisite for either the inevitable-discovery exception or the independent-source exception to apply is that the incriminating evidence would have necessarily been discovered even if Chief Hanzey had not examined the contents of the flash drive without a warrant. And just as the independent-source doctrine requires us to ask about the state of the world the moment before Chief Hanzey looked at the drive, the inevitable-discovery doctrine requires us "to determine, viewing affairs as they existed at the instant before the [allegedly] unlawful search, what would have happened had the . . . search never occurred." *United States v. Leake*, 95 F.3d 409, 412 (6th Cir. 1996) (quoting *United States v. Kennedy*, 61 F.3d 494, 498 (6th Cir. 1995)). A preponderance of the evidence must support our finding of inevitability. *United States v. Keszthelyi*, 308 F.3d 557, 574 (6th Cir. 2002) (citing *Nix*, 467 U.S. at 444). So we must ask whether a preponderance of the evidence supports the conclusion that, knowing what Chief Hanzey knew at the moment before he viewed the flash drive, law-enforcement authorities would inevitably have sought and obtained a warrant.

Unfortunately, the majority's analysis does not focus on "the instant before the [allegedly] unlawful search." *Leake*, 95 F.3d at 412. And its analysis puts too much strain on the concept of inevitability. The majority concludes that the evidence leading to Chapman-Sexton's conviction

would have been discovered because (1) "Chief Hanzey had more than enough facts to contact Chapman-Sexton's probation officer even before he looked at the contents of the flash drive, and Chief Hanzey had every reason to do so;"[1] (2) "Chapman-Sexton . . . had independently contacted his probation officer as he was required to do by the terms of his supervised release;" and (3) "[t]he probation officer, in turn, would have inevitably wanted to examine both the PlayStation and the flash drive" because "the probation officer would likely suspect that Chapman-Sexton was concealing child pornography." Majority Opinion at 7. The majority supports its conclusion that these suppositions make the inevitable-discovery doctrine applicable by pointing out that "[t]he probation officer, in fact, promptly contacted federal law enforcement authorities" after learning that Chapman-Sexton was under investigation by local authorities for child pornography-related offenses. *Id.*

These statements indicate that the majority assumes one of three possible courses of events was certain to occur in the absence of Chief Hanzey's warrantless search of the drive. Respectfully, I submit, each of these hypothetical chains of events contains fatally weak links.

The first scenario goes like this: (1) Chief Hanzey, based on talking to Coleman and on knowing that Chapman-Sexton had previously been convicted of sex offenses, would have gone to the Licking County Prosecutor's Office and proposed that it seek warrants to search Chapman-Sexton's home and the flash drive; (2) the Licking County Prosecutor's Office would have sought warrants based on Coleman's statement and on Chapman-Sexton's criminal history.[2]

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[1] Whether or not Chief Hanzey "had every reason" to contact the probation officer, the relevant question is whether he inevitably would have done so.

[2] Chief Hanzey testified that he could not simply go to the magistrate and apply for a warrant in his jurisdiction. Instead, the jurisdiction's protocols required Chief Hanzey to go to the Prosecutor's Office with evidence and ask that office to create an affidavit and seek a warrant. (R. 49, Page ID 344.)

The likelihood that these two independent decisionmakers—Chief Hanzey and the Prosecutor's Office—would have acted as this hypothetical assumes is supported by the district court's conclusion that Chief Hanzey had probable cause to seek a warrant before he viewed the flash drive. *United States v. Chapman-Sexton*, Case No. 2:16-cr-141, 2017 WL 476737, at *6 (S.D. Ohio Feb. 3, 2017). And it is possible Chief Hanzey would have sought a warrant absent having viewed the drive. However, the question whether the Licking County Prosecutor's Office would "inevitably" have sought a warrant does not have a straightforward answer. Chief Hanzey, in fact, testified at the suppression hearing that a principal reason he viewed the flash drive before seeking a warrant was that he thought the prosecutor would want more than simply Coleman's statement, and the knowledge that Chapman-Sexton was a convicted offender, before requesting a warrant from the magistrate. (R. 49, Page ID 393–94.) Consider the following exchange from the suppression hearing:

> Q [W]hy did you look?
>
> A Because I wanted to make sure there was for myself, and to have something to bring to Licking County Prosecutor's Office.
>
> Q Why did you not think just Mr. Coleman's statement would be enough for the prosecutor?
>
> A Because our prosecutor's office likes for us to view the evidence.
>
> Q Well, then, why did you only look at three pictures?
>
> A Because after three pictures I believed that there was enough probable cause at that time to remove it from the computer and call our prosecutor's office and tell them what I had.

(*Id.*) And this exchange:

> Q What did you believe about whether or not the prosecutor would approve a search warrant without you looking at the thumb drive?

> A I know Licking County. Like I said, I've been working with them for over 31 years and I knew you had to bring something to the table before they would entertain the search warrant.

(*Id.* at 342.) Even if Chief Hanzey had probable cause for a warrant before he looked at the flash drive, the Licking County Prosecutor's Office may not have agreed that there was probable cause. Therefore, the supposition that issuance of a valid warrant would have been inevitable fails on the circumstances of this case.

It is also doubtful, even putting aside the particular practices of the Licking County Prosecutor's Office, whether Chief Hanzey would have sought a warrant had he not looked at the flash drive. His statements at the suppression hearing suggested mixed feelings as to whether he had probable cause for a warrant without seeing for himself whether there was pornography on the drive. (*Compare* R. 49, Page ID 342 (After hearing Coleman's statement that Chapman-Sexton had child pornography on the flash drive and that Coleman had seen it, and knowing Chapman-Sexton's history, "I believe at that time I had probable cause to see if a crime had been committed.") *with id.* at Page ID 393–94 ("[A]fter three pictures I believed that there was enough probable cause at that time to . . . call our prosecutor's office . . . .") ("I needed to have probable cause. That's why I looked, knowing [Chapman-Sexton's] background and then the statement I got from Devon [sic] Coleman.").) This vacillating testimony is the reason the district court's independent-source analysis ran aground: that analysis was simply unclear as to the subjective likelihood that Chief Hanzey would have sought a warrant absent his looking at the flash drive. This uncertainty similarly prevents our finding that the evidence would inevitably have been discovered.

The second possible chain of events goes like this: (1) Chapman-Sexton's probation officer, based on his conversation with Chapman-Sexton the day after the burglary, would have

notified local authorities that Chapman-Sexton might have pornography on the flash drive or the stolen gaming system; (2) local authorities would have then sought a warrant for Chapman-Sexton's residence and the flash drive, based on the probation officer's statement and maybe also on Coleman's statement and Chapman-Sexton's criminal history.

This hypothetical chronology also fails to establish inevitable discovery absent Chief Hanzey's warrantless search. Chapman-Sexton did talk to his probation officer the day after the burglary, in compliance with a supervised-release term that required him to speak to his probation officer after interacting with law-enforcement officers. But the probation officer only heard—and apparently accepted at face value—Chapman-Sexton's unadorned statement that "a PlayStation and maybe games" had been taken.[3] (R. 68, Page ID 981.) The probation officer's testimony indicated he had not known that a flash drive had also been taken, much less that pornography was on the drive. He did not even know the PlayStation could be used to access the Internet. (*Id.* at Page ID 986–87.) This evidence weighs against a finding that the probation officer would inevitably have suspected there was pornography stored on any of the stolen items solely on the basis of his post-burglary conversation with Chapman-Sexton.

It is true that Chapman-Sexton did later inform his probation officer that Chapman-Sexton was under investigation for possessing child pornography, but that conversation occurred several days *after* the warrantless flash-drive search. (*Id.* at 982–83.) The information from that conversation, therefore, is not relevant to the inevitable-discovery analysis, which, as noted, focuses on the information available the moment *before* the warrantless search. *See Leake*, 95 F.3d at 412.

[3] That is how the probation officer's trial testimony paraphrased what Chapman-Sexton had told him.

But assume for the sake of argument that the probation officer would have developed suspicions about Chapman-Sexton. For the majority's analysis to work, the probation officer also would have had to tell the local authorities of his suspicion, and they might or might not have sought and might or might not have obtained a valid warrant to search the drive. Or the probation officer might have contacted federal law enforcement, but that appears even more remote, as in this case the probation officer did not talk to federal law enforcement at all until the local investigation was already well underway. Even then, the federal officers initiated contact with the probation officer, not the reverse. (*See* R. 35, Page ID 168–69; R. 68, Page ID 975, 1005.)

With respect to these first two possible chains of events, we must also remember that Coleman's reliability was in doubt. That doubt may have motivated Chief Hanzey's looking at the drive in the first place. Even assuming he would have sought a warrant without examining the drive's contents, we do not know whether the Prosecutor's Office would have found Coleman reliable. Similarly, had another local officer or a federal officer analyzed the facts available to Chief Hanzey, that officer may have chosen not to accord Coleman's statements much credence. The majority's conclusion that the evidence would inevitably have been found through legal means, therefore, depends on its assessment of various individual officers' assessments of Coleman's reliability. These credibility determinations render the inevitable-discovery exception inappropriate for use here because of our inability to see into the minds of these individuals. This court has recognized that the best inevitable-discovery analysis is one that focuses on demonstrated, objective facts:

> The government can satisfy its burden by showing that routine procedures that police would have used regardless of the illegal search would have resulted in the discovery of the disputed evidence . . . . [I]f the defendant shows that the police were not in fact following those routine procedures in the particular case, the government's evidence about what police *would have done* must bow to contrary evidence about what they *actually did*.

United States v. Ford, 184 F.3d 566, 577 (6th Cir. 1999) (citing *Kennedy*, 61 F.3d at 500). Here, the government's arguments about what Chief Hanzey or the Prosecutor's Office "would have done" had he not viewed the flash drive "must bow" to the evidence that he in fact did view it and all subsequent actions by law enforcement occurred because of that action. *Id.* Even if Chief Hanzey had followed "routine procedures" in this case, moreover, county police would not inevitably have discovered the evidence. *Id.* To the contrary, Chief Hanzey's testimony suggested that Licking County prosecutors' routine procedure was to require police to bring them concrete evidence *before* they would seek a warrant. (*See* R. 49, Page ID 342, 393–94.)

The third possible course of events on which the majority's theory might succeed goes like this: (1) The probation officer would have become suspicious that Chapman-Sexton had pornography on one or more of the stolen devices; (2) the probation officer would have sought and obtained from law enforcement the permission to examine those items himself.

This third possible chronology suffers from the same flaws as the second possible chronology and one additional flaw. As discussed, the probation officer apparently did not suspect—until his second conversation with Chapman-Sexton, several days after the investigation had already begun—that Chapman-Sexton was in possession of child pornography. Furthermore, even then the probation officer apparently did not become aware of the flash drive's existence—or of Chapman-Sexton's ability to access the Internet with the PlayStation—immediately. To the contrary, the probation officer did not hear from Chief Hanzey about the nature of the "allegations" against Chapman-Sexton until March 2, which was several days after the investigation had commenced. (R. 68, Page ID 985.)

In addition, it is not clear, even had the probation officer become suspicious about the flash drive or the PlayStation, that he had authority to search any of Chapman-Sexton's property

himself. The supervised-release terms did not permit the probation officer to conduct a search. And once the property was in the possession of law enforcement, as it was by the time the probation officer learned of the burglary from Chapman-Sexton, the probation officer might not have been allowed to access it. He might have had to ask permission, which the authorities might or might not have granted, and even then, it is not clear the probation officer would have thought he had authority under the supervised-release conditions to search Chapman-Sexton's belongings.

In sum, any application of the inevitable-discovery doctrine to this case requires us to assume that several independent actors would have made discretionary decisions that combined to result in a valid warrant for the search of Chapman-Sexton's residence or the flash drive. But our precedent cautions us to "keep speculation at a minimum," when analyzing whether the inevitable-discovery exception fits the evidence, "by focusing on 'demonstrated historical facts capable of ready verification or impeachment.'" *Ford*, 184 F.3d at 577 (quoting *Leake*, 95 F.3d at 412); *accord Keszthelyi*, 308 F.3d at 574.

In fact, we usually apply the inevitable-discovery doctrine when the facts do not require us to make significant suppositions about the strategic decisions that independent law-enforcement officers would have made. *See, e.g.*, *Keszthelyi*, 308 F.3d at 574–75. In the paradigmatic case to apply the doctrine, such as *Nix*, a search or investigation was already ongoing, and the only question was whether the continued search or investigation, when conducted in a routine fashion, would have turned up the disputed evidence. *See* 467 U.S. at 448–50. By contrast, here, there was no indication that any law-enforcement department—local, state, or federal—was going to begin an investigation until Chief Hanzey looked at the flash drive. True, Chief Hanzey was investigating a burglary when he spoke with Deven Coleman. But the point is that Coleman's statements sparked the investigation into Chapman-Sexton's possession of child pornography, and

that investigation was colored by the warrantless search from its inception. At the time Chief Hanzey viewed the contents of the flash drive, there was no ongoing investigation of Chapman-Sexton that inevitably would have uncovered the evidence.

This court's decision in *Keszthelyi* also demonstrates the proper application of the inevitable-discovery doctrine, and it is distinguishable from this case. There, we applied the inevitable-discovery exception to a search (pursuant to a warrant) that followed (1) a legal search, (2) an illegal search, and (3) statements by three witnesses. *Keszthelyi*, 308 F.3d at 563–64. This court held that evidence found in (illegal) search #2 was admissible for two reasons. First, search #3 was legal, because the warrant affidavit contained enough information from (legal) search #1 and the witness statements to support probable cause, even absent the information from search #2.[4] *Id.* at 575. Second, search #3 would have discovered the same evidence actually found in search #2 even if search #2 had never occurred, because search #3 was equal in scope to search #2. *Id.* at 574–75.

By contrast, in this case, we do not know that Chief Hanzey would even have applied for the first warrant had he not looked at the flash drive. Or assume Chief Hanzey *had* viewed the drive, and then sought a warrant, as in fact he did. If we assume that the magistrate would have issued a warrant on the basis of the non-tainted information in the warrant affidavit alone, then

[4] As this recitation of the facts suggests, the facts of *Keszthelyi* may also be analyzed under the independent-source doctrine. Indeed, although the court purported to base its holding on the inevitable-discovery doctrine, it relied heavily on *Murray v. United States*, 487 U.S. 533 (1988), a foundational independent-source-doctrine case. *See Keszthelyi*, 308 F.3d at 574 (discussing *Murray*, 487 U.S. at 535–36, 541). In *Keszthelyi*, the independent source would have been the search warrant containing ample basis for a probable-cause finding absent the illegally obtained evidence. The inevitable-discovery doctrine, however, requires courts to focus on what would have happened absent the allegedly illegal search rather than on whether the evidence actually obtained through that search had an independent, valid source. Regardless, *Keszthelyi* is a better case for the inevitable-discovery exception than this case. In *Keszthelyi*, unlike in this case, law-enforcement officers had already demonstrated a willingness and ability to seek and obtain search warrants before the illegal search took place. *See id.* at 563. Therefore, the court could rely on a minimum of speculative inference about whether the officers would have obtained the evidence legally. *See id.* at 574.

maybe we could find, like the *Keszthelyi* court, that the search supported by the warrant was not "a product of" the warrantless search. *Id.* at 575. But for the inevitable-discovery doctrine (as distinct from the independent-source doctrine) to apply, we must find, not that the warrant affidavit contained probable cause absent the information found during the warrantless search, but that it contained information making it inevitable that the Licking County Prosecutor's Office would have sworn out an affidavit seeking a warrant and inevitable that a magistrate would have issued a warrant. Such inevitability is lacking because Chief Hanzey's statements about the Licking County Prosecutor's Office suggest that the office may not have sought a warrant without his having viewed the drive. Those doubts were not present in *Keszthelyi*, where officers had already obtained one valid warrant before the illegal search ever took place. *Id.* at 563.

II.

Because I believe it is improper to affirm the district court's admission of the evidence based on the inevitable-discovery doctrine, I must ask whether another doctrine supports admissibility. The government presents three alternative bases: the good-faith exception, the "private-search" doctrine, and an argument that Chapman-Sexton (as a convicted offender on supervised release) had a "reduced expectation of privacy" in his belongings such that they could be searched without a warrant and upon reasonable suspicion. I need not consider the last alternative. Because the applicability of the private-search doctrine is a close call in this case, the good-faith exception applies to allow admission of the evidence and affirmance of the district court.[5]

[5] We review de novo the legal conclusions underlying a district court's denial of a motion to suppress. *United States v. Quinney*, 583 F.3d 891, 893 (6th Cir. 2009). We "may affirm on any ground supported by the record and may consider trial evidence in addition to evidence considered at the suppression hearing." *United States v. Binford*, 818 F.3d 261, 267 (6th Cir. 2016) (citing *United States v. Gill*, 685 F.3d 606, 609 (6th Cir. 2012)). Therefore, we could affirm based on any applicable exception. Because I believe that the good-faith exception would apply regardless of this court's outcome on the private-search doctrine—which would be a difficult decision requiring

The good-faith exception applies to admit evidence obtained in violation of the Fourth Amendment's requirements when the initial search was "close enough to the line of validity" that a reasonable officer could have believed it did not violate the Fourth Amendment. *United States v. McClain*, 444 F.3d 556, 566 (6th Cir. 2005) (citation omitted); *see United States v. Leon*, 468 U.S. 897, 905 (1984). "[T]he good faith exception . . . can apply in a situation in which the affidavit supporting the search warrant is tainted by evidence obtained in violation of the Fourth Amendment." *McClain*, 444 F.3d at 565; *see id.* at 566. In *McClain*, this court held that the exclusionary rule did not apply where officers had obtained evidence during a warrantless protective sweep, which they incorrectly but reasonably believed was justified by an exigency, and had obtained a warrant based in part on that evidence. *Id.* at 565–66.

Here, like the officers in *McClain*, a reasonable officer could have believed the Fourth Amendment did not require him to get a warrant. This is because a reasonable officer could have believed the private-search doctrine, which our circuit has recognized, justified a warrantless search of the flash drive.

The seminal case for the private-search doctrine is *United States v. Jacobsen*, 466 U.S. 109 (1984). In *Jacobsen*, employees of a private carrier opened a parcel entrusted to the carrier and found it contained a white powder.[6] *Id.* at 111. The employees partially repackaged the parcel

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harmonization of several of this court's decisions involving dissimilar fact patterns—I need not determine whether the private-search doctrine does apply on the facts of this case.

[6] In *Jacobsen*, the carrier's employees had authority to open the package pursuant to a company policy. *See* 466 U.S. at 111. Here, of course, Coleman had no authority to burgle Chapman-Sexton's house. So long as the private actor was not acting as an agent of the government, the illegality of the private actor's taking has no bearing on the legality of a subsequent search by law enforcement. *See, e.g.*, *United States v. Knoll*, 116 F.3d 994, 997–98 (2d Cir. 1997) (finding no Fourth Amendment violation when police searched defendant's files, which had been stolen by private actors and searched by the private actors before being given to the police); *see also Walter v. United States*, 447 U.S. 649, 656 (1980) ("It has . . . been settled since *Burdeau v. McDowell*, 256 U.S. 465 [1921] . . . that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully." (citation omitted)).

and contacted federal law-enforcement officers, who came to the carrier's facility and opened the package again. *Id.* Without getting a warrant, the officers then took a sample of the white powder, tested it, and found that it was cocaine. *Id.* at 111–12. The Supreme Court held that the Fourth Amendment's requirements did not apply to the federal officers' search because it did not "exceed[] the scope" of the earlier search conducted by the carrier's employees. *Id.* at 115. In other words, the defendant's privacy interest in the package was no more invaded by the government's search than it had already been invaded by the employees' search.[7] *See id.*

Our court has applied the private-search doctrine numerous times. For example, in *United States v. Bowers*, 594 F.3d 522 (6th Cir. 2010), this court held that pornographic photographs found by officers looking through an album owned by the defendant were admissible, even though the officers acted without a warrant, because the officers' search followed and did not exceed the scope of a previous search conducted by the defendant's housemate, who had led the officers to the album after she learned it contained pornography. *Id.* at 527.

In *United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015), by contrast, this court found evidence was not admissible where an officer viewed files on a personal computer pursuant to a private actor's informing the officer that she had viewed pornography on the computer. *Id.* at 488–89. This court found that the officer could not have been certain, pre-search, that he would see only the files that the private actor had previously discovered. *Id.* Instead, the officer had run the risk of viewing personal information that was still within the defendant's legitimate expectation of privacy because the private actor had not viewed it. *Id.*

[7] Although the Court acknowledged that the field test did, in some sense, exceed the scope of the private search, it stated that "[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy." *Jacobsen*, 466 U.S. at 123.

While finding the evidence inadmissible on the facts in *Lichtenberger*, this court reviewed prior cases, including some from other circuits, and indicated that the focus of the private-search doctrine is on whether the officers had a "virtual certainty" of uncovering nothing beyond the evidence already found by the private actor. *Id.* *Lichtenberger* also emphasized that the considerations of *Jacobsen*, when concretized in the context of searches of "complex electronic devices," *Lichtenberger*, 786 F.3d at 487, must recognize a heightened privacy interest in light of *Riley v. California*, 134 S. Ct. 2473, 2485 (2014), which held that officers must get a warrant before a search incident to arrest of a suspect's cell phone.

Lichtenberger dealt with pornography stored on a personal computer and did not address whether its holding extended to all electronic devices. However, several other circuits have applied the private-search doctrine to uphold warrantless searches of other types of electronic devices, and, in particular, electronic storage devices analogous to the one at issue here. For example, in *Rann v. Atchison*, 689 F.3d 832, 837 (7th Cir. 2012), the Seventh Circuit held that the private-search doctrine applied to the officers' warrantless search of a camera memory card and a zip drive that the defendants' daughter ("S.R.") and wife, respectively, brought to the officers. S.R. told the officers that the defendant had taken pornographic pictures of her. *Id.* at 834. Although the defendant argued that "the record contain[ed] no evidence that S.R. or her mother knew the digital storage devices contained images of child pornography prior to the police viewing," *id.* at 836, the Seventh Circuit stated that the Illinois Appellate Court had been reasonable in concluding that "S.R. and her mother knew exactly what the memory card and the zip drive contained," *id.* at 838. The Seventh Circuit continued:

> S.R. testified that she knew [the defendant] Rann had taken pornographic pictures of her and brought the police a memory card that contained those pictures. S.R.'s mother also brought the police a zip drive containing pornographic pictures of her daughter. Both women brought evidence supporting S.R.'s allegations to the

> police; it is entirely reasonable to conclude that they knew that the digital media devices contained that evidence.

Id. In holding that Rann's counsel was not ineffective for failing to move to suppress the evidence found on the memory card and zip drive, the Seventh Circuit expressly stated that the warrantless searches of those devices "did not violate the Fourth Amendment," and therefore a motion to suppress would have been futile. *Id.*

Similarly, in *United States v. Runyan*, 275 F.3d 449, 464 (5th Cir. 2001), the Fifth Circuit upheld warrantless searches of electronic storage devices based on the private-search exception. In *Runyan*, private actors had trespassed on the defendant's ranch and found a duffel bag containing pornographic photographs, as well as numerous computer disks, compact disks, and a camera. *Id.* at 453. A subsequent private search of the defendant's house revealed more compact disks, floppy disks, and zip disks. *Id.* One of the private searchers looked at "approximately twenty of the CDs and floppy disks that had been removed from the ranch and found that they contained child pornography." *Id.* The private searchers turned over the evidence to the police, who, in turn, viewed the disks without a warrant and confirmed that they contained pornography. *Id.* at 453–54.

In holding that the images viewed by police on the floppy disks and compact disks were admissible under the private-search doctrine, the Fifth Circuit stated that the focus of *Jacobsen* is on "whether the authorities obtained information with respect to which the defendant's expectation of privacy has not already been frustrated." *Runyan*, 275 F.3d at 461. After a lengthy and thoughtful analysis of *Jacobsen* and private-search cases from other circuits, see *Runyan*, 275 F.3d at 462–63, the Fifth Circuit concluded that "under *Jacobsen*, confirmation of prior knowledge does not constitute exceeding the scope of a private search," *id.* at 463. Applying this principle to the officers' searches of the disks, the Fifth Circuit held that for those disks which officers knew the

private searchers had already viewed, the warrantless searches did not exceed the scope of the private searches even though the officers "examined more files on each of the disks than did each of the private searchers." *Id.* at 464. In so holding, the court explicitly compared the electronic storage devices to closed, physical containers: "the police do not engage in a new 'search' for Fourth Amendment purposes each time they examine a particular item found within the container." *Id.* at 465.

Applying *Jacobsen*, *Bowers*, *Lichtenberger*, *Rann*, and *Runyan* to this case, it is a close call whether the private-search doctrine made Chief Hanzey's viewing the flash drive without a warrant legal. On the one hand, *Jacobsen* contains language indicating—as *Runyan* recognized—that the private-search inquiry centers on whether, from an ex post perspective (that is, after the results of the warrantless search are known), the defendant has in fact suffered a greater invasion of privacy than he had through the private search. *See Jacobsen*, 466 U.S. at 115, 117–18; *Runyan*, 275 F.3d at 463 ("*[C]onfirmation of prior knowledge* does not constitute exceeding the scope of a private search." (emphasis added)). Under this reading of *Jacobsen*, Chapman-Sexton suffered no greater invasion of privacy from Chief Hanzey's search than he did from Coleman's search: they both discovered child pornography on the flash drive. Whether Chief Hanzey viewed the identical images of child pornography previously viewed by Coleman would affect neither the incriminating effect of the images viewed nor the degree to which Chapman-Sexton's pre-search expectation of privacy was invaded.

On the other hand, *Jacobsen* also contains language indicating that the primary question is whether, from an ex ante perspective, the defendant retains any legitimate privacy interest in the thing to be searched that might be violated if officers try to replicate a private search. *See* 466 U.S. at 118–19, 120. Here, Coleman told Chief Hanzey that he had viewed child pornography on

the drive. Therefore, a reasonable officer could have expected a search of the flash drive would simply confirm what he had been told: that the drive contained child pornography, in which Chapman-Sexton had no legitimate privacy interest. But Chief Hanzey could not have been completely certain, pre-search, that he would view only child pornography or, if he did view only child pornography, that it would be the identical images Coleman claimed to have previously seen. The *Lichtenberger* court seemed to find this sort of uncertainty important, at least in the context of a personal computer. *See* 786 F.3d at 488–89; *but see Runyan*, 275 F.3d at 464. One could argue that *Lichtenberger*'s reasoning extends (though it did not explicitly say so) to all electronic devices. Therefore, I do not say that the private-search doctrine is necessarily satisfied here based on our circuit's precedent.

But I am convinced, based on the very close nature of this case under the private-search doctrine, that an objectively reasonable officer could have believed the warrantless search of the flash drive did not exceed the scope of a previous private search and therefore did not violate the Fourth Amendment. *Cf. Jacobsen*, 466 U.S. at 115. Reasonable courts have disagreed—and reasonable officers could be uncertain—about whether the best reading of *Jacobsen* requires an ex ante or an ex post analysis, or some combination of both.

In light of decisions like *Rann* and *Runyan*, a reasonable officer could believe a flash drive—which is a storage device like a camera memory card or the now-obsolescent zip drive or floppy disk—was subject to search as an electronic storage "container."[8] Indeed, *Rann*, decided a

[8] *Lichtenberger* did quote *Riley* for the proposition that "[o]ne of the most notable distinguishing features of modern cell phones is their immense storage capacity," thus suggesting the Court was focused on cell phones as storage devices when it found the officers' search illegal. *Lichtenberger*, 786 F.3d at 487 (quoting *Riley*, 134 S. Ct. at 2489). However, in the next breath, this court provided the context of the *Riley* quote, which made clear that the Supreme Court had determined it was the type and extent of data amassed on a cell phone, not the mere capacity to store data, that entitle owners of these "minicomputers" to a high degree of privacy in them. *See Lichtenberger*, 786 F.3d at 488 (citing *Riley*, 134 S. Ct. at 2488) ("That the item in question is an electronic device does not change the fundamentals of [the Fourth Amendment] inquiry. But under *Riley*, the *nature* of the electronic device greatly

few years before Chief Hanzey's warrantless search in this case, contains facts remarkably similar to the facts in this case. Therefore, a reasonable officer could believe that the private-search doctrine applies to an electronic storage device—here, a flash drive—and that *Lichtenberger*, which concerned only a personal computer, did not say enough to take all electronic storage devices necessarily outside the logic of cases like *Rann* and *Runyan*.[9]

Because a reasonable officer could have believed he did not need a warrant to look at the flash drive and simply confirm what Coleman had told him, the good-faith exception applies. *See McClain*, 444 F.3d at 566.[10]

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increases the potential privacy interests at stake . . . ." (emphasis added)); *see also Riley*, 134 S. Ct. at 2485 ("Cell phones . . . place vast quantities of information literally in the hands of individuals."); *id.* at 2489 ("First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record."); *Lichtenberger*, 786 F.3d at 488 (citing *Riley*, 134 S. Ct. at 2489) ("[T]he likelihood that an electronic device will contain 1) many kinds of data, 2) in vast amounts, and 3) corresponding to a long swath of time, convinced the *Riley* Court that officers must obtain a warrant before searching such a device . . . ."). Indeed, the Supreme Court noted that "a cell phone *collects*" data. *Riley*, 134 S. Ct. at 2489 (emphasis added). Unlike a cell phone, which automatically captures an intimate and accurate compilation of information as its owner carries it throughout the day, a flash drive does not "collect" anything. It stores only what the user decides to place on it: usually files of some kind. Also, unlike a device such as a smartphone or a personal computer, a flash drive does not directly access the many sources of data, personal and otherwise, available on the Internet.

[9] Several other out-of-circuit cases reinforce my conclusion that this area of the law is cloudy enough that a reasonable officer could believe the warrantless search fell within the private-search doctrine. *Compare United States v. Odoni*, 782 F.3d 1226, 1239–40 (11th Cir. 2015) (no Fourth Amendment violation where officers searched "electronic data files" that British authorities had taken from defendant's laptop and thumb drive and sent to United States, and evidence of British agency's practice as well as testimony of British investigator indicated British authorities had already examined the files) *and United States v. Slanina*, 283 F.3d 670, 680 (5th Cir. 2002), *vacated on other grounds by Slanina v. United States*, 123 S. Ct. 69 (2002) (FBI's "exhaustive search" of defendant's "office computer equipment," following "partial[]" search by defendant's employer that did not implicate Fourth Amendment, held not to violate Fourth Amendment "even though the FBI may have looked at more files" than the employer had) *with United States v. Goodale*, 738 F.3d 917, 921 (8th Cir. 2013) (no Fourth Amendment violation where informant took defendant's laptop to police station and "showed officers the laptop's [incriminating] web history," and one officer "moved and touched the laptop for about 17 seconds," but "[n]o evidence suggest[ed] that the officer's viewing went further than [informant's] search") *and United States v. Tosti*, 733 F.3d 816, 822 (9th Cir. 2013) (no Fourth Amendment violation where officer "scroll[ed] through the images" on defendant's computer that informant "had already viewed").

[10] *Leon* describes the good-faith analysis as an objective-reasonableness test. *See* 468 U.S. at 922, 926. Although *McClain* noted the absence of evidence in that case that the officers subjectively believed they were violating the Fourth Amendment, *see* 444 F.3d at 566, there is nothing in *McClain* making subjective belief a necessary part of

Because the evidence obtained based on Chief Hanzey's warrantless search of the flash drive is exempted from the exclusionary rule by the good-faith exception, we may affirm the district court's holding even though the district court improperly conducted the *Jenkins* independent-source analysis. I therefore concur in the judgment of the majority opinion and concur in its reasoning as to all but part II.B.

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the analysis. Indeed, the *McClain* court initially couched its good-faith analysis in objective terms. *See id.* ("We find [the Eighth Circuit's] statement of the rule in *Leon* particularly instructive: 'evidence seized pursuant to a warrant, even if in fact obtained in violation of the Fourth Amendment, is not subject to the exclusionary rule if an objectively reasonable officer could have believed the seizure valid.'" (quoting *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989))). In addition, our post-*McClain* decisions have not treated subjective belief as a separate element of the good-faith analysis. *See, e.g.*, *United States v. Hodson*, 543 F.3d 286, 293 (6th Cir. 2008) ("[T]he objective reasonableness determination does not examine the subjective states of mind of [the particular] law enforcement officers . . . ." (second alteration in original) (citation omitted)). Therefore, *McClain*'s mention of the officers' apparent lack of subjective bad faith appears to be merely a supportive finding.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of Ohio

UNITED STATES OF AMERICA
v.
Joshua D. Chapman-Sexton

JUDGMENT IN A CRIMINAL CASE

Case Number: CR2-16-141

USM Number: 68881-061

Tim Merkle
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)
which was accepted by the court.

☑ was found guilty on count(s) One (1), Two (2) & Three (3)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC§§2252(a)(2) & (b)(1)	Receipt of child pornography	3/15/2015	One

The defendant is sentenced as provided in pages 2 through 1 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/25/2017
Date of Imposition of Judgment

Signature of Judge

Algenon L. Marbley - U.S. District Judge
Name and Title of Judge

Date Sept 6, 2017

DEFENDANT: Joshua D. Chapman-Sexton
CASE NUMBER: CR2-16-141

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC§§2252(a)(2) and (b)(1)	Receipt of child pornography	6/12/2015	Two
18 USC§§2252(a)(4)(B) and (b)(2)	Possession of child pornography	2/28/2016	Three

DEFENDANT: Joshua D. Chapman-Sexton
CASE NUMBER: CR2-16-141

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Two Hundred Ninety Two (292) months on each of counts 1&2 to be served concurrently; and One Hundred Twenty (120) months on ct 3 to run concurrently with counts 1&2.

☑ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be incarcerated at FCI Devens, Mass.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on to

a , with a certified copy of this judgment.

UNITED STATES MARSHAL

By DEPUTY UNITED STATES MARSHAL

DEFENDANT: Joshua D. Chapman-Sexton
CASE NUMBER: CR2-16-141

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

LIFE on each of counts 1,2 & 3 to run concurrently. As a special condition of supervised release the defendant shall register, and keep the registration current, in each jurisdiction where the defendant resides, where he is an employee, and where the defendant is a student. For initial registration purposes only, the sex offender shall also register in the jurisdiction where convicted, if such jurisdiction is different from the jurisdiction of residence. If the state of residence is not accepting sex offender registrations pursuant to SORNA and unable to accept the defendant's registration, the defendant must maintain contact with state registration authorities and his probation officer to determine when such registration can be accepted. The duty to register may continue after the expiration of the defendant's federal supervision, and any existing duty to register under state law is not suspended and will remain in effect until the state implements SORNA of 2006. If the defendant's supervision transfers to another federal district, the defendant's duty to register as a required by SORNA shall be governed by that district's policy and laws of that state.

2. The defendant shall not possess or view sexually explicit material as defined by 18 U.S.C.§§2256(2)(A) and (B).

3. The defendant shall participate in a sex offender treatment program, to include a sex offender risk assessment, psychosexual evaluation and/or other evaluation as needed. The defendant shall follow the rules and regulations of the sex offender treatment program as implemented by the probation office. The defendant shall sign all necessary authorization forms to release confidential information so that treatment providers, probation officers, polygraph examiners and others (as necessary) are allowed to communicate openly about the defendant and hes relapse prevention plan.

4. The defendant shall also be subject to periodic polygraph examinations at the discretion and direction of the probation officer and at the defendant's expense.

5. The defendant's residence and employment shall be pre-approved by the probation officer and in compliance with state and local law.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☑ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Joshua D. Chapman-Sexton
CASE NUMBER: CR2-16-141

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature Date

DEFENDANT: Joshua D. Chapman-Sexton
CASE NUMBER: CR2-16-141

ADDITIONAL SUPERVISED RELEASE TERMS

6. The defendant shall have no contract with any minor children. Contact with minors shall not be permitted even with supervision unless otherwise approved by the Court. The term contact extends to forms of communications such as mail, telephone, and other forms of electronic communication. This provision does not encompass persons under the age of 18 such as ticker vendors, cashiers, waiters, etc. with whom the defendant must deal in order to obtain ordinary and usual commercial services. The defendant shall be prohibited from loitering where minors congregate, such as playgrounds, arcades, amusement parks, recreation parks, sporting events, shopping malls, swimming pools, etc.

7. The defendant is required to install software to monitor computer activities on any computer the defendant is authorized to use at the defendant's own expense. The software may record any and all activity on the defendant's computer, including the capturing of keystrokes, application information, internet use history, email correspondence, and chat conversation. This software will be checked on a random basis. The defendant has not expectations of privacy regarding computer use or information stored on the computer if monitoring software is installed and understands and agrees that information gathered by said software may be used against the defendant in subsequent court actions regarding the defendant's computer use and conditions of supervision. The defendant must also warn others of the existence of the software program. The defendant is prohibited from attempting to remove, tamper with, or alter/circumvent in any way the software program. Furthermore, the defendant must comply with the rules set forth in the computer monitoring participation agreement.

8. The defendant shall submit and/or surrender any media device, to which he has access and/or control, to a search based on reasonable suspicion or contraband or evidence of a violation of a condition of supervision. A media device is defined as, but not limited to, any device which is capable of accessing the Internet, storing images, text, or other forms of electronic communication.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Judgment — Page of 1

DEFENDANT: Joshua D. Chapman-Sexton
CASE NUMBER: CR2-16-141

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 300.00	$	$	$ 14,000.00

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Jessie	$5,000.00	$5,000.00	
Solomon	$9,000.00	$9,000.00	
TOTALS	$ 14,000.00	$ 14,000.00	

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Joshua D. Chapman-Sexton
CASE NUMBER: CR2-16-141

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
property described in Forfeiture A of the Indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

DEFENDANT: Joshua D. Chapman-Sexton
ASE NUMBER: CR2-16-141
DISTRICT: Southern District of Ohio

STATEMENT OF REASONS

(Not for Public Disclosure)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony and Class A misdemeanor cases.

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A. ☑ **The court adopts the presentence investigation report without change.**

B. ☐ **The court adopts the presentence investigation report with the following changes.** *(Use Section VIII if necessary)*
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report.)

1. ☐ **Chapter Two of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to base offense level, or specific offense characteristics)*

2. ☐ **Chapter Three of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility)*

3. ☐ **Chapter Four of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to criminal history category or scores, career offender status, or criminal livelihood determinations)*

4. ☐ **Additional Comments or Findings:** *(include comments or factual findings concerning any information in the presentence report, including information that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions; any other rulings on disputed portions of the presentence investigation report; identification of those portions of the report in dispute but for which a court determination is unnecessary because the matter will not affect sentencing or the court will not consider it)*

C. ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**
Applicable Sentencing Guideline: *(if more than one guideline applies, list the guideline producing the highest offense level)*

II. COURT FINDING ON MANDATORY MINIMUM SENTENCE *(Check all that apply)*

A. ☑ One or more counts of conviction carry a mandatory minimum term of imprisonment and the sentence imposed is at or above the applicable mandatory minimum term.

B. ☐ One or more counts of conviction carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum term does not apply based on:

☐ findings of fact in this case: *(Specify)*

☐ substantial assistance (18 U.S.C. § 3553(e))
☐ the statutory safety valve (18 U.S.C. § 3553(f))

C. ☐ No count of conviction carries a mandatory minimum sentence.

III. COURT DETERMINATION OF GUIDELINE RANGE: *(BEFORE DEPARTURES OR VARIANCES)*

Total Offense Level: 38
Criminal History Category: III
Guideline Range: *(after application of §5G1.1 and §5G1.2)* 292 to 365 months
Supervised Release Range: 5 to Life years
Fine Range: $ 50,000 to $ 500,000

☑ Fine waived or below the guideline range because of inability to pay.

DEFENDANT: Joshua D. Chapman-Sexton
CASE NUMBER: CR2-16-141
DISTRICT: Southern District of Ohio

STATEMENT OF REASONS

IV. GUIDELINE SENTENCING DETERMINATION *(Check all that apply)*

A. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range does not exceed 24 months.

B. ☑ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range exceeds 24 months, and the specific sentence is imposed for these reasons: *(Use Section VIII if necessary)*

C. ☐ The court departs from the guideline range for one or more reasons provided in the Guidelines Manual. *(Also complete Section V.)*

D. ☐ The court imposed a sentence otherwise outside the sentencing guideline system (i.e., a variance). *(Also complete Section VI)*

V. DEPARTURES PURSUANT TO THE GUIDELINES MANUAL *(If applicable)*

A. **The sentence imposed departs:** *(Check only one)*
- ☐ above the guideline range
- ☐ below the guideline range

B. **Motion for departure before the court pursuant to:** *(Check all that apply and specify reason(s) in sections C and D)*

1. **Plea Agreement**
   - ☐ binding plea agreement for departure accepted by the court
   - ☐ plea agreement for departure, which the court finds to be reasonable
   - ☐ plea agreement that states that the government will not oppose a defense departure motion.
2. **Motion Not Addressed in a Plea Agreement**
   - ☐ government motion for departure
   - ☐ defense motion for departure to which the government did not object
   - ☐ defense motion for departure to which the government objected
   - ☐ joint motion by both parties
3. **Other**
   - ☐ Other than a plea agreement or motion by the parties for departure

C. **Reasons for departure:** *(Check all that apply)*

☐	4A1.3	Criminal History Inadequacy	☐	5K2.1	Death	☐	5K2.12	Coercion and Duress
☐	5H1.1	Age	☐	5K2.2	Physical Injury	☐	5K2.13	Diminished Capacity
☐	5H1.2	Education and Vocational Skills	☐	5K2.3	Extreme Psychological Injury	☐	5K2.14	Public Welfare
☐	5H1.3	Mental and Emotional Condition	☐	5K2.4	Abduction or Unlawful Restraint	☐	5K2.16	Voluntary Disclosure of Offense
☐	5H1.4	Physical Condition	☐	5K2.5	Property Damage or Loss	☐	5K2.17	High-Capacity, Semiautomatic Weapon
☐	5H1.5	Employment Record	☐	5K2.6	Weapon	☐	5K2.18	Violent Street Gang
☐	5H1.6	Family Ties and Responsibilities	☐	5K2.7	Disruption of Government Function	☐	5K2.20	Aberrant Behavior
☐	5H1.11	Military Service	☐	5K2.8	Extreme Conduct	☐	5K2.21	Dismissed and Uncharged Conduct
☐	5H1.11	Charitable Service/Good Works	☐	5K2.9	Criminal Purpose	☐	5K2.22	Sex Offender Characteristics
☐	5K1.1	Substantial Assistance	☐	5K2.10	Victim's Conduct	☐	5K2.23	Discharged Terms of Imprisonment
☐	5K2.0	Aggravating/Mitigating Circumstances	☐	5K2.11	Lesser Harm	☐	5K2.24	Unauthorized Insignia
						☐	5K3.1	Early Disposition Program (EDP)

☐ Other Guideline Reason(s) for Departure, to include departures pursuant to the commentary in the Guidelines Manual: *(see "List of Departure Provisions" following the Index in the Guidelines Manual.) (Please specify)*

D. **State the basis for the departure.** *(Use Section VIII if necessary)*

DEFENDANT: Joshua D. Chapman-Sexton
CASE NUMBER: CR2-16-141
DISTRICT: Southern District of Ohio

STATEMENT OF REASONS

VI. COURT DETERMINATION FOR A VARIANCE *(If applicable)*

A. **The sentence imposed is:** *(Check only one)*
- ☐ above the guideline range
- ☐ below the guideline range

B. **Motion for a variance before the court pursuant to:** *(Check all that apply and specify reason(s) in sections C and D)*

1. **Plea Agreement**
   - ☐ binding plea agreement for a variance accepted by the court
   - ☐ plea agreement for a variance, which the court finds to be reasonable
   - ☐ plea agreement that states that the government will not oppose a defense motion for a variance

2. **Motion Not Addressed in a Plea Agreement**
   - ☐ government motion for a variance
   - ☐ defense motion for a variance to which the government did not object
   - ☐ defense motion for a variance to which the government objected
   - ☐ joint motion by both parties

3. **Other**
   - ☐ Other than a plea agreement or motion by the parties for a variance

C. **18 U.S.C. § 3553(a) and other reason(s) for a variance** *(Check all that apply)*

- ☐ The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)
  - ☐ Mens Rea
  - ☐ Extreme Conduct
  - ☐ Dismissed/Uncharged Conduct
  - ☐ Role in the Offense
  - ☐ Victim Impact
  - ☐ General Aggravating or Mitigating Factors *(Specify)*
- ☐ The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
  - ☐ Aberrant Behavior
  - ☐ Lack of Youthful Guidance
  - ☐ Age
  - ☐ Mental and Emotional Condition
  - ☐ Charitable Service/Good Works
  - ☐ Military Service
  - ☐ Community Ties
  - ☐ Non-Violent Offender
  - ☐ Diminished Capacity
  - ☐ Physical Condition
  - ☐ Drug or Alcohol Dependence
  - ☐ Pre-sentence Rehabilitation
  - ☐ Employment Record
  - ☐ Remorse/Lack of Remorse
  - ☐ Family Ties and Responsibilities
  - ☐ Other: (Specify)
  - ☐ Issues with Criminal History: *(Specify)*
- ☐ To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☐ To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☐ To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ To provide the defendant with needed educational or vocational training (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with medical care (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- ☐ To avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6)) (Specify in section D)
- ☐ To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))
- ☐ Acceptance of Responsibility
- ☐ Conduct Pre-trial/On Bond
- ☐ Cooperation Without Government Motion for Departure
- ☐ Early Plea Agreement
- ☐ Global Plea Agreement
- ☐ Time Served *(not counted in sentence)*
- ☐ Waiver of Indictment
- ☐ Waiver of Appeal
- ☐ Policy Disagreement with the Guidelines *(Kimbrough v. U.S., 552 U.S. 85 (2007))*: *(Specify)*
- ☐ Other: *(Specify)*

D. ***State the basis for a variance. (Use Section VIII if necessary)***

DEFENDANT: Joshua D. Chapman-Sexton
CASE NUMBER: CR2-16-141
DISTRICT: Southern District of Ohio

STATEMENT OF REASONS

VII. COURT DETERMINATIONS OF RESTITUTION

A. ☐ **Restitution Not Applicable.**

B. **Total Amount of Restitution: $** 14,000.00

C. **Restitution not ordered:** *(Check only one)*

1. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
2. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
3. ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
4. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or . 3663A, restitution is not ordered because the victim(s)'(s) losses were not ascertainable (18 U.S.C. § 3664(d)(5))
5. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s) elected to not participate in any phase of determining the restitution order (18 U.S.C. § 3664(g)(1)).
6. ☐ Restitution is not ordered for other reasons. *(Explain)*

D. ☐ **Partial restitution is ordered for these reasons *(18 U.S.C. § 3553(c))*:**

VIII. ADDITIONAL BASIS FOR THE SENTENCE IN THIS CASE *(If applicable)*

The Court adopts the factual findings and advisory guideline application in the pre-sentence report except (if applicable). Upon consideration of the factors enumerated in 18 U.S.C.§3353(a), the arguments of counsel, the pre-sentence investigation report, and as analyzed by this Court on the record, this Court finds that a sentence of Two Hundred Ninety Two (292) months is sufficient but not greater than necessary to comply with the purposes of sentencing.

Defendant's Soc. Sec. No.: 277-84-4730

Defendant's Date of Birth: 11/20/1985

Defendant's Residence Address: FCCC
370 S. Front. Cols, OH 43215
Defendant's Mailing Address:

Date of Imposition of Judgment
8/25/2017

Signature of Judge
Algenon L. Marbley - U.S. District Judge
Name and Title of Judge
Date Signed 9/6/17

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	Case No. 2:16-cr-141
Plaintiff,	:	JUDGE ALGENON L. MARBLEY
v.	:	
JOSHUA D. CHAPMAN-SEXTON,	:	
Defendant.	:	

OPINION AND ORDER

This matter is before the Court on Defendant Joshua D. Chapman-Sexton's ("Defendant" or "Chapman-Sexton") Motion to Suppress Search. (Doc. 16.) The Court held an evidentiary hearing on Defendant's Motion on Monday, January 30, 2017. For the reasons set forth below, Defendant's Motion is **DENIED.**

I. FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of February 29, 2016, officers from the Buckeye Lake Police Department ("BLPD") responded to a call notifying them of a disturbance. (Gov't Mem. Opp'n to Def.'s Mot. to Suppress (Doc. 35) at 2.) When they arrived at the scene, BLPD officers encountered an intoxicated juvenile, D.M., who eventually confessed that he and two other young men, D.C. and C.G.,[1] had broken into Chapman-Sexton's residence. (*See id.*; *see also* Attachment 1 to Def.'s Mot. to Suppress at 10.) D.M. informed the officers that D.C. and C.G. had stolen a Playstation 4, games, a controller and a flash drive (believed to be a SanDisk Cruzer Micro 4G USB thumb drive) from Chapman-Sexton. (Doc. 16 at 1, 10; Doc. 35 at 2.) D.C. and C.G. turned over these items to the BLPD. (Doc. 16 at 10–11; Doc. 35 at 2.)

[1] BLPD Chief Jim Hanzey's affidavit submitted in support of his application for a search warrant names D.C. as Deven Coleman and C.G. as Christian Gullett. (Doc. 16 at 10.)

D.C. is Chapman-Sexton's neighbor, and he also lived with Chapman-Sexton for a period of time. (*See* Doc. 16 at 11.) At the time he surrendered the stolen property, D.C. informed the BLPD that Chapman-Sexton told him that the Playstation and flash drive contained child pornography,[2] and that he had viewed child pornography with Chapman-Sexton on these items and on DVDs when the two lived together. (Doc. 16 at 11; Doc. 35 at 2.) Additionally, Chapman-Sexton purportedly told D.C. that he had engaged in oral sex with a 13-year-old acquaintance of D.C.'s ("John Doe") on or around February 27, 2016, and that John Doe's boxers were still at his house from the encounter. (Doc. 16 at 11; Doc. 35 at 2.) BLPD Chief Jim Hanzey ("Chief Hanzey") testified at the January 30, 2017 hearing that D.C. has previously provided him with information—some of which has been reliable, and some that has been less than reliable—but in this instance, Chief Hanzey believed D.C.'s statements.

After speaking with D.C., Chief Hanzey conducted a limited review of the flash drive in order to corroborate D.C.'s assertion that it contained child pornography. (Doc. 16 at 4, 11; Doc. 35 at 2.) Chief Hanzey testified that he conducted this preliminary review because, based on his approximately 32 years of experience with the BLPD, the Licking County Prosecutor's Office would not issue a search warrant unless he first corroborated D.C.'s statements. At the time Chief Hanzey conducted his limited search of the flash drive, he was aware that Chapman-Sexton had recently been released from prison for a previous federal child pornography-related conviction and that he was a registered sex offender. (Doc. 16 at 11.) Chief Hanzey observed three images depicting naked male children and male children engaged in sex acts on the flash drive. (Doc. 16 at 4; Doc. 35 at 3.) After viewing these images, Chief Hanzey stopped searching the flash drive and decided to obtain a search warrant to view the remaining contents. (Doc. 16

[2] According to D.C., Chapman-Sexton told him about the child pornography on the flash drive several days before D.C., D.M. and C.G. broke into Chapman-Sexton's residence.

at 11; Doc. 35 at 3.) He also contacted Chapman-Sexton, advising him that the BLPD had items it believed had been stolen from his residence and asking him to come to the station to identify them. (Doc. 16 at 4; Doc. 35 at 3.) At the police station, Chapman-Sexton confirmed that the items belonged to him, without reviewing the contents of the flash drive. (Doc. 16 at 4.) Chief Hanzey did not inform Chapman-Sexton that he had discovered child pornography on the flash drive. (*Id.*)

The following day, Chief Hanzey executed an affidavit in support of the BLPD's application for a search warrant, in which he stated that he "viewed the flash drive and did note that there appeared to be child pornography on it."[3] (*Id.* at 11.) The affidavit also contained the information Chief Hanzey had learned from D.C., and noted that Chief Hanzey had "knowledge that Joshua Sexton was recently released from prison for federal convictions for Possession of Child Pornography in Interstate Commerce, and is a registered sex offender for this conviction." (*Id.*) Based on this affidavit, Judge Wright of the Licking County Court of Common Pleas found that there was probable cause to issue a warrant allowing the BLPD to search Chapman-Sexton's residence, and did so on March 1, 2016. (*Id.* at 14–15.) On March 2, 2016, the BLPD obtained another warrant to search several containers seized during the previous day's search of Chapman-Sexton's residence. (*Id.* at 5, 17.) Finally, on March 3, 2016, the BLPD obtained a third search warrant to permit a computer technology expert from the Ohio Bureau of Criminal Investigation and Identification ("BCI") to conduct a forensic examination of the flash drive and other items seized during the burglary and search of Chapman-Sexton's residence. (*Id.* at 5, 19–22; Doc. 35 at 3.)

[3] Chief Hanzey testified that he did not bring the flash drive to the Licking County Prosecutor's Office, because the Prosecutor's Office prefers that the BLPD provide it with written reports or witness statements or oral information to support a search warrant application, as opposed to physical evidence.

At some point during this process, Chapman-Sexton's federal probation officer was notified that the BLPD was investigating Defendant and contacted FBI Task Force Officer Brett Peachey ("Officer Peachey"), the officer who had investigated Chapman-Sexton for child pornography charges in 2010. (Doc. 35 at 4.) Officer Peachey contacted Chief Hanzey to learn more about the BLPD's investigation. (*Id.*) It was agreed that Officer Peachey would obtain the evidence submitted to BCI and conduct his own forensic investigation in order potentially to pursue federal charges. (*Id.*) Before doing so, Officer Peachey obtained a federal search warrant. (*Id.*) The affidavit supporting Officer Peachey's application for the federal search warrant "did not mention Chief Hanzey's initial warrantless preview of the thumb drive, but did discuss what Chief Hanzey found on the thumb drive when he examined it pursuant to the Licking County warrant." (*Id.*)

In accordance with the federal search warrant, Officer Peachey reviewed 19 items—including the Playstation, the flash drive, and a Microsoft cellular phone. (*Id.*) The Playstation contained one pornographic photo and "numerous entries in the browser history for websites known to contain child pornography and erotica." (*Id.*) The flash drive—which was the same flash drive surrendered by D.C. and confirmed to be Chapman-Sexton's—stored approximately 4000 images and two videos of child pornography. (*Id.*) Finally, the cell phone contained text messages between Chapman-Sexton and John Doe. (*Id.*)

Based on the images and photos found on the flash drive, on July 21, 2016, a grand jury indicted Chapman-Sexton, charging him with two counts of Receipt of Child Pornography and one count of Possession of Child Pornography. (*Id.*) Defendant now moves to suppress any evidence obtained from the forensic examination of his flash drive.

II. LAW AND ANALYSIS

A. The Fourth Amendment and the Warrant Requirement.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. When a "search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (internal quotation marks and citation omitted). A warrant "ensures that the inferences to support a search are drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* (internal citation omitted). The Supreme Court has recognized, however, that the warrant requirement may be overcome in some circumstances because "the ultimate touchstone of the Fourth Amendment is reasonableness." *Kentucky v. King*, 563 U.S. 452, 459 (2011) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (internal quotation marks omitted)). The warrant requirement is therefore subject to certain exceptions. *Id.* If a warrantless search falls within a specific exception to the warrant requirement, it is reasonable. *Riley*, 134 S. Ct. at 2482.

B. The Exigent Circumstances Exception.

One "well-recognized exception" to the warrant requirement applies when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *King*, 563 U.S. at 459 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (internal quotation marks omitted)). As relevant here, "the need to prevent the imminent destruction of evidence has long been recognized as a

sufficient justification for a warrantless search." *Id.* at 460 (internal quotation marks and citations omitted).

To establish exigent circumstances in this situation, "the government must first show an objectively reasonable basis for concluding that the loss or destruction of evidence is imminent." *United States v. Bradley*, 488 F. App'x 99, 103 (6th Cir. 2012) (internal quotation marks and citation omitted). If the government makes this showing, the court must then "balance the interests by weighing the governmental interest being served by the intrusion against the individual interest that would be protected if a warrant were required." *Id.*

C. The Exigent Circumstances Exception Is Inapplicable.

In an effort to establish exigent circumstances and justify Chief Hanzey's warrantless search of the flash drive, the Government argues that: (1) there was probable cause that evidence of criminal activity would be found on the flash drive; (2) the Government has a heightened interest in protecting digital evidence, which is easily destructible; and (3) Chief Hanzey knew, according to BLPD procedures, that the flash drive would be imminently returned to Chapman-Sexton. (*See* Doc. 35 at 7–9.) None of these reasons establishes an objectively reasonable basis for concluding that the loss or destruction of evidence was imminent under the circumstances.

The Government relies on *United States v. Bradley* to support its point that the nature of the evidence involved weighs in favor of finding exigent circumstances.[4] 488 F. App'x 99 (6th Cir. 2012). In *Bradley*, the Sixth Circuit noted that "the governmental interest in protecting evidence from destruction is particularly high where digital evidence is involved, because such evidence is inherently ephemeral and easily destructible." *Id.* at 104. The *Bradley* court also emphasized the importance of the government's interest in "deterring the production and

[4] The Government does not explain how the existence of probable cause that evidence of criminal activity would be found on the flash drive establishes exigent circumstances justifying a warrantless search.

dissemination of child pornography." *Id.* But *Bradley* is distinguishable from this case in one important way—which the Government acknowledges: in *Bradley*, the defendant was challenging the warrantless *seizure* of his laptop, not a warrantless search of the same. (Doc. 35 at 8.)

Therefore, while it is certainly reasonable to "doubt[] the wisdom of leaving the owner of easily-destructible contraband in possession of that contraband once the owner is aware that law-enforcement agents are seeking a warrant," *Bradley*, 488 F. App'x at 103, this is not the factual situation here, as the BLPD was in possession of the flash drive. The mere fact that digital evidence *can* be destroyed easily is irrelevant when that evidence is not in the defendant's possession, but instead in the possession of law enforcement. Indeed, although it was not addressing the exigent circumstances exception, the Supreme Court in *Riley* noted that "once law enforcement officers have secured [an electronic device], there is no longer any risk that [an offender] will be able to delete incriminating data," and thus there is no cause for concern that evidence will be destroyed while a warrant is sought. *See Riley*, 134 S. Ct. at 2486.

While the Government argues in its Opposition that, pursuant to "police department procedures, Chief Hanzey knew that the thumb drive would imminently be returned to the defendant" and thus he was faced with the choice of "doing no search and returning a device he believed likely contained contraband to an offender" or doing a limited warrantless search, Chief Hanzey testified at the hearing that the BLPD typically retains possession of property recovered from a burglary for at least 30 days, in order to allow the property's rightful owner sufficient time to decide whether or not to press charges against the perpetrator. Thus, because the BLPD had secured the flash drive and would retain possession of it for approximately 30 days, there

was no cause for concern about the destruction of its contents and there were no exigent circumstances justifying Chief Hanzey's warrantless search.

Rather than performing an initial warrantless preview of the flash drive, Chief Hanzey should have: (1) contacted the Licking County Prosecutor's office and provided a prosecutor with the flash drive; (2) informed a prosecutor that he had received a tip from Chapman-Sexton's former roommate that the flash drive contained child pornography and that D.C. had seen the pornography himself; (3) explained that he knew Chapman-Sexton is a registered sex offender with a previous child pornography conviction, and that he had no reason to disbelieve D.C.; and (4) obtained permission to search the flash drive. Chief Hanzey had ample time to follow this proper procedure, given the BLPD's practice of retaining stolen property for nearly one month. Accordingly, the exigent circumstances exception to the warrant requirement is inapplicable here.[5]

D. The Flash Drive Evidence Is Admissible Under the Independent Source Doctrine.

The exclusionary rule "prohibits introduction into evidence of tangible materials seized during an unlawful search." *Murray v. United States*, 487 U.S. 533, 536 (1988) (citing *Weeks v. United States*, 232 U.S. 383 (1914)). It also prohibits the introduction of "fruit of the poisonous tree," or "derivative" evidence that is the "product of the primary evidence, or that is otherwise acquired as an indirect result of an unlawful search." *Id.* at 536–37; *see also Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963).

However, if the unlawfully obtained evidence has an "independent source," it may be admitted. *See Murray*, 487 U.S. at 537; *see also Silverthorne Lumber Co. v. United States*, 251

[5] The Court notes that it is possible that, under some set of circumstances, it may be permissible for a law enforcement officer to preliminarily review an effect that allegedly contains contraband; the Court does not hold that a preliminary review of the sort done by Chief Hanzey is always a Fourth Amendment violation. Rather, the Court merely finds that the exigent circumstances exception is inapplicable here.

U.S. 385, 392 (1920). The justification underlying the independent source doctrine was described by the Supreme Court as follows:

> The interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred . . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Murray, 487 U.S. at 537 (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)). The independent source doctrine applies to evidence "initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality." *Id.*

In his Motion, Defendant argues that the evidence obtained from the flash drive must be suppressed, because the initial warrant was "tainted by an illegal search." (Doc. 16 at 7.) According to Chapman-Sexton, "but for the illegal search, no state warrant would have issued, and but for the state warrants and the information gained, the federal warrant would not exist." (*Id.*) Thus, as Defendant correctly notes, it is the burden of the Government to establish that "the chain of events giving rise to the federal warrant is wholly independent and unrelated to the illegal search done by the Buckeye Lake Police and the information gathered from that search." (*Id.*)

The Sixth Circuit has opined on the applicability of the independent source doctrine under *Murray* when a search warrant is issued based on a search warrant application containing information from an illegal search. *See United States v. Jenkins*, 396 F.3d 751 (6th Cir. 2005). The *Jenkins* court interpreted *Murray* to mean that if an "application for a warrant contains probable cause apart from the improper information, then the warrant is lawful and the

independent source doctrine applies." *Id.* at 758. Accordingly, to determine if the independent source rule applies, a court must consider "the sufficiency of the untainted [search warrant] affidavit, to see if probable cause [to issue a warrant] exists without the tainted information." *Id.* at 760 (citing, among others, *United States v. Markling*, 7 F.3d 1309, 1315–16 (7th Cir. 1993) (considering whether probable cause existed after stripping tainted information from a warrant affidavit and noting that "this is the approach federal courts typically take in applying *Murray*"); *United States v. Restrepo*, 966 F.2d 964, 968–70 (5th Cir. 1992) ("[E]vidence obtained in an illegal search is first excised from the warrant affidavit, after which the expurgated version is evaluated for probable cause.")); *see also United States v. Lord*, 230 F. App'x 511, (6th Cir. 2007) (affirming denial of defendant's motion to suppress when search warrant affidavit contained probable cause after being stripped of reference to material gleaned from warrantless search).

With regard to evaluating an affidavit for probable cause, "it has been the rare case in which the Sixth Circuit has found a search warrant based on an informant tip to be inadequate *if* the information has been corroborated to some degree." *Jenkins*, 396 F.3d at 760 (emphasis in original); *see also, e.g.*, *United States v. Pelham*, 801 F.2d 875 (6th Cir. 1986) (finding search warrant based on informant tip to be supported by probable cause).

The Sixth Circuit's decision in *United States v. Ruth*, 489 F. App'x 941 (6th Cir. 2012), is instructive here. In *Ruth*, the defendant's adopted adult son informed the police that his father possessed a computer containing child pornography, and also provided the police with a flash drive of child pornography that he had obtained from the computer. *Id.* at 942. To corroborate this information, the defendant's son stated that he had been sexually abused by the defendant as a child, and that the defendant had also told him about his intention to engage in sex with other

children. *Id.* The police then signed a search warrant affidavit detailing their interview with the defendant's son. *Id.* The defendant moved to suppress the evidence seized from the search of his home that took place after a warrant was issued, claiming that the information from his son provided insufficient probable cause. *See id.* The Sixth Circuit affirmed the denial of defendant's motion to suppress, noting that a "common-sense approach" must be taken when determining whether the corroborating information provided by an informant is reliable. *See id.* at 943.

Here, after purging the first search warrant affidavit of the tainted information—Chief Hanzey's statement that he had searched the flash drive and found child pornography—the affidavit still contains information that, "under the totality of the circumstances, provided a 'substantial basis' for the magistrate to believe 'there was a fair probability that contraband or evidence of a crime would be found in [the] particular place'" to be searched. *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Namely, the affidavit stated that: (1) Chapman-Sexton had told D.C. that his Playstation 4 and flash drive contained child pornography, and that he had engaged in oral sex with a 13-year-old male and still had his boxers at his house; (2) D.C. had viewed child pornography with Chapman-Sexton on the Playstation, flash drive and DVDs when he lived at Defendant's home; and (3) Chapman-Sexton has a prior conviction for possessing child pornography and is a registered sex offender . (Doc. 16 at 10–11.)

Although the factual circumstances here are not identical to those in *Ruth*, the information provided by D.C.—Chapman-Sexton's neighbor and former roommate, and an informant from whom Chief Hanzey has previously received reliable tips—has a similar guarantee of trustworthiness when using a "common-sense approach." *See Ruth*, 489 F. App'x at 943. Moreover, although Chief Hanzey mistakenly believed that he needed to corroborate

D.C.'s tip by viewing the contents of the flash drive, the tip Chief Hanzey received from informant D.C. was already corroborated to a reasonable extent. D.C's statements were reliable in light of Chief Hanzey's own personal knowledge that Chapman-Sexton was recently released from prison for a federal child pornography conviction and that Chapman-Sexton is a registered sex offender, and Chief Hanzey's prior dealings with D.C. as a trustworthy informant. (*Id.* at 11.)

Thus, because the search warrant affidavit contained sufficient information to establish probable cause when stripped of the information gained by the illegal initial review of the flash drive, and because that information was corroborated, the first state search warrant is valid. Accordingly, the subsequent state warrants and federal warrant were not "fruit of the poisonous tree." Further, the Court finds that Officer Peachey followed the proper procedures in obtaining the federal warrant. The evidence obtained from the flash drive is therefore admissible under the independent source doctrine.[6]

III. CONCLUSION

For all of these reasons, the Court **DENIES** Chapman-Sexton's Motion to Suppress.

IT IS SO ORDERED.

ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

Dated: February 3, 2017

[6] Because the Court holds that the flash drive evidence is admissible under the independent source doctrine, it need not reach the Government's argument that it must be admitted under the good faith exception established in *United States v. Leon*, 468 U.S. 897 (1984).

No. 17-3933

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSHUA CHAPMAN-SEXTON,

Defendant-Appellant.

ORDER

BEFORE: GILMAN, KETHLEDGE, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Chief Judge Cole recused himself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: February 15, 2019

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Re: Case No. 17-3933, *USA v. Joshua Chapman-Sexton*
Originating Case No.: 2:16-cr-00141-1

Dear Mr. Jaeger,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Alexis J. Zouhary

Enclosure