**Docket No.**
**In the Supreme Court of the United States**

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PATRICK O. NEISS,

*Petitioner*,

v.

STATE OF MONTANA,

*Respondent*.

◆

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA**

◆

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## Questions Presented

1. In *Holland v. United States*, 348 U.S. 121, 125 (1954) this Court recognized the "inherent risk" of the use of circumstantial evidence, but held that a special instruction was not required so long as certain precautions are taken. Courts and commentators have struggled with the lack of clarity concerning whether these precautions apply to all circumstantial evidence cases or only in net worth prosecutions of the type in *Holland* as the Court entertained both arguments, i.e. (a) that the precautions do not apply across the board, and (b) that if the rejection of the cautionary jury instruction is to be applied broadly, so are the warnings regarding the use of circumstantial evidence.

Should this lack of clarity be resolved by this Court?

2. The State trial court gave the following jury instruction: "When circumstantial evidence is susceptible to two interpretations, one that supports guilt and the other that supports innocence, the jury determines which is most reasonable." Petitioner objected, contending that the language instructing the jury to "determine[] which is most reasonable" violated federal constitutional protections because the instruction diluted the State's burden of proof and compromised his right to be presumed innocent.

When giving a circumstantial evidence instruction, most state courts require the trial court to include language that if the circumstantial evidence is "open to two reasonable constructions, one indicating guilt and the other innocence, it is your duty to accept the construction indicating innocence." See *Hampton v. State*,

961 N.E.2d 480, 491 (Ind. 2012); *State v. Sanchez*, 388 Mont. 262, 399 P.3d 886, 891 (2017) (McKinnon, concurring) ("In my view, the 'most reasonable' instruction is inconsistent with the presumption of innocence to which a defendant is entitled.").

Is the instruction in this case, which essentially instructed the jury that it could reject a reasonable interpretation of the evidence that supports innocence, unconstitutional?

3. The State trial court also gave the following jury instruction: " Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt."

Does this instruction, which is the subject of debate in the United States Court of Appeals– compare, e.g. *Monk v. Zelez*, 901 F.2d 885, 889-90 (10th Cir.1990) (unconstitutional) and *Scurry v. United States*, 347 F.2d 468, 470 (D.C.Cir.1965) (same) cert. denied , 389 U.S. 883 (1967) with *Ramirez v. Hatcher*, 136 F.3d 1209 (9th Cir.) (explicitly rejecting *Monk*, *id.* at 1214 n.11), , cert. denied, 525 U.S. 967 (1998) and *United States v. Williams,* 20 F.3d 125, 129 (5th Cir.), cert. denied, 513 U.S. 891 (1994); *cf. Holland v. United States*, 348 U.S. 121, 140 (1954) (disfavoring phrasing reasonable doubt even as doubt "which [people] in more serious and important affairs of [their] own lives might be willing to act upon.")– whether by itself or in combination with the instruction in Question 2, dilute the State's burden

of proof and compromise Petitioner's right to be presumed innocent?

4. A search warrant authorized the seizure of all "electronic devices," including all computers found in the home and "the information contained therein" was both overbroad and lacked particularity and probable cause for the seizure because this was not a computer-based crime, but instead a homicide investigation. A second warrant, obtained two and one-half years after the computers were originally seized had no temporal or substantive limitations and it purportedly authorized the search and seizure of an unlimited amount of data. A forensic search conducted by the F.B.I. showed the chrome web history related to key word searches found on one of the computers and the prosecution argued that this internet search history was proof Petitioner planned to commit the homicide. Courts have struggled with questions of probable cause and particularity and "good faith" reliance upon the warrant in this circumstance. See, e.g., Nicole Friess, *When Rummaging Goes Digital: Fourth Amendment Particularity and Stored E-Mail Surveillance*, 90 Neb. L. Rev. (2013); *Symposium: The Search and Seizure of Computers and Electronic Evidence Search Warrants in an Era of Digital Evidence* 75 Miss. L.J. 85 (2005-2006); Susan W. Brenner & Barbara A. Fredericksen, *Computer Searches And Seizures: Some Unresolved Issues*, 8 Mich. Telecomm. & Tech. L . Rev. 39 (2002 ).

Should the results of a forensic search of the computers, including the chrome web history of internet searches found on one of the computers, have been suppressed?

## List of Parties

All parties appear in the caption of the case on the cover page.

## List of Proceedings

There are no other proceedings involving the Petitioner.

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## MISCELLANEOUS

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The Opinion of the Supreme Court of Montana has been designated for publication. It is reported at 2019 MT 125 and at 443 P.3d 435. A copy is attached hereto in the Appendix.

## JURISDICTION

The decision of the Montana Supreme Court was filed on June 4, 2019. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment IV:

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

U.S. Const., Amendment XIV:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Statement of the Case

Petitioner, Patrick Neiss, was charged by Second Amended Information with the felony offenses of Deliberate Homicide and Tampering with Evidence.[1] Neiss filed numerous pretrial motions, all of which were denied.

Just prior to trial, the State disclosed results of a forensic search of the computers seized from Neiss' home two and one-half years prior to trial. The State had searched the computers pursuant to a second search warrant granted in 2015.

Neiss filed an additional motion asking for the computer evidence to be suppressed. The state court ordered supplemental briefing and the trial was continued. Subsequently, the court issued an order, which included a section that denied the motion to suppress the computer evidence.

The jury trial lasted seven days. During trial, Neiss filed written objections to several of the State's proposed jury instructions, including the State's proposed circumstantial evidence instruction. The district court overruled Neiss' objection and gave the circumstantial evidence instruction to the jury.

After deliberating six and one-half hours, the jury convicted Neiss on both counts. On Count I, Deliberate Homicide, Neiss was sentenced to 100 years (with a consecutive ten year weapons enhancement.) On Count II, Tampering with Evidence. Neiss was sentenced to ten years to run concurrently with Count I.

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[1]. The tampering charge was based on the fact that the gun used to kill Greene was never found.

## Statement of the Facts

At 10:46 p.m., law enforcement received a 911 call from a woman who reported she had found the body of Frank "Trey" Richey Greene on the ground outside his home. (Trial Tr. at 354.) Greene suffered a gunshot wound to the head and was deceased.[2] (Trial Tr. at 453-54.)

The 911 caller reported seeing a vehicle frequently driven by Neiss drive by shortly after she found Greeene's body. (Trial Tr. 357.) Based upon the report, an attempt to locate was issued for Neiss. (7/13/15 Tr. at 159.) Neiss was found at a nearby gas station. He was then arrested, without incident, and transported to the Yellowstone County Sheriff's Office.

At the sheriff's office, Neiss was subjected to a gunshot residue (GSR) test on his hands and face. Later, officers decided they did not have enough evidence to formally charge Neiss, so they released him. (7/13/15 Tr. at 56:6-12.)[3]

Search Warrant for 7200 Central Avenue

Five days after the death of Greene, detectives applied for a search warrant for 7200 Central Avenue. (Doc. 65, State's Ex. 1). Neiss was living at 7200 Central with his mother and seven-year old son. The application requested permission to search for evidence related to the homicide and alsorequested permission to seize all

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[2]. An autopsy later determined Greene had suffered three gunshot wounds. (Trial Tr. at 439.) The time of his death was disputed at trial.

[3]. Neiss was not formally charged until August 11, 2014, seventeen months after the homicide. (D.C. Doc. 149 at 2.)

"[c]ell phones, IPads, computers and/or otherelectronic devices and the information contained therein[.]" (D.C. Doc. 65, State's Ex. 1).

The search warrant application provided details about an ongoing dispute between Neiss and Greene. (D.C.Doc. 65, State's Ex. 1, at SW 117-118.) Neiss and Greene were neighbors and former friends. Neiss had a motor stolen from him and he believed Greene had committed the theft. There had been verbal disputes and confrontations between Neiss and Greene.

In addition, the search warrant application said shoeprints had been found on Greene's property. Officers said the shoeprints looked "fresh" and said that the shoeprints led to and from the property where Neiss lived. (D.C.Doc. 65, State's Ex. 1, at SW 119-120.) This allegation was suspect because the footprints actually never left the victim's property.

Execution of Search Warrant at 7200 Central Avenue

Execution of the search warrant took place at 4 a.m., six days after the homicide. (7/13/15 Tr. at 13.) Details of the search were provided at an evidentiary hearing. A video of the search was also played and admitted into evidence at the hearing as State's Exhibit 1. (7/13/15 Tr. at 22.)

Although the warrant did not contain a no-knock provision, at least twenty law enforcement officers were involved in the search. SWAT team members were all dressed in dark camouflage clothing with full body armor.

Some SWAT team members carried assault rifles. (7/13/15 Tr. at 15: 10-21.)

The SWAT commander drove the Yellowstone County's BEAR or Ballistic Engineer Armored Response vehicle to the search. (7/13/15 Tr. at 16:10- 11.)

Officers broke through the front door, and shortly after entering, they deployed a "flash bang concussive device" at the rear of the house. (7/13/15 Tr. at 17.) The flash bang device was very loud and emitted a bright light. No law enforcement officer had knocked on any of the doors prior to entry. (7/13/15 Tr. at 24.)

Seizure and Subsequent Search of Computers

The search warrant for 7200 Central Ave. included a sentence that authorized the seizure of all: "Cell phones, IPads, computers and/or other electronic devices and the information contained therein." (Doc. 65, State's Ex. 1., at SW 132.)

During the search in 2013, officers seized three computers from Neiss' home. The computers were kept by the State in evidence for two and one-half years. Then, in 2015 the State applied for a second warrant to conduct a forensic search of the computers. (D.C. Doc. 156)

After receiving the second warrant for the computers, detectives took the computers to FBI Agent Salacinski, whose office was located in Billings, Montana. (Trial Tr. at 578.) Before searching the computers, Salacinski conducted what he called a question and answer session to try to narrow the search and determine what evidence detectives wanted him to look for on the computers. (Trial Tr. at 579.) He and the detectives came up with a list of key words for the search. (Trial Tr. at 586.)

Salacinski also asked the detectives to narrow the date range of his search because the warrant did not have a date range listed. (Trial Tr. at 580.) After conducting a forensic search of the computers, Salacinski prepared a report of the results, which included a summary of the Chrome Web history that included a search of any of the key words provided. (Trial Tr. at 592-93, State's Ex. 12, 12A, 12 B, 12 C)

The key words in the history for January and February of 2013 included the terms "silencer"and "murder." (Trial Tr. at 593-94.) The exhibit prepared by Salacinski also included the "Uniform Resource Locator" (URL) for the searches. (Trial Tr. at 594.) This exhibit also displayed the URL[4] for a number of YouTube videos. (Trial Tr. at 602.) Over objection, the State was allowed to play one of the YouTube videos to the jury. (Trial Tr. at 808, State's Ex. 51.)

The video had a demonstration of a .38 caliber gun being shot with and without a suppressor. This video was admitted based on the testimony that the video's URL6 was found in the relevant Chrome web history on one of the computers.

Additional Evidence During Trial

During trial, the State presented testimony that it had located shoeprints on Greene's property. (Trial Tr. at 770-788). During searches of Neiss' home, officers were unable to locate any shoes that had a tread pattern that matched the

[4]. The URL for the video was: https://www.youtube.com/watch?v=3Lsx0WAetsI

shoeprints found on Greene's property. (Trial Tr. at 968, 970.) During cross-examination, the officer who documented the shoeprints acknowledged he was not an expert on shoes and that he had no training on how to interpret shoeprints. (Trial Tr. 810-811.)

Neiss was subjected to a gunshot residue (GSR) test on his hands and face. The test was sent to the Montana State Crime Lab where it analyzed by Bahne Klietz. (Trial Tr. at 1109-1011.) At trial, Klietz testified that when looking for GSR, she looks at the morphology or appearance of the particles and their chemical composition. (Trial Tr. at 1113.) Klietz testified that particles of GSR contain lead, barium and antimony and have a spherical or melted morphology, but these items are also present in other items such as brake pads, enamels, paints and fireworks. (Trial Tr. at 1121, 1133)

If the three elements (lead, barium, and antimony) are found and the morphology is also present, Klietz will conclude the particle is "characteristic" of GSR. If a particle has only two of the three elements, or is missing the morphology, she will conclude the particle is only "indicative" or "consistent" with GSR.

Klietz testified that GSR particles are easily transferrable. Klietz's report included information that Neiss was employed as a car mechanic (and so presumably was in an environment that contained those elements). (Trial Tr. at 1136.) Klietz tested the samples taken from Neiss and she also tested a cartridge case that came from the crime scene.

As to the sample taken from Neiss, Klietz testified she found a total of 6

particles "characteristic" of GSR. She found a total of 8 particles she classified as "indicative" or "consistent" with GSR.

Klietz testified that many of the particles found on Neiss had a strange morphology. (Trial Tr. at 1136:20-25.) The particles were big and flaky and did not appear as a rounded ball. These particles also contained tin. Klietz testified that she could not account for the strange morphology or for the presence of tin, so she asked to test the GSR from a cartridge case located at the crime scene. (Trial Tr. at 1141.)

The cartridge case sample did not match the particles of GSR found on the casing from the crime scene. (Trial Tr. at 1143:14-15.)

The State also presented testimony from Travis Spinder, the supervisor of the firearm and toolmark section of the State Crime Lab. (Trial Tr. at 1148), who testified that he made comparisons between the .40 caliber shell casings found at the crime scene with .40 caliber shell casings found during the search of Neiss' property, and that five casings from the crime scene and eleven casings found on Neiss' property "were fired from the same gun." (Trial Tr. at 1186.)

Because the gun that fired the bullets was never found, and because Spinder had not tested all possible guns that could have fired the bullets, Spinder's conclusion as to the degree of certainty of a "match" was to be limited at trial. (9/8/15 Tr. 21; see also, D.C. Doc. 151:15-16.)

Spinder acknowledged that the comparison between shell casings is a subjective determination.

Finally, Philip Kinsey, from the Montana State crime lab, testified as to his review of all serology and DNA testing done at the lab. (Trial Tr. at 1060.) Items tested included clothing, various blood stain collection kits, cigarette butts and two .40 caliber casings taken from the crime scene. (Trial Tr. at 1068).

There was no DNA evidence linking Neiss to the crime scene. (Trial Tr. at 1060-1086.) Neiss was also excluded as a contributor of the DNA found on the cigarette butts. (Trial Tr. at 1080.) A small amount of DNA was detected on one of the shell casings. However, the control sample sent with the extract was contaminated. (Trial Tr. at 1082.) Therefore, the DNA that was found was rendered worthless and the results of any tests could not be used. (Trial Tr. at 1082-1083.)

The Court instructed the jury in accordance with Montana Pattern Jury Instructions Criminal[5] 1-117(a), i.e., "When circumstantial evidence is susceptible to two interpretations, one that supports guilt and the other that supports innocence, the jury determines which is most reasonable."

Neiss filed a written objection to the use of this instruction at his trial, but his objection was overruled. (D.C. Doc. 238, Trial Tr. at 1352-53).

The Court also instructed the jury on reasonable doubt in accordance with Montana Pattern Jury Instructions Criminal 1-104, i.e.

> The State of Montana has the burden of proving the guilt of the Defendant beyond a reasonable doubt. Proof beyond a reasonable

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[5]. Montana Jury Instructions may be found at https://courts.mt.gov/courts/supreme/boards/crim_jury#81694259-2009-criminal-jury-instruction

> doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt.

Verdict and Appeal

Petitioner was convicted of evidence tampering and deliberate homicide. On appeal, he raised three issues: (1) whether trial court erred in denying his motion to suppress evidence seized pursuant to a search warrant that did not explicitly authorize a no-knock entry; (2) whether the court properly denied Petitioner's motion to suppress evidence obtained through a forensic search of his computer; and (3) whether the jury instruction on circumstantial evidence diluted the presumption of innocence and undermined the constitutional requirement of proof beyond a reasonable doubt.

A divided Montana Supreme Court affirmed. The majority (1) overruled prior precedent insofar as it required investigating officers to obtain authorization from a judge to execute a no-knock entry, and held officers may execute a no-knock entry where they have a reasonable suspicion of exigent circumstances justifying it; (2) held officers may seize an electronic device pursuant to a warrant and may subsequently search the property pursuant to a search warrant even though there was no nexus with the crime charged and a general rummaging search was employed; and (3) found that the jury instructions in this case were proper under prior Montana Supreme Court precedent.

Justice Gustafson dissented, in an opinion joined by Justice Dirk Sandefur,

with respect to the seizure and subsequent search of the Petitioner's computer. She found that the 2013 search warrant lacked particularity, was overbroad, and offered no probable cause to justify the seizure of the computers; the 2015 search warrant did not validly authorize the search of the computers because it was invalid on its face and lacked particularity; and the two-year delay in searching the computers after their seizure was unreasonable.

## REASONS FOR GRANTING THE WRIT

### I. ADVISING A JURY IN A CIRCUMSTANTIAL EVIDENCE CASE THAT "WHEN CIRCUMSTANTIAL EVIDENCE IS SUSCEPTIBLE TO TWO INTERPRETATIONS, ONE THAT SUPPORTS GUILT AND THE OTHER THAT SUPPORTS INNOCENCE, THE JURY DETERMINES WHICH IS MOST REASONABLE" DILUTES THE STATE'S BURDEN OF PROOF AND COMPROMISES THE RIGHT TO BE PRESUMED INNOCENT

A special instruction on circumstantial evidence– the so-called *Webster*[6] charge – was deemed required by the common law where a case was entirely circumstantial, courts fearing that it might result in the conviction of the innocent. See Irene Merker Rosenberg & Yale L. Rosenberg, *"Perhaps What Ye Say is Based Only on Conjecture"-Circumstantial Evidence, Then and Now*, 31 Hous. L. Rev. 1371, 1390 (1995) ("Rosenberg"); Julie Schmidt Chauvin*, "For It Must Seem Their Guilt:" Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 Loy. L.Rev. 217, 223 (2007) (Chauvin).

Although this Court has held that such an instruction is not required in federal courts, so long as "the jury is properly instructed on the standards for

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[6]. *Commonwealth v. Webster*, 59 Mass.(Cush) 295 (1850).

reasonable doubt," *Holland v. United States*, 348 U.S. 121, 139, 140 (1954), many state courts still give such an instruction. See *Hampton v. State*, 961 N.E.2d 480, 485, 486 (Ind. 2012) (collecting authorities and holding that "discarding the 'reasonable theory of innocence' jury instruction is unwise."); Rosenberg, at 1400-1401. The question here is whether the language of the instruction, quoted above, dilutes the State's burden of proof and compromise Petitioner's right to be presumed innocent. *Cf. Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U. S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970).

*Holland*, a prosecution for evasion of income tax based upon a net worth theory, did not answer the question. Although the Court said "the better rule is that, where the jury is *properly instructed on the standards for reasonable doubt*, such an additional instruction on circumstantial evidence is confusing and incorrect," 348 U.S. at 139 (emphasis added), it did not say that a state court could not give such an instruction let alone state what language would be permissible. Yet, it also indicated that an instruction on reasonable doubt "as something the jury would act upon would seem to create confusion." *Id.* at 141.

Nonetheless, state courts adopting its ruling, have ignored that the "Holland Court prefaced its rejection of the reasonable hypothesis of innocence standard with a lengthy discussion of the risk inherent in the use of circumstantial evidence in net worth cases, including a condition that the jury be properly instructed on the standard of beyond a reasonable doubt." Chauvin, at 226.

As Chauvin states, "Precautions regarding the use of circumstantial evidence, such as it being 'so fraught with danger for the innocent that the courts must closely scrutinize its use,' demonstrate that even the Holland Court recognized the inherent risk in the use of this type of evidence." *Ibid.* (quoting *Holland*, at 125).

Chauvin and Rosenberg both note that it is unclear whether these caveats apply to all circumstantial evidence cases or only in net worth prosecutions of the type in Holland. They note that the Court entertained both arguments: (1) that the caveats do not apply across the board, and (2) that if the rejection of the cautionary jury instruction is to be applied broadly, so are the warnings regarding the use of circumstantial evidence. Rosenberg, at 1393-96; Chauvin, at 226 n. 45.

For this reason alone, some clarification is in order.

In any event, under this Court's precedents, it must be determined "whether the challenged jury instruction had the effect of relieving the State of the burden of proof . . . ." *Sandstrom*, 442 U.S. at 521. As reaffirmed in *Sandstrom*, the instruction must be analyzed under the "'Due Process Clause[, which] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Id.* at 520 (*quoting In re Winship*, 397 U. S. 358, 364 (1970)) and his Fifth Amendment rights such as presumption of innocence and not having to present evidence or explain the inference left hanging by the Montana circumstantial evidence charge.

An instruction violates due process where there is a reasonable likelihood that jurors would interpret it to allow conviction based on any "degree of proof

below" the reasonable doubt standard. See *Victor v. Nebraska*, 511 U.S. 1, 6 (1994); *Cage v. Louisiana*, 498 U.S. 39, 41 (1991) (per curiam).

The Montana circumstantial evidence jury instruction strongly suggests that defendant has to prove innocence, namely that his "reasonable inference" is "more reasonable" than the prosecution's, by itself, and surely when coupled with the erroneous reasonable doubt charge of "convincing character" suggests a higher standard of doubt by shifting the burden to defendant.

This is true not only in cases of misidentification, but also where a correct definition is in some way muddled or distorted by additional instruction language. See, e.g., *Whitney v. Horn*, 280 F.3d 240, 256 (3d Cir. 2002) ("Neither the correct statements of law within the instruction, nor the statement immediately after the instruction, completely negated or explained the absolutely incorrect statement of law in the context of the rest of the instructions.") cert. denied, 537 U.S. 1195 (2003); *Bey v. Superintendent Greene SCI,* 856 F.3d 230 (3rd Cir., 2017); *United States v. Gordon*, 290 F.3d 539 (3d Cir. 2002). This is because "[a] reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

While judges are afforded substantial discretion in how to instruct criminal juries, they cannot exercise such discretion in a way that distorts the controlling legal principles

There is little doubt that the instruction here fails to pass constitutional

muster. As Justice McKinnon[7] observed in *State v. Sanchez*, 388 Mont. 262, 399 P.3d 886, 890-91 (2017), concurring in the judgment because "the direct evidence of guilt is strong and it was unnecessary for the jury to rely on circumstantial evidence,":

> In my view, the "most reasonable" instruction is inconsistent with the presumption of innocence to which a defendant is entitled. Were this case based entirely on circumstantial evidence, the jury would have been given conflicting jury instructions that it should adopt the "most reasonable" interpretation of the circumstantial evidence while also being instructed the State's burden was to prove guilt beyond a reasonable doubt and the defendant was entitled throughout trial to a presumption of innocence. The "most reasonable" instruction mistakenly draws on sufficiency precedent and, in doing so, injects a comparative measure — "most" — which potentially compromises the reasonable doubt standard.
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> I would endorse a circumstantial evidence instruction which could be relied upon to produce a result consistent with the State's burden of proving guilt and the defendant's presumption of innocence. The instruction given, "[w]hen circumstantial evidence is susceptible of two interpretations, one that supports guilt and one that supports innocence, the jury determines which is most reasonable," directed the jurors to compare interpretations and choose the interpretation "most" reasonable. While a jury must evaluate interpretations and assess whether they are reasonable, that interpretation must still be measured against the State's burden of proof beyond a reasonable doubt and a defendant's presumption of innocence. The "most reasonable" instruction, due to its origins in sufficiency precedent, obscures the distinction between evaluating and assessing the evidence with measuring that evidence against the State's burden of proof. Potentially, the "most reasonable" instruction, though not here, could undermine the reliability of a conviction which is based entirely

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[7]. Justice McKinnon wrote the majority opinion in this case, deeming herself bound by the majority opinion in *Sanchez* and *State v. Iverson*, 390 Mont. 260, 411 P.3d 1284 (2018). See *State v. Thompson*, 381 Mont. 156, 161, 364 P.3d 1229, 1233 (2015) (discussing stare decisis in Montana). She did overrule a prior decision concerning the no-knock warrant, but that was because a subsequent decision of this Court had rejected the prior decision's analysis.

on circumstantial evidence.

This analysis is correct. The standard enunciated by the Montana Supreme Court is the one applied on appellate review of a jury verdict, not an instruction to the jury. See *People v. Wong*, 81 N.Y.2d 600, 608, 601 N.Y.S.2d 440, 444, 619 N.E.2d 377, 381 (1993); *People v. Rehmeyer,* 19 Cal.App.4th 1758, 1766, 24 Cal.Rptr.2d 321, 324 (1993) ; see Rosenberg at 1418-19; but see *Knight v. State*, 186 So.3d 1005 (Fla. 2016) (reasonable hypothesis of innocence instruction not required, but applied on appellate review of sufficiency).

Moreover, in this case the deficiency was not cured by the "reasonable doubt" instruction. See Chauvin, at 231-34. It defined reasonable doubt as proof of "such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs," language that this Court in *Holland* found "would seem to create confusion." 348 U.S. at 141.

In *Scurry v. United States*, 347 F.2d 468, 470 (D.C. Cir. 1965), cert. denied, 389 U.S. 883 (1967), which had in turn relied on *Holland*, Judge J. Skelly Wright, observed:

> A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks trending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary.

This analysis was followed in *Monk v. Zelez*, 901 F.2d 885 (10th Cir 1990),

where the Tenth Circuit ultimately granted a new trial before a military tribunal. The Court faulted both the use of the word "substantial" in the reasonable doubt charge and the use of language couched in terms of "willingness to act." *Id.* at 890 (citing *Holland*). Even more significantly, *Monk* was one of the circuit court decisions that the Supreme Court cited with approval in *Cage v. Louisiana*, 498 U.S. at 41 fn *.

Several state courts agree. See, e.g., *Commonwealth v. Rembiszewski*, 391 Mass. 123, 131, 461 N.E.2d 201, 207 (1984) ("Equating the proof that the jurors might have wanted in making decisions with respect to their personal affairs with the degree of certitude necessary to convict the defendant tended to reduce the standard of proof from the criminal standard of proof beyond a reasonable doubt to the standard in civil cases, proof by a fair preponderance of the evidence."); *State v. Francis*, 151 Vt. 296, 303-304, 561 A.2d 392, 396 (1989) ("We also believe it trivializes the proof-beyond-a-reasonable-doubt standard to compare it to decisions of personal importance in a juror's life. Making a decision about the guilt of an accused is dissimilar to deciding important personal matters. The latter often involves the balancing of advantages and disadvantages and the decision is reached upon a mere tip of the balance.... If people really did make important personal decisions only when convinced beyond a reasonable doubt as to their correctness, human activity would evidence far more inertia than it does.")

There is contrary authority, see, e.g., *Ramirez v. Hatcher*, 136 F.3d 1209 (9th

Cir.), cert. denied, 525 U.S. 967 (1998) and *United States v. Williams*, 20 F.3d 125, 129 (5th Cir.), cert. denied, 513 U.S. 891 (1994), but all this shows is that the issue is one for this Court to resolve.

Moreover, in those states that require a circumstantial evidence instruction, there is substantial debate concerning the appropriate language. See *Hampton*, at 487, 490 *et seq*.

In *Hampton*, following a careful review of the authorities, the Court said "the jury should be instructed as follows: *In determining whether the guilt of the accused is proven beyond a reasonable doubt, you should require that the proof be so conclusive and sure as to exclude every reasonable theory of innocence*." 961 N.E.2d at 491 (emphasis in original).

California requires a similar instruction:

> [B]efore you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. *If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence.*

Judicial Council of California Criminal Jury Instructions, Calcrim No. 224 (2019 edition) (emphasis added); see *People v. Merkouris,* 46 Cal.2d 540, 561-562, 297 P.2d 999, 1013-14 (1956) (instruction similar to that given here is erroneous).

New York's instruction is as follows:

> [I]t must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence.

*If there is a reasonable hypothesis from the proven facts consistent with the defendant's innocence, then you must find the defendant not guilty.*

New York Criminal Jury Instructions & Model Colloquies, *Circumstantial Evidence– Entire Case* (emphasis added) available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Circumstantial_Evidence.pdf.

See *People v. Sanchez*, 61 N.Y.2d 1022, 1024, 475 N.Y.S.2d 376, 463 N.E.2d 1228 (1984) (" the jury should be instructed in substance that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence.")[8]

The problem arises even in states where the circumstantial evidence instruction has become discretionary. See, e.g., *In re Standard Jury Instructions in Criminal Cases*, 431 So.2d 594 (Fla.1981) (instruction eliminated in standard instructions; instruction discretionary).

In *Wadman v. State*, 750 So. 2d 655 (Fla. 4th DCA 1999), the defendant was charged with aggravated assault with a firearm and the trial court advised the jury, as follows: "Let me tell you because the definition of firearm does not involve proof that a gun is loaded or operable, the Defendant's use of a firearm during a crime can be established even if the gun is not recovered and received into evidence. Circumstantial evidence can be sufficient to establish the use of a firearm."

The Court of Appeal reversed, observing, "The problem with the instruction

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[8]. At one time, Montana required an instruction "that if the circumstantial evidence was susceptible to two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is the duty of the jury to adopt the interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt." *State v. Lucero,* 214 Mont. 334, 339, 693 P.2d 511, 514 (1984). It adopted the current formulation in *State v. Iverson*, 390 Mont. 260, 411 P.3d 1284 (2018) and *State v. Sanchez*, 388 Mont. 262, 399 P.3d 886 (2017),

in this case is that it diminishes the state's burden of proof with respect to one element of the crime charged. . . . The problem is that the instruction uses the term 'circumstantial evidence' without defining it or explaining how the jury is to view such evidence. Common definitions of 'circumstantial' are '[o]f no primary significance,' 'incidental,' 'inessential,' and 'secondary.' . . . the instruction's undefined use of the term 'circumstantial evidence' could have led the jury to believe that one element of the crime did not need to be established beyond a reasonable doubt, but only by 'secondary' or 'incidental' evidence.'"750 So.2d at 657-58.

This case is the perfect vehicle to resolve the issues. The circumstantial proof was not overwhelming. Among other things, there was no DNA evidence linking the Petitioner to the crime and the gunshot residue test excluded the Petitioner because he did not have barium and the morphology, so his GSR did not match the crime scene. More important, a charge error that dilutes the  dilutes the State's burden of proof and compromises the right to be presumed innocent is not subject to harmless error analysis. See *Sullivan v. Louisiana*,  508 U.S. 275, 281 (1993).

## II. THE SEIZURE AND SUBSEQUENT SEARCH OF PETITIONER'S COMPUTER PRESENTS UNSETTLED ISSUES CONCERNING PROBABLE CAUSE AND PARTICULARITY AND "GOOD FAITH" RELIANCE UPON THE WARRANT THAT HAVE DIVIDED THE STATE AND CIRCUIT COURTS

A. Introduction

As Courts and commentators have noted, Fourth Amendment issues concerning seizures and searches of digital equipment present questions that are not easily susceptible of analysis under traditional precedent. See, e.g., Nicole Friess, *When Rummaging Goes Digital: Fourth Amendment Particularity and Stored E-Mail Surveillance*, 90 Neb. L. Rev. (2013); Symposium: *The Search and Seizure of Computers and Electronic Evidence Search Warrants in an Era of Digital Evidence*, 75 Miss. L.J. 85 (2005-2006); Susan W. Brenner & Barbara A. Fredericksen, *Computer Searches And Seizures: Some Unresolved Issues*, 8 Mich. Telecomm. & Tech. L . Rev. 39 (2002 ); *cf. Riley v. California*, 573 U.S. 373 (2014) (a warrant is required to search a mobile phone; search incident to arrest rule inapplicable).

Professor Orin S. Kerr, in an article commissioned by the National Center for Justice and supported by a grant from the Department of Justice:

> contends that the legal rules regulating the search warrant process must be revised in light of the demands of digital evidence collection. Existing rules are premised on the one-step process of traditional searches and seizures: the police obtain a warrant to enter the place to be searched and retrieve the property named in the warrant. Computer technologies tend to bifurcate the process into two steps: the police first execute a physical search to seize computer hardware, and then later execute a second electronic search to obtain the data from the seized

> computer storage device. The failure of the law to account for the two-stage process of computer searches and seizures has caused a great deal of doctrinal confusion, making it difficult for the law to regulate the warrant process effectively.

Orin S. Kerr, *Search Warrants in an Era of Digital Evidence*, 75 Miss. L. J. 85 (2005)

Many of the decisions in the Federal Courts of Appeals and State appellate courts concern child pornography cases, in which computer use is well-known. Yet, even in those cases, these courts struggle over probable cause determinations[9]

Indeed, the United States Magistrate Judges, who are in the front line of the debate, have issued conflicting decisions on applications for warrants for digital evidence. Compare *In re Associated With the Email Account XXXXXXX@ Gmail. Com Maintained At Premises Controlled By Google, Inc.*, 33 F.Supp.3d 386 (S.D. N.Y. 2014) (granting warrant) with *In the Matter of The U.S.'s Application For a*

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[9] Compare, e.g, *Burnett v. State*, 848 So. 2d 1170, 1173-75 (Fla. App. 2003) (no probable cause to support warrant to search computer for evidence of child pornography based on initial complaint that suspect had made lewd videotape of two children); *State v. Staley*, 249 Ga. App. 207, 548 S.E.2d 26, 28-29 (Ga. App. 2001) (although police had probable cause to believe that Staley had molested a specific child, that he had worked as a computer analyst, that he had been previously convicted of molesting a child and taking pictures of that child, and that the affiant detailed that pedophiles stored information relating to having sex with children, there was no nexus between either the crime of molesting that specific child or the propensities of child sex offenders and search of computer in Staley's apartment) with *United States v. Martin,* 426 F.3d 68 (2d Cir. 2005) (2-1 decision) (finding probable cause based on subscription to website that's essential purpose was to trade child pornography); *United States v. Wagers*, 339 F. Supp. 2d 934 (E.D. Ky. 2004) (probable cause existed that suspect's home computer contained child pornography based on membership in child pornography website). But see *United States v. Corcas*, 419 F.3d 151 (2d Cir. 2005) (although affirming denial of motion to suppress, the panel did so based on *Martin* finding probable cause stemming from membership in child pornography website, while criticizing that precedent as unsound).

*Search Warrant To Seize And Search Elec. Devices From Edward Cunnius.*, 770 F.Supp.2d 1138 (W.D. Wash. 2011) (declining warrant)*; In the Matter of the Search of Information Associated with [redacted]@ mac. com that is Stored at Premises Controlled by Apple, Inc.*, 13 F.Supp.3d 145 (D.D.C. April 7, 2014) (same); *In the Matter of Applications for Search Warrants for Information Associated with Target Email Accounts/Skype Accounts*, 2013 WL 4647554 (D.Kan. Aug. 27, 2013).

As Justice Gustafson observed in her dissent below in this case, the 2013 search warrant lacked particularity, was overbroad, and offered no probable cause to justify the seizure of the computers; the 2015 search warrant did not validly authorize the search of the computers because it was invalid on its face and lacked particularity; and the two-year delay in searching the computers after their seizure was unreasonable.

Each of these issues will be discussed below, including any purported reliance on "good faith," and show that this case is an ideal vehicle to resolve the issues.

B. The Seizure Under the 2013 Warrant

The first warrant application did not provide probable cause to seize all "Cell phone, IPads, computers and/or other electronic devices and the information contained therein[]" from Petitioner's home. (D.C.Doc. 65, State's Ex. 1.,) It does not contain any facts that would justify the seizure of computers from Petitioner's home. The application has no facts linking the use of a computer to the homicide. The application has no facts linking Petitioner to the use of a computer.

Importantly, this was not a computer crime. *Cf. United States v. Scott*, 83 F. Supp. 2d 187, 197 (D. Mass. 2000) (it is reasonable to suppose that someone allegedly engaged in bank fraud and producing false securities on his computer would have records of the bank fraud and false securities on that computer). It is not reasonable to assume that a computer has any nexus with a homicide investigation.

Even if the application provided probable cause to arrest Petitioner, the application did not have any facts that supported the seizure of all computers found in the home. See, e.g. *State v. Johnson*, 6 Neb.App. 817, 578 N.W.2d 75, 83 (1998) ("if mere probable cause to arrest a suspect also established probable cause to search the suspect's home, there would be no reason to distinguish search warrants from arrest warrants.")(citing *United States v. Lucarz*, 430 F.2d 1051 (9th Cir.1970)); accord *United States v. Savoca*, 739 F.2d 220, 224-25 (6th Cir.1984)) ("The fact that there is probable cause to arrest a person for a crime does not automatically give police probable cause to search his residence or other area in which he has been observed for evidence of that crime.")

The application did not have any information that would support a conclusion Petitioner even owned a home computer, let alone information that if he did, the computer would then contain evidence of the homicide. Certainly, there was no evidence to support a finding that all computers in the home, no matter who they belonged to, would contain evidence and therefore be subject to seizure.

The conclusion that officers did not have probable cause to seize the

computers is best supported by the State's own actions in this case. The State seized the computers in 2013, but did nothing to search the computers until two and one-half years later. At that time, the State candidly admitted it did not know what would be on the computers, "if anything." (9/14/15 Tr. at 91:2-4.) Then, when the State sent the computers to be analyzed, they were not sent to some far off computer lab, they were sent across town. The fact that the State did nothing with the computers for two and one-half years despite the fact that it would have been very easy for them to do so is the best evidence the State did not have probable cause to seize the computers in the first place.

The Fourth Amendment requires not only that warrants be supported by probable cause, but that they "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The particularity requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). See also *Marron v. United States*, 275 U.S. 192, 196 (1927).

The modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs, and accordingly makes the particularity requirement that much more important. See, e.g. *United States v. Riccardi*, 405 F.3d 852, 863 (10th Cir.2005) (warrant authorizing general search of computer invalid as it permitted officers to

search anything "from child pornography to tax returns to private correspondence"); Because of this "warrants for computer searches must affirmatively limit the search to evidence of specific federal crimes or specific types of material." *Id.* at 862.

Heightened scrutiny of particularity and breadth take on added significance with cell phones and personal computers. This Court recognized as much in *Riley*, holding that searches of cell phones are fraught with these issues. These same privacy issues which are protected by scrutiny of particularity and breadth are the same for computers for the cell phone is a mini-computer that is carried around by almost every person in this country.[10]

The good faith exception to the exclusionary rule cannot save the search. The exception does not apply to "evidence seized 'in objectively reasonable reliance on' a warrant issued by a detached and neutral magistrate judge, even where the warrant is subsequently deemed invalid." *United States v. Falso*, 544 F.3d 110, 125

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[10]. Drastic technological improvements to cell phones have been made since *Riley* in 2014 and the storage capacity of computers including the advent of storage in the "cloud." The Court in *Riley* identified several quantitative differences that underscore the decision to afford cell phones and other "digital containers" greater Fourth Amendment protection than their physical analogs. First, the "immense storage capacity" of cellphones allows "millions of pages of text, thousands of pictures, or hundreds of videos" to be stored and transported. Second, cellphones facilitate the collection and aggregation "in one place of many distinct types of information," as well as data dating back "to the purchase of the phone, or even earlier.' Chief Justice Roberts explained, "there is an element of pervasiveness that characterizes cell phones but not physical records."

But it was not just the quantity of records at issue in *Riley* that justified increased Fourth Amendment protection, it was also a qualitative difference in the digital records created and stored on cell phones. This data includes "private information never found in a home in any form."

(2d Cir. 2008) (quoting *United States v. Leon*, 468 U.S. 897, 922 (1984)). "The burden is on the government to demonstrate the objective reasonableness of the officers' good faith reliance on an invalidated warrant." *United States v. Clark*, 638 F.3d 89, 100 (2d Cir. 2011).

This Court has identified four circumstances where an exception to the exclusionary rule would not apply: (1) where the issuing magistrate has been knowingly misled; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the warrant is so facially deficient that reliance upon it is unreasonable. *Leon*, 468 U.S. at 923. The critical question is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 n.23.

In this instance, there can be little doubt that exceptions (3) and (4) can be applicable. The Montana Supreme Court majority apparently thought so, essentially predicating its holding on the theory that the subsequent warrant cured any deficiency.

Other courts have recognized that "if the original seizure was illegal, the subsequent warrant would not cure the defect." *Chupp v. State*, 509 N.E.2d 835, 838 (Ind. 1987); see also *State v. Hartman*, 238 Or.App. 582, 592, 243 P.3d 480, 486 (2010), modified on recons.,241 Or.App. 195, 248 P.3d 448 (2011)(rejecting

warrant-based inevitable discovery argument where, once information obtained as a result of original unlawful seizure of evidence was excised from application for subsequent warrant to seize the same evidence, the warrant application was insufficient to establish probable cause); *cf. Murray v. United States*, 487 U.S. 533, 542 (1988) (remanding for independent source hearing); *United States v. Townsley*, 843 F.2d 1070, 1079 (8th Cir.1988), cert. denied 499 U.S. 944 (1989) ("When none of the evidence obtained in an initial illegal entry or seizure is used to obtain the warrant authorizing the subsequent entry or seizure, the valid warrant purges the evidence of any taint arising from the prior illegal activity.").

Even if the subsequent warrant could purge the taint, such a warrant would have to be obtained promptly. As discussed below, there was a 2 ½ delay. Given that delay, the subsequent warrant was not valid and thus could not cure the taint.

C. The 2015 Warrant

Even if the first warrant did validly authorize the seizure of all computers from the home, the second warrant, obtained two and one-half years after the computers were originally seized was invalid on its face. The second warrant had no temporal or substantive limitations and it purportedly authorized the search and seizure of an unlimited amount of data.

The Fourth Amendment requires a search warrant "particularly [to] describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "Such particularity is necessarily tied to the Amendment's

probable cause requirement."[11] *In re 650 Fifth Ave. & Related Props.*, 830 F.3d 66, 99 (2d Cir. 2016).

"By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of

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[11]. At one point in the majority opinion below, the Court stated that Petitioner had not sufficiently raised the argument in the trial court and it was waived. (Slip Op., p. 27). It said Petitioner's argument "that the warrant was not 'specifically particularized as to the reason to search' conflates probable cause with particularity because only probable cause relates to the reason for a search. . . . . Whether a warrant lacks particularity and whether probable cause supports it are distinct issues. " (Slip Op., p 27 n.2).

Yet, later in the opinion, the majority said "Essential to both constitutional provisions and § 46-5-221, MCA, is the particularity requirement. A search warrant must particularly describe which items are to be seized." (Slip. Op. p. 30). It then discussed and analyzed the question under the rubric of probable cause.

As shown above, probable cause and particularity are not distinct issues, so the discussion on the merits was not an alternative holding and there is no adequate and independent state ground. See Garner v. Lee, 908 F. 3d 845, 859 (2d Cir. 2018); Galarza v. Keane , 252 F.3d 630, 637 (2d Cir. 2001) (Sotomayor, J. ) (noting that a state court's reliance on a state procedural bar must be "unambiguous"); cf. Harris v. Reed, 489 U.S. 255 (1989).

In any event, a state procedural rule will not bar enforcement of a federal right if, although independent and adequate, the rule is applied in an "exorbitant" manner. See Lee v. Kemna, 534 U.S. 362, 376 (2002). As the dissenting opinion in the Montana Supreme Court shows, this is such a case. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457–458 (1958). Indeed, again as the dissenters suggested below, the novel state procedural requirement appears to have imposed for the purpose of evading compliance with a federal standard. See, e.g., NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 293–302 (1964).

the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); see also *Kentucky v. King*, 563 U.S. 452, 459 (2011).

There are three elements necessary to satisfy this requirement. "First, a warrant must identify the specific offense for which the police have established probable cause. Second, a warrant must describe the place to be searched. Third, the warrant must specify the items to be seized by their relation to designated crimes." *United States v. Galpin*, 720 F.3d 436, 445-46 (2d Cir. 2013) (internal quotation marks, citations, and footnote omitted).

These elements "must be satisfied 'in the warrant, not in the supporting documents.'" *In re 650 Fifth Ave*, 830 F.3d at 99 (quoting *Groh v. Ramirez*, 540 U.S. 551, 557 (2004)). Where necessary, "a court may construe a warrant with reference to a supporting application or affidavit," but it can do so only if the warrant "uses appropriate words of incorporation." *Groh*, 540 U.S. at 557-58.

Thus, for a warrant to meet the particularity requirement, it must identify the alleged crime for which evidence is sought. See *United States v. George* , 975 F.2d 72, 76 (2d Cir. 1992) (observing that warrant lacked particularity where "[n]othing on the face of the warrant tells the searching officers for what crime the search is being undertaken"); *United States v. Galpin* , 720 F.3d 436, 447 (2d Cir. 2013) (holding that search warrant generally authorizing police officers to search defendant's physical property and electronic equipment for evidence of "NYS Penal

Law and or Federal Statutes" violated the particularity requirement (internal quotation marks omitted)) (cited in *In re 650 Fifth Ave.*, 830 F.3d at 100).

Here, FBI Agent Salacinski was the one who limited the search of the computers, not the issuing magistrate. It was Salacinski who requested a time limit and who worked with officers to develop a key word search to narrow his search. The fact that Salacinski imposed his own limits when searching the computers does not save the warrant because the restrictions must come from a neutral magistrate, not from the investigating officer. See e.g., *Katz v. United States*, 389 U.S. 347, 356 (1967).

The second warrant also erroneously authorized a search of computers found in *New Jersey*, not Yellowstone County, MT. The application for the warrant was not incorporated into the warrant and, in accordance with *Groh*, cannot cure the warrant's facial invalidity.

Even if it had been, the application did not provide probable cause to perform an unlimited search of all data that could be found on the computers seized from Petitioner's home.

The majority below made an analogy to a file cabinet, quoting Thomas K. Clancy, *Symposium: The Search and Seizure of Computers and Electronic Evidence: The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer*, 75 Miss. L.J. 193, 197-98 (2005). But Professor Clancy later observed that this was the position of *some* courts and others had rejected it:

> Some authorities reject the container analogy and view searches for data on a computer much differently than paper document searches. The leading case, *United States v. Carey* [172 F.3d 1268 (10th Cir. 1999)] espouses the view that law enforcement officers must take a "special approach" to the search of data contained on computers and that the "file cabinet analogy may be inadequate." This position is premised on the fact that "electronic storage is likely to contain a greater quantity and variety of information than any previous storage method.

*Id.* at 204.[12]

Indeed, in addition to *Carey*, the Tenth Circuit has extensively discussed searches of digital files. See, e.g., *United States v. Loera*, 923 F.3d 907 (10th Cir. 2019); *United States v. Russian*, 848 F.3d 1239, 1245 (10th Cir. 2017); *United States v. Christie*, 717 F.3d 1156, 1164 (10th Cir. 2013); *United States v. Burke*, 633 F.3d 984, 992 (10th Cir. 2011); *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009); *United States v. Brooks*, 427 F.3d 1246, 1251 (10th Cir. 2005); *United States v. Riccardi*, 405 F.3d 852, 861 (10th Cir. 2005); *United States v. Campos*, 221 F.3d

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[12]. Clancy would reject the "special approach" and follow the container analogy. 75 Miss. L. J. at 208. However, other commentators would follow the Tenth Circuit's approach. See Raphael Winick, *Searches and Seizures Of Computers and Computer Data*. 8 Harvard Journal of Law & Technology 75, 110-111 (1994) ("Application of the container rule to computer memory devices essentially permits law enforcement officers to rummage through any and all information stored on a computer disk whenever the officers obtain possession of the physical computer hardware. However, Fourth Amendment law has long since abandoned the concept that physical possession of property by law enforcement officers makes any subsequent search constitutional."); Susan W. Brenner & Barbara A. Fredericksen, *Computer Searches And Seizures: Some Unresolved Issues*, 8 Mich. Telecomm. & Tech. L . Rev. 39, 60-63, 81-82 (2002) (setting forth some of the differences between searches of "paper documents and computer-generated evidence" and maintaining that courts should impose restrictions on computer searches such as limiting the sear ch by file types, by requiring a second warrant for intermingled files, and by imposing time frames for conducting the search.)

1143, 1148 (10th Cir. 2000).[13]

"[W]arrants for computer searches must affirmatively limit the search to evidence of specific federal crimes or specific types of material." *Burke*, 633 F.3d at 992 (quoting *Riccardi*, 405 F.3d at 862). A warrant should enable "the searcher to reasonably ascertain and identify the things authorized to be seized." *Cooper*, 654 F.3d at 1126 (quoting *Riccardi,* 405 F.3d at 862).

Whether the container approach or the Tenth Circuit approach meets constitutional requirements is certainly an open question and one that should be addressed by this Court.

D. The Delay Before Searching the Computers Was Unreasonable.

The State waited two and one-half years to search the computers after they were taken from Petitioner's home. Petitioner did not consent to the seizure of the computers. This delay supports the conclusion the State did not have probable cause to seize the computers, but it is also constitutionally unreasonable. A seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment. *United States v. Mitchell*, 565 F. 3d1347, 1350 (11th Cir. 2009) (per curiam).

There is no case in which such a lengthy delay has been approved. In

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[13]. In *United States v. Christie*, 717 F.3d 1156 (10th Cir. 2013) then Judge Gorsuch recognized the particularity requirement to computer searches are still relatively new as are the protocols for searching a computer.

*Mitchell,* law enforcement agents seized the hard drive of the defendant's computer acting on probable cause that the computer contained images of child pornography. Twenty-one days after the initial seizure of the hard drive, the agent applied for and received a warrant to search the computer. The defendant challenged the delay in obtaining the search warrant, but the challenge to the search warrant was rejected by the court. The Eleventh Circuit reversed, holding the delay unreasonable.

The Fourth Circuit recently followed *Mitchell* in *United States v. Pratt*, 915 F.3d 266 (4th Cir. 2019). In *Prat*t, there was a 31-day delay in obtaining a warrant for the defendant's cell phone because the defendant had committed crimes in both North and South Carolina, and the government had to decide the location where to seek a warrant. *Id.* at 272. The Fourth Circuit held that the agents did not act diligently in that case because it "shouldn't have taken a month" for the agents to decide where to seek a warrant, particularly given the government's concession that it was "unlikely that the forum for a warrant would affect a later prosecution." *Id.* Further, in *Pratt*, the government was not waiting for a state prosecutor to act.

Where delays have been permitted, they have been for a matter of days, not months. See *United States v. Laist* , 702 F.3d 608, 616–17 (11th Cir. 2012) (25-day delay in getting a search warrant for a seized computer upheld. The delay was reasonable because the agents worked diligently on the affidavit; they were responsible for investigations in ten counties; and the defendant consented to the

seizure and had been allowed to keep certain files, diminishing his privacy interest.); *United States v. Burgard* , 675 F.3d 1029, 1033–34 (7th Cir. 2012) (Seventh Circuit accepted a six-day delay for an officer to seek a warrant for a cellphone where he needed to consult with prosecutors and with the officer who seized the phone, but the Seventh Circuit criticized even that delay); *United States v. Vallimont*, 378 F. App'x 972, 975–76 (11th Cir. 2010) (45-day delay in getting a search warrant for a seized computer upheld. The delay was reasonable because the investigator was diverted to other cases, the county's resources were overwhelmed, and the defendant diminished his privacy interest by giving another person access to the computer.)

It is clear that the decision of the Montana Supreme Court conflicts with *Mitchell* and *Pratt*. As the dissenting opinion noted, the original warrant to seize the computer in the first instance was invalid in the first instance and the majority essentially engaged in a bootstrap.

Review of the conflict in decisions is warranted.

## CONCLUSION

This case presents issues of exceptional importance in which the courts of this nation have issued conflicting decisions. It is important that this conflict be resolved promptly so that the judiciary and law enforcement have clear guidance.

Certiorari should be granted.

Dated: August 20, 2019

/s/ Eric Nelson

# APPENDIX