No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JASON LOERA

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari

To The United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR THE COURT TO CONSIDER ARE:

1. Are the federal circuit courts and state courts of last resort analyzing and applying the inevitable discovery doctrine in a manner eviscerating the Fourth Amendment?
2. Is the time ripe for the Supreme Court to provide parameters to the inevitable discovery doctrine based on ongoing conflicts of interpretation and application?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Loera respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, in Case No. 17-2180.

LIST OF ALL PROCEEDINGS

1. Proceeding in the United States District Court for the District of New Mexico; Docket No. 1:13-CR-01876-JB-1; Case Caption, United States of America, Plaintiff, vs. Jason Loera, Defendant; Date of Entry of Judgment, October 5, 2017.
2. Proceeding in the United States Court of Appeals for the Tenth Circuit; Docket No. 17-2180; Case Caption, United States of America, Plaintiff-Appellee vs. Jason Loera, Defendant-Appellant; Date of Entry of Judgment, May 13, 2019; Date of Order Denying Petition for Rehearing, June 5, 2019.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED

The opinions of the United States District Court for the District of New Mexico are published and can be found at *United States v. Loera*, 59 F. Supp. 3d 1089 (D.N.M. 2014), and *United States v. Loera*, 182 F. Supp. 3d 1173 (D.N.M. 2016). The opinion of the United States Court of Appeals for the Tenth Circuit is published and can be found at *United States v. Loera,* 923 F.3d 907 (10th Cir. 2019).

JURISDICTION

The United States District Court for the District of New Mexico had original jurisdiction over Mr. Loera's criminal case pursuant to 18 U.S.C. § 3231. The District Court entered judgment against Mr. Loera on October 5, 2017. A Notice of Appeal was filed on October 13, 2017. The Court of Appeals for the Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and entered judgment against Mr. Loera on May 13, 2019. A Petition for Panel Rehearing was filed on May 28, 2019, and an Order Denying the Petition for Panel Rehearing was entered on June 5, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely pursuant to Supreme Court Rule 13.3.

RELEVANT CONSTITUTIONAL PROVISION

This case involves the principles and protections of the Fourth Amendment which 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.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

The FBI in 2012 began investigating Jason Loera for illegally intercepting emails intended for then-sitting New Mexico Governor Susana Martinez and her staff in violation of 18 U.S.C. §§ 1030 and 2511. Pet. App. 3.

The FBI applied for and obtained the First Warrant on November 19, 2012, which authorized the search of Appellant's residence to search electronic storage devices for evidence that Petitioner committed computer fraud and hijacked emails. Pet. App. 140.

Special Agents Aaron Cravens and Brian Nishida executed the First Warrant on November 20, 2012. While Special Agent Cravens was executing the First Warrant and searching Petitioner's CDs, he found what appeared to be an image depicting child pornography. He opened the file to confirm that it was an image of child pornography and after determining that it was alerted Agent Nishida as well as the FBI agent in charge. On a separate CD Agent Cravens found another image of child pornography. On each occasion that Agent Cravens had confirmed that a CD contained an image depicting child pornography after opening the file and viewing the entire image, he would then eject the CD and set it aside to be seized and reviewed off-site. Pet. App. 4-6.

Following Agent Craven's discovery, Agent Nishida also discovered what he confirmed was child pornography. Agent Nishida took a different approach and continued searching the CD that he had already discovered contained images depicting child pornography. Both agents continued to search after independently

discovering material outside the scope of the search warrant. As a result of the November 20, 2012, search in execution of the First Warrant, the FBI seized thirteen CDs, computers, external hard drives, an iPhone, and an iPad from Appellant's residence. Of the thirteen CDs seized from Loera's residence: four contained child pornography images and nine contained evidence of computer fraud. These materials were taken to an FBI facility for later review. Pet. App. 4-6. The District Court found that the action of the agents in continuing to view files after independent discovery of child pornography was unlawful under Tenth Circuit precedent. Pet. App. 254.

On November 27, 2012, a week after the initial execution of the first warrant, in an effort to obtain a subsequent search warrant for child pornography, Special Agent Cravens spent two-and-a-half hours searching the four CDs already known by both Agent Cravens and Agent Nishida to contain images of child pornography in order to describe those images in applying for the second search warrant. Special Agent Cravens was not searching these CDs for evidence of computer fraud or email hijacking; rather, he was at that point specifically scanning the CDs for child pornography images, allegedly so that he could describe those images in an application for a second warrant. Pet. App. 6-7.

The District Court, pursuant to a suppression motion, concluded that the November 27, 2012, search was unlawful and the Tenth Circuit agreed, though both courts found that exceptions to the exclusionary rule applied. Pet. App. 25-26, 38. Agent Cravens applied for a second warrant, supported by information gathered from the unconstitutional search on November 27. In conducting a full examination of

Appellant's computers and electronic records in execution of the Second Warrant, Special Agent Nishida found evidence of child pornography. Pet. App. 6-8. A federal grand jury indicted Appellant, and the Government filed a superseding indictment in 2014, charging Appellant with three counts of possession of material containing a visual depiction of a minor engaged in sexually explicit conduct. Count I of the Superseding Indictment concerns the hard drive on Appellant's laptop and Counts II and III each concern CDs seized from Appellant's residence. Pet. App. 8. Appellant filed his motion to suppress and supporting memorandum, seeking an order suppressing all evidence of child pornography seized from his residence on November 20, 2012, as a result of any searches of that evidence in execution of the First or Second Warrants. The District Court denied Appellant's motion to suppress. Pet. App. 140-142.

Appellant subsequently filed his motion to reconsider, which the District Court also denied. The District Court's denials were the result of determining (1) that the application for the second warrant would have supported probable cause had the information obtained during the unlawful second search been excised and (2) that the good faith exception, the plain view doctrine, and the inevitable discovery doctrine prevented application of the exclusionary rule based on the illegality of the search and the violation of the Fourth Amendment. Pet. App. 8, 30, 36, 38, 272. Appellant, pursuant to a plea agreement, pled guilty specifically reserving his rights to appeal the denial of his motions to suppress and to reconsider. Pet. App. 8.

An appeal to the Tenth Circuit Court of Appeals followed. The Tenth Circuit, in a published decision, reversed the District Court's finding that the conduct of the agents during the execution of the first warrant became unlawful and reversed the District Court's determination that the second warrant would have been supported by probable cause without the information from the second search. The Tenth Circuit also found that the plain-view and good-faith exceptions were inapplicable but affirmed that the inevitable discovery exception applied. Pet. App. 1-42.

REASONS FOR GRANTING THE PETITION

Federal courts of appeals and state courts of last resort are openly and intractably divided as to the application of the inevitable discovery doctrine, at times even within their own jurisdictions. The application of inevitable discovery is constitutionally significant, and the courts have had ample time to develop a consistent body of law that would comport with this Court's holding in *Nix v. Williams.* This Court should utilize this case – which presents the issue of the inevitable discovery doctrine in the context of electronically stored information and a particularly comprehensive fact pattern finding illegal searches – to resolve the conflict and define when the inevitable discovery doctrine can be utilized to overcome ongoing unlawful conduct by law enforcement in violation of the Fourth Amendment.

I. Background

The conflict over whether the inevitable discovery doctrine applies in cases where law enforcement has engaged in illegal conduct arises from divergent views utilized by both the federal circuit courts and state courts of last resort. The tension

and uncertainty as to how to apply this Court's precedent on the inevitable discovery doctrine is evidenced by multiple federal circuit courts and state courts of last resort analyzing the application of the inevitable discovery doctrine based on whether a warrant could have been obtained but was not sought; some analyze the application by holding that inevitable discovery may not be used to excuse a warrantless search; and yet other courts analyze the inevitable discovery doctrine based on whether the illegally obtained evidence would have reasonably been discovered through an active alternative line of investigation that was ongoing at the time of the illegal search.

This Court adopted the inevitable discovery doctrine in *Nix v. Williams*, 467 U.S. 431 (1984). The inevitable discovery doctrine holds that when evidence is obtained in violation of the Fourth Amendment such evidence need not be suppressed if it inevitably would have been discovered through lawful means independent of the unconstitutional search. *Id.* at 446. The critical consideration in applying the inevitable discovery doctrine is to place law enforcement officers in the "same positions they would have been in had the impermissible conduct not taken place," and, based on that perspective, determine whether officers would have inevitably discovered the evidence lawfully. *Id.* at 447.

The rationale behind the inevitable discovery rule is that the exclusion of physical evidence that would inevitably have been discovered would add nothing to the integrity or fairness of criminal proceedings. *Id.* at 446. The integrity and fairness of the proceedings can be assured by placing the government and the accused in the same positions they would have been in had the impermissible conduct not

taken place. *Id.* at 447. Therefore, if the prosecution is able to prove that the evidence would have been obtained inevitably, and, therefore, would have been admitted regardless of any overreaching by law enforcement, there is no reason to suppress that evidence to ensure the fairness of the proceedings. *Id.*

This Court has not revisited the application of the inevitable discovery doctrine since its decision in *Nix v. Williams.* The closest this Court has come to considering these issues are the cases of *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) and *Utah v. Strieff*, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016). This Court found that the facts and circumstances in *Riley* constituted a violation of an individual's Fourth Amendment Rights and suppression of the evidence was required. However, *Riley* was based upon an illegal search of an individual's cell phone data without a warrant. Further, this Court found that the facts and circumstances in *Strieff* satisfied the attenuation doctrine and therefore did not require suppression of the evidence seized incident to arrest. Neither of those decisions analyze the application of the inevitable discovery doctrine.

The facts and circumstances in *Loera* establish actions taken by law enforcement that are far more egregious than those in *Riley* which this Court found to be unconstitutional and not subject to any exceptions to the exclusionary rule.

Significantly, this Court's holding in *Nix v. Williams* occurred before the advancements of digital technology and the unlimited capacity of electronic equipment to store information. The struggle to apply the inevitable discovery doctrine adopted in *Nix* to the unique technological capabilities of today's digital

storage devices has led to the split in how different federal circuit courts and state courts of last resort apply this doctrine.

This situation in the age of digital media was not addressed by the *Nix v. Williams* decision, in which the search for a child by 200 volunteers would have inevitably led to the discovery of that child's body even had a law enforcement officer not illegally obtained the defendant's statement as to where the body was located. The Supreme Court did not address and had no reason to address the application of the inevitable discovery doctrine to electronic storage devices that often contain a vast amount of very sensitive financial records, federally protected health records, and/or potentially embarrassing, although not illegal, personal information, none of which would necessarily be encompassed by a search warrant seeking evidence of an unrelated crime. Moreover, allowing officers to comb through computer files on an electronic device in order to execute a search warrant for limited information would result in the inevitable discovery doctrine always being applied to a situation in which a person has committed a crime, even if that crime is not what officers are investigating or are even aware of, where officers have a warrant to search electronic data, no matter how limited that search warrant appears facially.

Courts continue to struggle with the application of this Court's inevitable discovery doctrine – a set of legal rules largely developed decades ago, before the advancements in modern technology – to the question of whether the illegal police conduct, absent probable cause independent of the illegal activity, requires suppression of evidence obtained in violation of the Fourth Amendment. In

Rodriquez v. State, 187 So.3d 841, 847-48 (Fla. 2015) *cert. denied*, 137 S.Ct. 124, 196 L.Ed.2d 199 (2016), the Supreme Court of Florida recognizes the diverging views on the application of the inevitable discovery doctrine. However, that case comports with the language in *Nix v. Williams*, and requires that "under the inevitable discovery doctrine, if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the evidence will be admissible." *Id.* (internal citations omitted).

Contrary to the holding in *Rodriquez*, which comports with this Court's precedent in *Nix,* the Tenth Circuit in *Loera* has broadly expanded the inevitable discovery doctrine in a manner that essentially eviscerates the warrant requirement of the Fourth Amendment. In *Loera* there was no evidence that Agent Nishida was pursuing a warrant when Agent Cravens continued his illegal search. The Tenth Circuit has now created legal precedent for inevitable discovery to apply in any case where there is a mere possibility that legal actions could have resulted in a warrant.

II. The Tenth Circuit's Analysis For The Application Of The Inevitable Discovery Doctrine Is Unclear And Inconsistent With The Other Circuits

The Tenth Circuit's decision in *Loera* is inconsistent with its prior and subsequent decisions. The Tenth Circuit stated that "[t]he extent to which the warrant process has been completed at the time those seeking the warrant learn of the search, and whether a warrant is ultimately obtained, are factors entitled to great importance in determining whether the evidence would have inevitably been discovered pursuant to a warrant." *United States v. Souza,* 223 F.3d 1197, 1204 (10th Cir. 2000). The Tenth Circuit Court established four factors in *Souza*: 1) the extent to

which the warrant process has been completed at the time those seeking the warrant learn of the search; 2) the strength of the showing of probable cause at the time the search occurred; 3) whether a warrant ultimately was obtained, albeit after the illegal entry; and 4) evidence that law enforcement agents 'jumped the gun' because they lacked confidence in their showing of probable cause and wanted to force the issue by creating a *fait accompli*.

Based on the district court's application of the *Souza* factors, Petitioner, in making his argument before the Tenth Circuit, relied heavily upon that Court's ruling in *United States v. Souza*, 223 F.3d 1197 (10th Cir. 2000). *Souza* adopts the four-factor test articulated by the Second Circuit in *United States v. Cabassa*, 62 F.3d 470 (2nd Cir. 1995). However, the Second Circuit was not without concerns when it adopted the factors. The Court stated:

> There are, of course, semantic problems in using the preponderance of the evidence standard to prove inevitability. To say that more probably than not event "X" would have occurred is to say only that there is a 50% + chance that "X" would have occurred. Clearly, the doctrine of inevitable discovery requires something more where the discovery is based upon the expected issuance of a warrant. Otherwise, it would result in illegally seized evidence being received when there was a 49% chance that a warrant would not have issued or would not have issued in a timely fashion, hardly a showing of inevitability.

Id. at 474.

Moreover, the Tenth Circuit did not apply or analyze the *Souza* factors, which were meant to balance concerns between deterring police misconduct when a warrantless search has been issued versus the interests of effective law enforcement

as required by *Nix*. It is no longer clear under what circumstances the Tenth Circuit will apply the *Souza* factors.

However, the Tenth Circuit's decision relies on *United States v. Christy*, 739 F.3d 534 (10th Cir. 2014) almost exclusively to apply the inevitable discovery doctrine, and significantly, neglects the analysis, central to the *Christy* holding of the *Souza* factors. *See Christy,* 739 F.3d at 541-43. It is unclear why the Tenth Circuit did not apply the *Souza* factors to *Loera,* as there was no mention of *Souza* in that opinion. Notwithstanding its departure from the *Souza* factors in deciding *Loera,* in a subsequent unpublished decision, the Tenth Circuit, citing to *Loera* in support of denial of suppression when evidence would inevitably have been discovered through lawful means independent of the illegal search, applied the *Souza* factors for that analysis. *United States v. Blackburn*, 2019 WL 3991103, *4 (10th Cir. Aug. 23, 2019)(unpublished).

Contrary to the requirement now cited by the Tenth Circuit that the evidence would have been discovered through lawful means independent of the illegal search, the search of the materials at issue was illegal as it violated the particularity requirement of the warrant. When law enforcement officers consciously choose to search outside the scope of a valid warrant it *de facto* transforms an otherwise valid warrant into an impermissible general warrant. Under the reasoning of the Tenth Circuit, any warrant issued for the search of electronic media may be treated as a general warrant authorizing the search of an entire electronic file system as soon as probable cause of another crime is discovered. Not only does this transform a warrant,

normally bound by the particularity requirement, into a general warrant, but it is expressly disallowed by F.R. Crim. P. 41(e)(2)(b) which requires that a later review of the seized materials be consistent with the warrant. "A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant." F.R. Crim. P. 41(e)(2)(b). The Tenth Circuit's holding excuses the illegal behavior and shields the evidence from suppression by applying the inevitable discovery doctrine.

Contrary to the position of the Tenth Circuit, the Ninth Circuit and the Supreme Court of Utah have identified the need to balance the compelling and competing policies behind the inevitable discovery doctrine. The inevitable discovery exception promotes the "interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime." *Nix v. Williams,* 467 U.S. at 443. The Supreme Court of Utah has noted that:

> It becomes difficult to strike the precise balance in cases where the police have probable cause to seek a warrant but act without one. In that class of cases, a rule that would "excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment."

Brierley v. City, 390 P.3d 269, 275 (Utah 2016)(*quoting United States v. Echegoyen,* 799 F.2d 1271, 1280 n. 7 (9th Cir. 1986)).

III. As Identified In *Riley v. California* Electronically Stored Information Presents Unique Challenges in Fourth Amendment Jurisprudence

As electronically stored information becomes increasingly essential to the lives of all citizens, it is a paramount concern that the protections conferred by the Fourth Amendment are properly extended to this digital realm. Computer technology poses unique challenges with respect to the exceptions to the exclusionary rule because computers are capable of storing and intermingling a large amount of information and because computer data may be mislabeled or otherwise concealed.

This Honorable Court has noted that electronically stored information presents unique challenges in Fourth Amendment jurisprudence. "Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." *Riley v. California*, 573 U.S. 373, 396-397 (2014). Further, this Honorable Court noted that the "general preference [is] to provide clear guidance to law enforcement through categorical rules. If police are to have workable rules, the balancing of the competing interests …must in large part be done on a categorical basis–not in an ad hoc, case-by-case fashion by individual police officers." *Id.* at 398 (internal quotations and citations omitted). Due to the heightened risk that officers will tread beyond the scope of a warrant in searches of electronic information, clear rules on the application of inevitable discovery are required to ensure the Fourth Amendment protections are not eviscerated.

IV. The Conflict

The struggle to apply this Court's precedent has divided federal courts of appeals and state courts of last resort as to why and when to apply the inevitable discovery exception to the exclusionary rule for the admission of evidence obtained through illegal searches. The inconsistency in the application of the rule throughout the judiciary is evidenced by the degrees of variation being applied as identified below.

A. Federal Courts Of Appeals And State Courts Of Last Resort Are Split As To Whether The Inevitable Discovery Doctrine Requires That Law Enforcement Pursue A Warrant Prior To An Illegal Search

The Sixth and Ninth Circuit Courts have determined that the failure to obtain a search warrant, even if officers could have obtained a search warrant precludes the inevitable discovery exception to the exclusionary rule. The Ninth Circuit stated: "[T]o excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment." *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986). Likewise, in *United States v. Mejia,* 69 F.3d 309, 320 (9th Cir. 1995), the Court stated: "This Court has never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant." In a recent case where the Ninth Circuit vacated submission pending the decision from the Supreme Court in *Riley v. California,* the Court held that the government is asking us to "excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant." *U.S. v. Camou,* 773 F.3d 932,

943 (9th Cir. 2014). Based on the previous Ninth Circuit decision in *Mejia*, the Court found that this is impermissible and the inevitable discovery exception to the exclusionary rule was not satisfied.

Further, the Sixth Circuit identified a line of cases that demonstrates the Circuit's commitment to the Fourth Amendment's warrant requirement and rejects the government's attempt to circumvent the requirement via the inevitable discovery doctrine. *United States v. Quinney*, 583 F.3d 891, 894 (6th Cir. 2009); *United States v. Johnson,* 22 F.3d 574, 583 (6th Cir.1994)(rejecting the logic that simply because the police could have obtained a warrant, it was therefore inevitable that they would have done so); *United States v. Buchanan,* 904 F.2d 349, 356-57 (6th Cir.1990)(rejecting the government's contention that a warrantless search was permissible because agents had collected information that would have supported a search warrant); *United States v. Griffin,* 502 F.2d 959, 961 (6th Cir.1974); *United States v. Bowden*, 240 Fed.Appx. 56, 63 (6th Cir.2007).

The California, Florida, Louisiana, and Kansas State Supreme Courts have adopted a similar rationale behind application of the inevitable discovery doctrine. *People v. Robles*, 23 Cal.4th 789, 801, 3 P.3d 311, 319 (Cal. 2000)(in the absence of exigent circumstances a police officer is required to obtain a warrant to enter a residence even if contraband is clearly displayed in a window and the officer observes the contraband from a place in which he or she has a right to be and inevitable discovery will not apply); *Rodriquez v. State*, 187 So.3d 841, 848, 849-50 (Fla. 2015)*cert. denied*, 137 S.Ct. 124, 196 L.Ed.2d 199 (2016)(the inevitable discovery

doctrine does not apply when the prosecution cannot demonstrate an active and independent investigation and the state must show that a search warrant is being actively pursued prior to the occurrence of the illegal conduct and the doctrine cannot function to apply simply when police could have obtained a search warrant if they had taken the opportunity to pursue one); *State v. Lee*, 976 So.2d 109, 127-28, 2005-2098 at 23-24(La. 1/16/08)(a mere showing that the police had probable cause for a search and could have secured a warrant from a neutral magistrate does not satisfy the inevitable discovery doctrine, because it would effectively obviate the Fourth Amendment preference for warrants and reduce the exclusionary rule to cases in which the police lack probable cause.) In *State v. Brown*, 245 Kan. 604, 612, 783 P.2d 1278, 1284 (1989), the Supreme Court of Kansas allowed the inevitable discovery doctrine to be applied if law enforcement was in the process of obtaining a search warrant at the time of the illegal search.

The Fourth Circuit held that the inevitable discovery doctrine will apply "if the government produces evidence that the police would have obtained the necessary warrant absent the illegal search." *United States v. Allen*, 159 F.3d 832, 841 (4th Cir. 1998). However, the Court articulated similar concerns as those of the Ninth Circuit. The Court stated that "the inevitable discovery doctrine cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant." *Id.* at 842.

The Seventh Circuit however has taken an opposing view, explicitly allowing consideration of whether a warrant *certainly* would have been issued, had it been sought, as a factor in determining inevitability. *See generally United States v. Elder*, 466 F.3d 1090, 1091 (7th Cir. 2006)(The usual understanding of that doctrine is that the exclusionary rule should not be applied when all the steps required to obtain a valid warrant have been taken before the premature search occurs). In *United States v. Fifer,* 863 F.3d 759, 767 (7th Cir. 2017) *cert. denied,* 138 S. Ct. 1262, 200 L.Ed.2d 420 (2018)(the challenged evidence was also admissible under the related doctrine of inevitable discovery since the officer who did the on-site search credibly testified that he would have referred the case to the sex-crimes division regardless of what he had seen on the devices); *United States v. Pelletier*, 700 F.3d 1109, 1116 (7th Cir. 2012)(in other words, the government must show not only that it could have obtained a warrant, but also that it would have obtained a warrant.)

Similarly, the Missouri State Supreme Court has held that evidence found during a warrantless search would inevitably have been discovered because a search warrant could have been obtained and the evidence would have been discovered by legitimate means. *State v. Butler*, 676 S.W.2d 809, 813 (Mo.1984).

However, the Supreme Court of North Dakota applies a strict standard when inevitable discovery is claimed by the state. The Court stated: "First, use of the doctrine is permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question." *State v. Holly,* 833 N.W.2d 15, 33 (ND 2013). The Court further articulated that "the State must prove that the evidence

would have been found without the unlawful activity and must show how the discovery of the evidence would have occurred … a showing that discovery might have occurred is entirely inadequate." *Id.*

Facially, the Tenth Circuit's ruling seems to require more than probable cause, finding that Agent Nishida would have applied for a warrant had Agent Cravens not undertaken the illegal search in order to apply for a second warrant to search for child pornography. This reasoning essentially holds that had law enforcement not acted illegally, they would have acted legally. In every case where multiple law enforcement officers are engaged in an investigation, and one officer engages in illegal conduct, is it acceptable to not suppress illegally tainted evidence by arguing that another officer would have followed the law but for the illegal conduct of the first officer when the record does not support that the second officer was in fact in the process of legally obtaining a search warrant? Likewise, in every case where probable cause exists, but a search is conducted before acquiring a warrant, is it acceptable to argue against suppression of tainted evidence merely because a warrant would have been obtained if it had been sought? Broad application of the inevitable discovery rule to cases such as Petitioner's guts the particularity requirement of the warrant and effectively reduces the analysis of any such case to the question of whether probable cause existed. Such a split among the lower courts in their application of the inevitable discovery doctrine will result in continued disparate application of the law.

B. The Circuit Courts Disagree Concerning Whether There Must Be An Alternate Line Of Investigation That Was Already Being Pursued At The Time of the Misconduct.

The Fifth Circuit, Eleventh Circuit, and Eighth Circuit have all determined that there must have been a substantial alternative line of investigation at the time of the constitutional violation. *See generally, United States v. Cherry*, 759 F.2d 1196, 1205-06 (5th Cir. 1985)(In order for the exception to apply, the prosecution must demonstrate both a reasonable probability that the evidence would have been discovered in the absence of police misconduct and that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation); *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984)(To qualify for admissibility, there must a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct); *United States v. Connor*, 127 F.3d 663, 667 (8th Cir. 1997)(To succeed under the inevitable discovery exception to the exclusionary rule, the government must prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation).

Other circuits have declined to adopt this requirement. *See*, *United States v. Boatwright*, 822 F.2d 862, 864 (9th Cir.1987), *United States v. Thomas,* 955 F.2d 207,

210 (4th Cir.1992), *United States v. Christy*, 739 F.3d 534, 541(10th Cir. 2014), and *United States v. Kennedy,* 61 F.3d 494, 499–500 (6th Cir.1995).

In *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986), the Ninth Circuit stated that the inevitable discovery doctrine had no application to the facts of that case because "there were not two independent investigations or searches in progress; there was but one continuous investigation." *Id.* at 1280 n.7. The Ninth Circuit reached this conclusion reasoning that "[i]n *Nix,* police officers discovered the location and condition of the victim's body through an unlawful interrogation of the defendant. The *Nix* court, nonetheless, upheld the admissibility of this evidence because it concluded that an independent ground search simultaneously conducted by the police would have inevitably discovered the evidence." *Echegoyen*, 799 F.3d at 1280 n.7.

In *Cherry*, 759 F.2d 1196, the Fifth Circuit found that:

> the requirement of an alternate line of investigation served the exclusionary rules' purpose of deterring police misconduct, and reasoned that the general application of the inevitable discovery exception would greatly encourage the police to engage in illegal conduct because (1) the police would usually be less certain that the discovery of the evidence is "inevitable" in the absence of the illegal conduct and (2) the danger that the evidence illegally obtained may be inadmissible would be reduced. While suppression in such a case may put the prosecution in a worse position because of the police misconduct, a contrary result would cause the inevitable discovery exception to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means. When the police forego legal means of investigation simply in order to obtain evidence in violation of

> a suspect's constitutional rights, the need to deter is paramount and requires application of the exclusionary rule.

Id. at 1204-1205.

Historically, the agents involved here continued their first search, but went outside the particulars of the material to be searched for computer fraud and email hijacking in the first warrant. This conduct constituted a violation of the Fourth Amendment.

The Tenth Circuit correctly held that all subsequent searches after November 20, 2012, were unconstitutional. However, the Tenth Circuit erred in not finding that the agents committed a constitutional infraction of the search of the electronic media at the first search of November 20, 2012, by continuing their search at Loera's residence and later at their office looking specifically for child pornography and no longer searching for the material described in the first warrant.

V. The Issue Regarding The Inevitable Discovery Doctrine As It Applies To Current Technological Advances Is Ripe For This Court To Decide And The Case At Bar Presents The Facts Necessary To Determine The Exception To Important Fourth Amendment Protections.

The views of the inevitable discovery doctrine have grown more divergent and under some jurisdictions eviscerate the protections of the Fourth Amendment. The Tenth Circuit decided that the inevitable discovery doctrine may be applied in this search, where electronically stored information that had been seized pursuant to a warrant was illegally searched a second time for suspected evidence outside the scope of that warrant. The evidence illegally discovered in the second search was used to obtain a second warrant. The Tenth Circuit found that the second search violated the Fourth Amendment because it was unreasonably directed at evidence not

specified in the first warrant. The Tenth Circuit found that the "plain-view" and "good-faith" exceptions to the exclusionary rule were not applicable, but ruled that the inevitable discovery doctrine applied, finding that a second warrant inevitably would have been issued based upon evidence obtained in the first search.

The Tenth Circuit declined, without explanation, to apply or address the *Souza* factors that it had previously relied upon in determining application of the inevitable discovery doctrine. As a result of not applying the *Souza* factors in *Loera*, and subsequently applying them in *United States v. Blackburn,* it is uncertain as to when or whether the Tenth Circuit will apply the *Souza* factors to inevitable discovery cases.

Although the Tenth Circuit did not explicitly reject *Souza*, the Court's decision here to conduct its inevitable discovery analysis without considering the four *Souza* factors leaves the Tenth Circuit's *stare decisis* on this issue uncertain, which if followed to its logical conclusion would completely eviscerate the exclusionary rule for illegal searches, in light of advances in technology resulting in broad searches of electronically stored information, in violation of the Fourth Amendment. Moreover, as cited in this petition, some circuits have looked to and relied heavily on the Tenth Circuit in the application of the inevitable discovery doctrine. Based on the uncertainty and inconsistency of the application of inevitable discovery doctrine throughout the federal circuit courts and state courts of last resort, the inevitable discovery doctrine is ripe for this Honorable Court to establish categorical rules to eliminate the ad hoc, case-by-case application. The Tenth Circuit's decision has

greatly expanded the scope of the inevitable discovery doctrine without clear rules or established parameters to deter unconstitutional misconduct by law enforcement.

VI. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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