No._____

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL LUSTIG,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether failure to suppress evidence resulting from an illegal search amounted to a violation of Petitioner's Fourth Amendment rights.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

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Petitioner Michael Lustig respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit affirmed the denial of petitioner's motions to suppress evidence, compel discovery, and dismiss the indictment, finding that the illegal searches of cellular phones located in petitioner's car did not taint the discovery of the identity of a minor female who became the basis of one petitioner's counts of conviction. *United States v. Lustig,* 796 Fed. Appx. 460 (9th Cir. 2020) (unpublished) (attached as Appendix A).

JURISDICTION

On March 9, 2020, the Ninth Circuit affirmed petitioner's convictions via memorandum disposition. *See* Appendix A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

The Fourth Amendment of the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.…"

STATEMENT OF THE CASE

This issue at the heart of this petition is a search of Michael Lustig's cellular phones by a deputy named Chase Chiappino. In an earlier opinion, the Ninth Circuit found those searches to be illegal and reversed Lustig's convictions for further factfinding. [1] The question on remand was whether that illegal search tainted the discovery of the crimes of conviction. The district court and Ninth Circuit found that no taint occurred. *See* Appendix A. But as argued below, the facts show the opposite, particularly in light of Chiappino's multiple conflicting accounts of the search.

I. Summary of evidence below.

The suppression litigation on remand involved Chiappino's discovery of the identity of minor females D.M. and A.G. following his searches through petitioner's phones. The government conceded before the district court that D.M. was discovered as a result of the illegal search of petitioner's car phones, but claimed that A.G. was independently discovered after Chiappino spontaneously recalled allegedly suspicious text messages that he had seen on Lustig's pocket

1 Lustig will summarize here only the facts relevant to this petition. A general overview of the prior proceedings may be found in the Ninth Circuit's published opinion resolving Lustig's first appeal. *See United States v. Lustig*, 830 F.3d 1075, 1077-1078 (9th Cir. 2016).

phones the night of his arrest. But the record showed that Chiappino had discovered A.G. by name and number after directly searching for information related to D.M., and long before he claimed to have "recalled" the suspicious text messages. As such, A.G.'s discovery was tainted by D.M., and all evidence relating to her should have been suppressed. A brief summary of the relevant evidence follows.

Officers arrested Lustig on June 8, 2012 in a prostitution sting. During the arrest, Chiappino searched Lustig's pocket phones and allegedly saw text messages about a "bookstore" and "library" during these searches. Petitioner's Excerpts of Record before the Ninth Circuit (ER) at 404. Chiappino later claimed that he spontaneously remembered these "suspicious" messages during a database search and decided to run the number associated with them through system, which revealed that they were associated with a minor female. However, no mention is made of those messages in any contemporaneous records. *See* ER 313, 414-423. Chiappino also seized and searched cellular phones from Lustig's car. Those latter searches were later found to have been illegal by the Ninth Circuit. *See Lustig*, 830 F.3d at 1077-1078.

Four days after the arrest, Chiappino ran law-enforcement database searches with information taken from Lustig's phones. Chiappino first searched for

information relating to a contact named "Dominick." That information was taken from one of Lustig's car phones. This search returned no results in the system. ER 280-81. Chiappino then searched for "Dominick" information taken from one of Lustig's pocket phones. ER 281, 978-79. This search revealed that the phone number was associated with a minor female. ER 282. At that point, Chiappino suspected that Lustig was involved in sex trafficking of minors. *See* ER 84, 310.

After that finding, Chiappino spent 40 minutes running different numbers through the database. *See* ER 965-78. Each search revealed the target's personal identifying information, known family members and associates, arrest reports, and other law-enforcement-related details. *See e.g.* ER 712-48. Chiappino did not disclose any of those searches in a later sworn declaration before the district court. *See* ER 194.

A few minutes later, a database search revealed to Chiappino the name of minor female D.M. *See* ER 964. Chiappino accessed detailed database links for D.M. pertaining to "personDetails," "objectDetails," "objectIncident," and "arrestDetails," among others. *Id*. During these searches related to D.M., Chiappino found minor female A.G. by name and saw that the system associated her with the same phone number from the allegedly suspicious "bookstore" text messages. *See* ER193, 740. As with his previous findings, Chiappino did not

disclose the searches in a later sworn declaration filed with the court. After his inconsistencies and omissions were discovered during the evidentiary hearings on remand, Chiappino claimed that the earlier discovery of A.G. "meant nothing" to him. ER 162. According to Chiappino, he truly discovered A.G. after "recalling" the suspicious text messages from Lustig's pocket phone on the night of the arrest and running the associated number through the database.

After these searches, Chiappino used the information he obtained to locate and interrogate D.M. and A.G. and conduct follow-up investigation. ER 194-95. Lustig was ultimately indicted and filed motions to suppress, leading to the Ninth Circuit's opinion in *Lustig I*. On remand, Lustig renewed his motions to suppress, arguing that Chiappino had repeatedly misrepresented the nature and scope of his database searches, and that his discovery of A.G. had flowed from the tainted searches for D.M. and all information related to her.

But the district court denied Lustig's motions, and the Ninth Circuit affirmed. The Court found that "the district court did not clearly err by crediting Deputy Sheriff Chiappino's testimony that his investigation into MF2 was not tainted by the Car Phone searches. Chiappino plausibly explained that, after a string of database queries that had been spurred by the Car Phone evidence, he started on a new track by looking up a phone number that was associated with

suspicious Pocket Phone text messages, which led him directly to MF2. Lustig, 796 Fed. Appx. at 460.

This petition follows.

REASON FOR GRANTING THE PETITION

Review is warranted due to the district court's finding that evidence pertaining to A.G. did not constitute "fruit of the poisonous tree."

The exclusionary rule encompasses "evidence seized during an unlawful search," and also the "indirect ... products of such invasions." *Wong Sun v. United States*, 371 U.S. 471, 484 (1964). Evidence derivative of a Fourth Amendment violation—the so-called "fruit of the poisonous tree," *id*. at 488—is ordinarily "tainted" by the prior "illegality" and thus inadmissible, subject to a few recognized exceptions. *United States v. Washington*, 490 F.3d 765, 774 (9th Cir. 2007).

The Ninth Circuit addressed the "fruit of the poisonous tree" doctrine in *United States v. Johns*, 891 F.2d 243 (9th Cir. 1989). In *Johns*, officers suspected that illegal activity was taking place at a small airstrip near Tucson, Arizona. After receiving a tip, officers stopped a truck leaving the airstrip and searched it without a warrant. The government conceded that this stop was illegal. *Id*. at 244. "As a result of the stop," however, "the officers learned the identity" of the driver and passenger, and began to surveil them, which led to the discovery and seizure of

marijuana. *Id*. The Court held that the marijuana evidence "must be suppressed because the illegally obtained identification significantly directed the investigation which led to the marijuana." *Id*. at 245.

The Court explained that evidence qualifies as the "fruit of the poisonous tree" when "the illegal activity tends to significantly direct the investigation to the evidence in question." *Id*. (*quoting United States v. Chamberlin*, 644 F.2d 1262, 1269 (9th Cir.1980)). "The focus," in other words, "is on the causal connection between the illegality and the evidence." *Id*. (citation omitted). Because "[t]he illegal stop was the impetus for the chain of events leading to the marijuana," the marijuana evidence was inadmissible. *Id*. at 245–46. The Court further noted in *Johns* that "the burden of showing admissibility rests on the prosecution." *Id*. at 245 (*quoting Chamberlin*, 644 F.2d at 1269).

Here, the government conceded below that "D.M. in fact was the fruit of a tainted search." ER 126. The government made clear that "finding D.M. was as a result of the search that began with the car phones, that led to the search of the iPhone, that led to the discovery of D.M. through the COPLINK query. And that, we would concede." *Id*. The only issue, then, is whether Chiappino's discovery of A.G. was also tainted. And the record is clear that the government failed to meet its burden that no such taint existed.

The ARJIS database evidence established that Chiappino found A.G. after searching through documents pertaining to D.M., and he found D.M.'s number in Lustig's car phones. As Chiappino testified at the evidentiary hearing, that was the very first number that he ran through the database. *See* ER 67-68. From D.M.'s number, Chiappino found documents pertaining to D.M., then a La Mesa police report that mentioned A.G. by name, which in turn led him to run specific searches on A.G.. *See* ER 217, 925-926. Importantly, the evidence showed that approximately 9:38 a.m., Chiappino clicked on the "Person Details" option for A.G., *which in turn led to a screen that contained her phone number, the same number with area code 602 that he later claimed to have stumbled upon by allegedly reviewing strange text messages on one of the Pocket Phones*. *See* ER 740, 925; *see also* ER 109-111.

That chain of events discredits Chiappino's earlier assertions that"[n]o information derived from any search of the phones in the car factored in my decision to search the phone number associated with [A.G.]" ER 405 ¶ 16. Indeed, long before the second evidentiary hearing where this information was revealed for the first time, defense counsel had reviewed the ARJIS records and advised the district court that "*it is entirely likely that [A.G.'s] phone number turned up in*

these exhaustive searches, and/or in the police reports mentioned above." *See* ER 219 (emphasis provided). The evidence ultimately showed that was the case.

But the district court ignored this key evidence in denying Lustig's motion to suppress and the Ninth Circuit did the same in affirming the denial. The district court's order does not mention, explain, or account for the fact that Chiappino saw A.G.'s phone number on the "Person Details" screen long before he allegedly decided to spontaneously input the number based on his recollection of text messages from the Pocket Phones that he "quickly" searched days before. *See* ER 740. Instead, the district court found that "the deputy searched that number because of the text messages using code words like 'bookstore.'" ER 5. That finding was illogical, implausible, and simply erroneous under the circumstances.

The evidence showed that Chiappino had seen the alleged "bookstore" text messages on Lustig's Pocket Phones at the time of Lustig's arrest, *four days* before his ARJIS searches. ER 241. Chiappino did not write down or otherwise memorialize his review of the messages or their content. ER 313; *see also* ER 414-423. The report he prepared contemporaneous to the arrest did not mention any messages. *Id*.. In fact, the evidence showed that Chiappino did not even take pictures of the text messages until July 2012, nearly a month *after* the ARJIS

searches at issue and *after* he had interviewed both D.M. and A.G.. *See* ER 311-313.

Thus, on this record, it is both illogical and implausible to suggest that Chiappino decided to search for A.G.'s number based on allegedly-suspicious text messages he saw days before—suspicions that were entirely absent from his own contemporaneous records of the incident—instead of having input the number into the ARJIS database because he had seen it *a few minutes earlier* on A.G.'s "Person Details" page in the database. It is even more illogical or implausible to suggest that was the case when the text-message version of events depended entirely on Chiappino's own recollection testimony, which was suspect at best due to the false declaration he filed under oath and his previous misrepresentations and misstatements during the initial evidentiary hearing. In these circumstances, the district court clearly erred in discarding the reliable documentary evidence that revealed the source of the search for A.G.'s number and instead adopting the government's version of events, and the Ninth Circuit erred in affirming the denial. Certiorari should be granted accordingly to preserve Petitioner's Fourth Amendment rights.

A. The "independent source" and "inevitable discovery" doctrines do not apply here.

The district court and Ninth Circuit did not rely on the "independent source" or "inevitable discovery" doctrines to deny Lustig's motions to suppress. *See* ER 1-6. But the government extensively argued the issue below and may attempt to raise both exceptions here. Neither argument should be well-taken.

"[T]he 'independent source' exception operates to admit evidence that is actually found [1] by legal means through [2] sources unrelated to the illegal search." *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989). *See also United States v. Lundin*, 817 F.3d 1151, 1161 (9th Cir. 2016) (explaining that the doctrine "asks whether the evidence actually was 'obtained independently from activities untainted by the initial illegality'") (*quoting Murray v. United States*, 487 U.S. 533, 537 (1988)). Even accepting Chiappino's testimony as true, his search failed both prongs.

First, the evidence was not found through "legal means." The government's argument is literally that one illegal search should be saved by the fruit of another illegal search. Lustig is not aware of any published case where the government has achieved this counter-intuitive result, stringing exclusionary-rule exceptions together to form a perfect circle of illegal searches. The independent source rule

simply does not apply because A.G. was not discovered through "legal means," but rather, at best, through another illegal search instead.

Second, the other source was not "unrelated." Indeed, the searches were hopelessly intertwined. The Supreme Court observed in *Murray,* 487 U.S. at 542 that when "a later, lawful seizure is genuinely independent of an earlier, tainted one . . . there is no reason why the independent source doctrine should not apply." But in the same breath is cautioned that that "may well be difficult to establish where the seized goods are kept in the police's possession." *Id*. The evidence shows that the fruit of the phones weren't just kept together, they were continually mixed together throughout the ARJIS searches. Chiappino haphazardly bounced from phone number to phone number, person to person, and screen to screen, without any pattern. He claimed that he could not remember why he ran a single other number. He ran multiple different phone numbers that were not found in any phone—demonstrating that he was running searches on numbers gleaned from the ARJIS searches themselves. These were not "unrelated" searches, because they were inextricably bound up with one another. For this reason, and because the other searches were themselves the fruit of illegality, the independent source rule does not apply.

The same is true of the "inevitable discovery" doctrine. The government admits that it illegally found D.M.'s information and that suppression should result. But it speculates that it might have discovered D.M. through other means, and thus that this evidence would have been "inevitably discovered." The law says otherwise.

First, Ninth Circuit precedent on inevitable discovery is clear—which is likely why the government abandoned it on appeal the last time it persuaded the district court to go along with this argument. The Court has held that: "We have '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.'" *United States v. Camou*, 773 F.3d 932, 943 (9th Cir. 2014) (*quoting United States v. Young*, 573 F.3d 711, 723 (9th Cir. 2009)). "Put differently, allowing the government to claim admissibility under the inevitable discovery doctrine when officers have probable cause to obtain a warrant but fail to do so would encourage officers never to bother to obtain a warrant." *United States v. Lundin*, 817 F.3d 1151, 1161-62 (9th Cir. 2016). Moreover, the "doctrine requires that the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search itself." *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989) (emphasis provided).

The government could have obtained warrants, but did not. Under *Lundin*, *Camou*, and *Young*, it would be a misapplication of the inevitable discovery doctrine to excuse this failure.

But the government's argument suffers from an even more fundamental flaw: it relies on subjective conjecture rather than the objective assessment of historical fact. The "inevitable" discovery must not be speculative, but rather supported by "demonstrated historical facts capable of ready verification and impeachment." *Young*, 573 F.3d at 722-23. There are no such "historical facts" at issue here; the government depends entirely on what the officer claims he "would have done" in an alternate universe. The law does not support this approach. Inevitable discovery can only be extrapolated from imagined future investigations when it would be "an inevitable step in [an] imminent routine booking procedure," or "where [it is] the only available procedural step." *Ramirez-Sandoval*, 872 F.2d at 1400 (9th Cir. 1989) (emphasis provided). Where, as here, an investigator has discretion in how to carry out an investigation, inevitable discovery doesn't apply. *Id*. It was reversible error to find to the contrary. *Id*. (reversing and remanding for erroneous finding of inevitable discovery).

Nothing in Chiappino's conjecture is based on objective historical fact. There is no way to test or impeach his hypothetical investigation. The exception simply does not apply here and the Court should reject the argument outright.

For all these reasons, petitioner's convictions were tainted by errors of constitutional magnitude. Certiorari should be granted to the address this violation of petitioner's Fourth Amendment rights.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: May 8, 2020

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APPENDIX

A

NOT FOR PUBLICATION

FILED

MAR 9 2020

MOLLY C. DWYER, CLERK
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL LUSTIG, AKA George, Defendant-Appellant.	No. 18-50426 D.C. No. 3:13-cr-03921-BEN-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Submitted March 4, 2020**
Pasadena, California

Before: TASHIMA, HURWITZ, and FRIEDLAND, Circuit Judges.

Michael Lustig appeals the district court's denial of his motions to suppress evidence, compel discovery, and dismiss the indictment, which followed a remand after our decision in *United States v. Lustig* (*Lustig I*), 830 F.3d 1075 (9th Cir. 2016). The background facts about the charges against Lustig are described in

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Lustig I, and the parties are familiar with the proceedings that occurred on remand, so we do not recount them here. We affirm.

1. "We review de novo a district court's denial of a motion to suppress," but we review the district court's underlying factual findings for clear error. *United States v. Lara*, 815 F.3d 605, 608 (9th Cir. 2016); *see Lustig I*, 830 F.3d at 1079.

With respect to Lustig's motion to suppress all evidence related to MF2, the district court did not clearly err by crediting Deputy Sheriff Chiappino's testimony that his investigation into MF2 was not tainted by the Car Phone searches. Chiappino plausibly explained that, after a string of database queries that had been spurred by the Car Phone evidence, he started on a new track by looking up a phone number that was associated with suspicious Pocket Phone text messages, which led him directly to MF2. If Chiappino's testimony is credited, as the district court reasonably concluded it should be, the Car Phone searches were not the but-for cause of the investigation into Lustig's interactions with MF2. The district court therefore appropriately declined to exclude MF2-related evidence as fruit of the poisonous tree. *See United States v. Pulliam*, 405 F.3d 782, 786 (9th Cir. 2005).

Lustig waived any challenge to evidence about MF1. Although Lustig's counsel mentioned a potential future MF1-related suppression request during an initial hearing in the district court, his written motion did not seek to suppress

MF1-related evidence. And he did not request a ruling on MF1-related evidence from the district court after it issued an order that did not address that evidence. In these circumstances, Lustig's decision to renew his guilty plea shows that he "was aware of the right he was relinquishing and relinquished it anyway." *See United States v. Depue*, 912 F.3d 1227, 1233 (9th Cir. 2019) (en banc).

2. Neither Federal Rule of Criminal Procedure 16 nor *Brady v. Maryland*, 373 U.S. 83 (1963), required the Government to produce more information than it did. Based on the information that was produced, Lustig was able to litigate vigorously and comprehensively his theory of how Car Phone evidence could have tainted the investigation. He has not shown that the additional material he requested, such as additional screenshots from the database Chiappino searched, would have been material to his defense under the standards of either Rule 16 or *Brady*. *See United States v. Cano*, 934 F.3d 1002, 1022-23 (9th Cir. 2019) (describing materiality standards).

3. The district court did not err by declining to dismiss the indictment. Lustig obtained the evidence necessary for him to litigate his suppression motion before renewing his guilty plea. And although there were some changes in Chiappino's narrative over time—as Chiappino acknowledged on cross-examination—the discrepancies Lustig has identified are relatively minor. They do not rise to the level of outrageousness necessary to require dismissal of the

indictment. *See United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013).

AFFIRMED.