

No. \_\_\_\_\_

IN THE  
Supreme Court of the United States

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ERIC J. PEREZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition For Writ of Certiorari  
To The Ninth Circuit Court of Appeals

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APPENDIX

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Richard D. Wall  
CJA Appointed Counsel for Petitioner  
1604 W. Dean  
Spokane, WA 99201  
(509) 747-5646

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

No. 2:16-CR-0063-SMJ-1

Plaintiff,

**ORDER DENYING MOTION TO  
SUPPRESS**

v.

ERIC J. PEREZ,

Defendant.

**I. INTRODUCTION**

In the late morning on November 17, 2015, Quincy Police Officer Mark Pannek responded to a report from a Quincy High School counselor about possible inappropriate communications between a female student and an older male. Officer Pannek interviewed a student (S1), who described and showed him Facebook messages between her sister (S2) and Defendant Eric Perez. The following morning, Officer Pannek made a request pursuant to 18 U.S.C. § 2703(f) that Facebook preserve the data in Mr. Perez's account. Officer Pannek obtained a search warrant for Perez's Facebook account the following day. The resulting search produced evidence that the Government intends to rely on to support child sex trafficking, coercion, and child pornography charges against Perez.

1       Perez moves to suppress all evidence obtained from the disclosure of  
2 communications between S1 and Perez by S2 and the subsequent search of his  
3 Facebook account. ECF No. 130. Perez argues that S1 unlawfully intercepted the  
4 electronic communications that led to this investigation, and the communications are  
5 therefore inadmissible under 18 U.S.C. § 1515. He also asks the Court to rule that  
6 18 U.S.C. § 2703(f) is unconstitutional because the preservation requests it  
7 authorizes amount to a warrantless seizure of property.

8       Because 18 U.S.C. § 1515 applies only to intercepted voice transmissions, it  
9 does not apply to the communications here. Assuming S1's access of S2's Facebook  
10 account was unauthorized, that is not a basis to suppress resulting evidence.  
11 Additionally, it is unnecessary to reach the constitutionality of 18 U.S.C. § 2703(f)  
12 because the Government did not discover any evidence through the preservation  
13 request. The Government obtained information from Perez's Facebook account  
14 pursuant to a warrant obtained independent of the preservation request, and no  
15 evidence in the record indicates that Perez attempted to delete, modify, or even  
16 obtain access to information in his Facebook account in the period between when  
17 Officer Pannek made the preservation request and when the search warrant was  
18 executed. Accordingly, Perez's motion to suppress is denied.

## II. BACKGROUND

On November 17, 2015, Officer Pannek received a call from another officer stating that he received a report from Quincy High School about possible inappropriate contact between a female student and an older male. Officer Pannek, who was the school resource officer for Quincy High School and Middle School, went to the high school at about 10:00 a.m. and spoke with the counselor who initially reported the issue. The counselor explained to Officer Pannek that two female students had approached him about Facebook Messenger communications between an older male and a younger female student at the school. The female student was one of the reporting students' younger sister.

Officer Pannek interviewed each of the two girls, both high-school freshmen, about the incident. One of the girls (S1) told Officer Pannek that she viewed a Facebook Messenger conversation between her younger sister (S2) and a man named Eric Perez. S1 showed Officer Pannek the messages on her phone and agreed to send him a screenshot of the messages in an email. Later that day, Officer Pannek interviewed S2 at her home, with her mother present. S2 confirmed that she had been communicating with Perez. That afternoon, Officer Pannek identified the Facebook profile of Defendant Eric Perez as corresponding to the communications with S2.

1 Early the next day, on November 18, Officer Pannek communicated with a  
2 detective at the sheriff's office about how to preserve and seize the electronic  
3 information. He then submitted a "preservation request" to Facebook through an  
4 online system for law enforcement. Facebook accepted the request almost  
5 immediately, in the late morning on November 18. Officer Pannek understood this  
6 request would make a copy of Perez's Facebook account that would prevent Perez  
7 from permanently altering or deleting information from the account, but it would  
8 not alter Perez's ability to use his account.

9 After Facebook granted Officer Pannek's preservation request, Officer  
10 Pannek began working on a search warrant for Perez's Facebook user profile. A  
11 judge signed the warrant the afternoon of November 19, and police executed it that  
12 evening. The warrant authorized police to obtain identifying information, message  
13 traffic, wall posts, and other similar information. Investigation of these materials  
14 led to discovery of the information the Government relies on to support the charges  
15 against Perez in this case.

### 16 III. DISCUSSION

#### 17 A. The Wiretap Act does not apply to S1's access of S2's Facebook 18 communications.

19 Perez argues that S1's unauthorized access of S2's Facebook messages  
20 violates the Wiretap Act, 18 U.S.C. § 2511, and the information obtained as a  
result is inadmissible pursuant to 18 U.S.C. § 2515. ECF No. 130 at 17. For the

1 purpose of this motion, the Government stipulates that S1's access to the  
2 communications was unauthorized, but argues 18 U.S.C. § 2515 does not apply.  
3 ECF No. 133 at 14.

4       Perez's argument fails because the statutes do not apply to the conduct at  
5 issue here. As relevant here, 18 U.S.C. § 2511 prohibits "any person" from  
6 "intentionally intercept[ing]" any "electronic communication," except as  
7 specifically permitted by the statute. And 18 U.S.C. § 2515 provides that  
8 "[w]henver any wire or oral communication has been intercepted, no part of the  
9 contents of such communication and no evidence derived therefrom may be  
10 received in evidence in any trial." First, the prohibition on intercepting electronic  
11 communications is inapplicable here because it applies only to "interception"—that  
12 is, "acquisition contemporaneous with transmission"—not access to stored  
13 electronic communications. *Konop v. Haw. Airlines, Inc.*, 302 F.3d 868, 878 (9th  
14 Cir. 2002). Second, even if the statute applied, 18 U.S.C. § 2515 makes  
15 inadmissible "wire or oral communications" only. These are defined as "aural  
16 transfer" and "oral communication," 18 U.S.C. § 2510, and therefore do not  
17 include written or visual electronic communications. Accordingly, even if S1's  
18 access of S2's Facebook communications was unauthorized, that is not a basis to  
19 suppress the resulting evidence.

1 **B. It is unnecessary to reach the constitutionality of the preservation**  
2 **request because the Government did not obtain evidence from the**  
3 **request.**

4 The Fourth Amendment protects against “unreasonable searches and  
5 seizures.” U.S. Const. amend. IV. “A ‘seizure’ of property occurs when there is  
6 some meaningful interference with an individual’s possessory interests in that  
7 property.” *Lavan v. City of L.A.*, 693 F.3d 1022, 1027 (9th Cir. 2012). Seizures of  
8 personal property are ordinarily unreasonable under the Fourth Amendment  
9 “‘unless . . . accomplished pursuant to a judicial warrant,’ issued by a neutral  
10 magistrate after finding probable cause.” *Illinois v. McArthur*, 531 U.S. 326, 330  
(2001) (quoting *United States v. Place*, 462 U.S. 696, 701 (1983)).

11 Perez asks this Court to hold that 18 U.S.C. § 2703(f) is unconstitutional  
12 because it permits the government to seize property without a warrant. Of note, no  
13 Ninth Circuit case has directly spoken to this issue. But it is unnecessary to  
14 address that question here because no evidence in this case was obtained from the  
15 preservation request. *See United States v. Calandra*, 414 U.S. 383, 347 (1974)  
16 (“[E]vidence obtained in violation of the Fourth Amendment cannot be used in a  
17 criminal proceeding against the victim of the illegal search and seizure.” (emphasis  
18 added)). Officer Pannek obtained a search warrant the day after he made the  
19 preservation request in this case. No evidence was presented to the Court that  
20 Perez attempted to modify or delete any information in his account that was later

1 obtained as a result of the search warrant. Accordingly, there is no causal  
2 connection between the preservation request and any evidence in this case. In other  
3 words, the Government would have obtained the same information by execution of  
4 the warrant regardless of the preservation request.


5 **IV. CONCLUSION**

6 For the reasons discussed, **IT IS HEREBY ORDERED:**

7 1. Defendant's Motion to Suppress, **ECF No. 130**, is **DENIED**.

8 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
9 provide copies to all counsel.

10 **DATED** this 11th day of September 2017.

11   
12 **SALVADOR MENDEZ, JR.**  
13 United States District Judge  
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UNITED STATES DISTRICT COURT  
Eastern District of Washington

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Dec 18, 2017  
SEAN F. MCAYOY, CLERK

UNITED STATES OF AMERICA  
V.  
ERIC J. PEREZ

\*1st AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 2:16CR00063-SMJ-1

USM Number: 19977-085

Nicolas V. Vieth

Defendant's Attorney

Date of Original Judgment: 12/15/2017

☒ \*Correction of Sentence for Clerical Mistake (Fed. R. Crim. P.36)

THE DEFENDANT:

☒ pleaded guilty to count(s) 3, 5, 7, 9, 10, 11 and 12 of the Second Superseding Indictment

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

☐ was found guilty on count(s) \_\_\_\_\_  
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1591(a)(1), (b)(1), (c)	Child Sex Trafficking	08/15/15	3ss
18 U.S.C. § 2251(a)	Attempted Production of Child Pornography	07/22/15	5ss
18 U.S.C. § 2251(a)	Attempted Production of Child Pornography	07/21/15	7ss
18 U.S.C. § 2422(b)	Coercion and Enticement of a Minor to Engage in Criminal Sexual Activity	11/13/15	9ss
18 U.S.C. § 2422(b)	Coercion and Enticement of a Minor to Engage in Criminal Sexual Activity	03/10/16	10ss

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

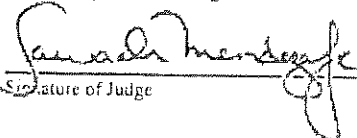
☐ The defendant has been found not guilty on count(s) \_\_\_\_\_

☒ Count(s) All remaining counts ☐ is ☒ are dismissed on the motion of the United States.

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

12/13/2017

Date of Imposition of Judgment

  
Signature of Judge

The Honorable Salvador Mendoza, Jr. Judge, U.S. District Court

Name and Title of Judge

12/18/2017

Date

DEFENDANT: ERIC J. PEREZ  
CASE NUMBER: 2:16CR00063-SMJ-1

**ADDITIONAL COUNTS OF CONVICTION**

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 2422(b)	Coercion and Enticement of a Minor to Engage in Criminal Sexual Activity	04/08/16	11ss
18 U.S.C. § 2251(a)	Production of Child Pornography	02/14/14	12ss

DEFENDANT: ERIC J. PEREZ  
CASE NUMBER: 2:16CR00063-SMJ-1

### IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 25 years

This total term of imprisonment consists of 25 years with respect to each of Counts 3, 5, 7, 9, 10, 11, and 12 to be served concurrent with each other.

Defendant shall receive credit for time served in federal custody prior to sentencing in this matter.

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

Court recommends placement of the defendant in the BOP Facility at Sheridan, Oregon.  
Defendant shall participate in the BOP Inmate Financial Responsibility Program.

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

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

☐ at \_\_\_\_\_ ☐ a.m. ☐ p.m. on \_\_\_\_\_  
☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on \_\_\_\_\_  
☐ as notified by the United States Marshal.  
☐ as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_ with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ERIC J. PEREZ

CASE NUMBER: 2:16CR00063-SMJ-1

### SUPERVISED RELEASE

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

This total term of supervised release consists of life with respect to each of Counts 3, 5, 7, 9, 10, 11, and 12 to be served concurrent with each other.

### MANDATORY CONDITIONS

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

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

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**STANDARD CONDITIONS OF SUPERVISION**

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

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

**U.S. Probation Office Use Only**

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

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: ERIC J. PEREZ  
CASE NUMBER: 2:16CR00063-SMJ-1

### SPECIAL CONDITIONS OF SUPERVISION

1. You must not communicate, or otherwise interact, with any of your victims, either directly or through someone else, without first obtaining the permission of the probation officer. You must not enter the premises or loiter within 1000 feet of any of the victim's residences or places of employment.
2. If you pose a risk to another person or an organization, the probation officer may seek permission from the court to require you to notify that person or organization about the risk. If the court approves, you must provide the notification. The probation officer may contact the person or organization to confirm that you have provided the proper notification.
3. You must not have direct contact with any child you know or reasonably should know to be under the age of 18, not including your own children, without the permission of the probation officer. If you do have any direct contact with any child you know or reasonably should know to be under the age of 18, not including your own children, without the permission of the probation officer, you must report this contact to the probation officer within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.
4. You must not be employed in any occupation, business, or profession, or participate in any volunteer activity which provides access to children under the age of 18, unless authorized by the supervising officer.
5. You must not possess or use any computer with access to any on-line computer service without the prior approval of the supervising officer. This includes any Internet service provider, bulletin board system, or any other public or private computer network. You must not have access to a modem during your term of supervision without the prior approval of the supervising officer.
6. You must submit your computers (as defined in 18 U.S.C. § 1030(e)(1)) or other electronic communications or data storage devices or media, to a search. You must warn any other people who use these computers or devices capable of accessing the Internet that the devices may be subject to searches pursuant to this condition. A probation officer may conduct a search pursuant to this condition only when reasonable suspicion exists that there is a violation of a condition of supervision and that the computer or device contains evidence of this violation. Any search will be conducted at a reasonable time and in a reasonable manner.
7. You must allow the probation officer, or designee, to conduct random inspections, including retrieval and copying of data from any computer, or any personal computing device that you possess or have access to, including any internal or external peripherals. This may require temporary removal of the equipment for a more thorough inspection. You must not possess or use any public or private data encryption technique or program. You must purchase and use such hardware and software systems that monitor your computer usage, if directed by the supervising officer.
8. You must live at an approved residence, and must not change your living situation without advance approval of the supervising officer.
9. You must not possess any type of camera or video recording device.
10. You must not reside or loiter within 500 feet of places where children congregate, which includes playgrounds, primary and secondary schools, city parks, daycare centers, and arcades.
11. You are prohibited from possessing or manufacturing any material, including videos, magazines, photographs, computer-generated depictions, or any other media that depict sexually explicit conduct involving children or adults, as defined at 18 U.S.C. § 2256(2). You must not enter any establishment involved in the sex industry, including but not limited to adult bookstores, massage parlors, and strip clubs. You must not utilize any sex-related adult telephone numbers. The supervising officer is authorized to monitor compliance in this area by obtaining relative records including but not limited to telephone, Internet, credit cards and bank statements.
12. You must submit your person, residence, office, or vehicle and belongings to a search, conducted by a probation officer, at a sensible time and manner, based upon reasonable suspicion of contraband or evidence of violation of a condition of supervision. Failure to submit to search may be grounds for revocation. You must warn persons with whom you share a residence that the premises may be subject to search.

DEFENDANT: ERIC J. PEREZ

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**SPECIAL CONDITIONS OF SUPERVISION**

13. You must complete a sex offender evaluation, which may include psychological and polygraph testing. You must pay according to your ability and allow the reciprocal release of information between the evaluator and supervising officer.

14. You must actively participate and successfully complete an approved state-certified sex offender treatment program. You must follow all lifestyle restrictions and treatment requirements of the program. You must participate in special testing in the form of polygraphs, in order to measure compliance with the treatment program requirements. You must allow reciprocal release of information between the supervising officer and the treatment provider. You must pay for treatment and testing according to your ability.

15. You must undergo a substance abuse evaluation and, if indicated by a licensed/certified treatment provider, enter into and successfully complete an approved substance abuse treatment program, which could include inpatient treatment and aftercare upon further order of the court. You must contribute to the cost of treatment according to your ability to pay. You must allow full reciprocal disclosure between the supervising officer and treatment provider.

16. You must abstain from the use of illegal controlled substances, and must submit to urinalysis and sweat patch testing, as directed by the supervising officer, but no more than 6 tests per month, in order to confirm continued abstinence from these substances.

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### CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 700.00	\$ 0.00	\$ 0.00	\$ 0.00

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

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

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

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ 0.00	\$ 0.00
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☐ Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_

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

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

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

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

\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.



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### SCHEDULE OF PAYMENTS

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

- A ☐ Lump sum payment of \$ \_\_\_\_\_ due immediately; balance due
- ☐ not later than \_\_\_\_\_, or  
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or
- C ☐ Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

Defendant shall participate in the BOP Inmate Financial Responsibility Program. During the time of incarceration, monetary penalties are payable on a quarterly basis of not less than \$25.00 per quarter.

While on supervised release, monetary penalties are payable on a monthly basis of not less than \$25.00 per month or 10% of the defendant's net household income, whichever is less, commencing 30 days after the defendant is released from imprisonment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the following address until monetary penalties are paid in full: Clerk, U.S. District Court, Attention: Finance, P.O. Box 1493, Spokane, WA 99210-1493.

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

☐ Joint and Several

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

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

\*one Hewlett-Packard laptop computer, Serial No. Unknown; one Toshiba external hard drive, Serial No. 75N1S5W1S64A; three Samsung cellular phones, Serial Nos. DEC 256691519201251090, DEC 256691518906718361, and RV1D541RE5B; and, one black Motorola cellular phone, Serial No. DEC268435460415069006.

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

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 21 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC J. PEREZ, AKA Ignacio Valdez,

Defendant-Appellant.

No. 18-30004

D.C. No.  
2:16-cr-00063-SMJ-1

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of Washington  
Salvador Mendoza, Jr., District Judge, Presiding

Argued and Submitted November 8, 2019  
Seattle, Washington

Before: GOULD and NGUYEN, Circuit Judges, and PRESNELL,\*\* District  
Judge.

Defendant Eric Perez appeals from the district court's denial of his motion to  
suppress evidence obtained from his Facebook account. Perez claims that the  
evidence was obtained as a result of a preservation request, issued pursuant to 18

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

\*\* The Honorable Gregory A. Presnell, United States District Judge for  
the Middle District of Florida, sitting by designation.

U.S.C. § 2703(f), which Perez contends violates the Fourth Amendment. The district court did not reach Perez's constitutional claims because it concluded that the evidence did not result from the preservation request at all, but instead resulted from a lawful search warrant. We affirm.

1. Police began to investigate Perez after interviews with a school counselor and several teenage girls revealed that he had initiated inappropriate communications of a sexual nature with a 12-year-old girl through Facebook messages. A day after speaking with these girls, on November 18, 2015, Officer Mark Pannek of the Quincy, Washington police submitted to Facebook a preservation request, pursuant to the Stored Communications Act, 18 U.S.C. § 2703(f), to preserve the data in Perez's Facebook account.<sup>1</sup> The Government did not receive any of Perez's account data at that time. The following evening, November 19, Officer Pannek obtained a valid search warrant for Perez's account and submitted it to Facebook. In response to the warrant, Facebook provided the police with a PDF file of information from Perez's account, containing data from

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<sup>1</sup> Under Facebook's data policy and terms of service, Facebook may "access, preserve and share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity; to protect ourselves, you and others, including as part of investigations." Similarly, Facebook can retain information "for an extended period of time when it is the subject of a legal request or obligation, governmental investigation, or investigations concerning possible violations of our terms or policies, or otherwise to prevent harm." Facebook users agree to these terms when they use or access Facebook's services, and users agree that they "will not use Facebook to do anything unlawful."

the account spanning from May 31, 2015 up until the evening of November 19, 2015. This file included hundreds of pages of inappropriate sexual communications with six underage girls, including references to past sexual contact and encouragement of prostitution.

Perez was indicted. After the district court denied Perez's motion to suppress, Perez pleaded guilty to Child Sex Trafficking of a Victim Less than Fourteen Years of Age, Attempted Production of Child Pornography and Production of Child Pornography, and Attempted Coercion and Enticement of a Minor to Engage in Criminal Sexual Activity. Perez reserved the right to appeal the district court's order denying the motion to suppress, and he timely appealed.

2. We review motions to suppress de novo and the trial court's underlying factual findings for clear error. *United States v. Zapien*, 861 F.3d 971, 974 (9th Cir. 2017).

For evidence to be suppressed as a result of a Fourth Amendment violation, the claimed constitutional violation must be a "but-for" cause of the Government obtaining the evidence. *Hudson v. Michigan*, 547 U.S. 586, 592 (2006). A movant generally bears the initial burden of showing that governmental action implicated the Fourth Amendment. *See, e.g., United States v. Kovac*, 795 F.2d 1509, 1510 (9th Cir. 1986). The district court concluded that Perez had not shown that the Government obtained any evidence as a result of the challenged preservation

request and, therefore, did not reach the question of the preservation request's constitutionality. We conclude that the district court's factual finding was not clear error.

Perez does not contest the validity of the November 19 search warrant but instead contends that, in response to that warrant, "Facebook provided information from the copy that it had previously made in response to the preservation request." Perez cites nothing in the record to support this conclusory contention, however. Indeed, Perez concedes that "Facebook would have been able to comply with the warrant . . . by making a copy of the information in that account *after* receiving the warrant." But he does not explain why we must hold that it was clear error for the district court to find that that was what happened. In fact, evidence in the record supports that finding. Police did not receive a copy of the account until after the search warrant was submitted and, importantly, that copy contained data up until the end of the day on November 19, 2015—the day the search warrant was submitted to Facebook and the day *after* Facebook approved the preservation request.<sup>2</sup> This timeline contradicts Perez's contention, without citation to the record, that a copy of his account created in response to the preservation request *necessarily* "was the copy . . . that was later provided to law enforcement in

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<sup>2</sup> According to testimony at the suppression hearing, preservation requests result in "being able to view what was present *at the time of [a] particular preservation.*"

response to the warrant.”

Perez does not dispute this timeline or offer an alternative timeline that establishes that the data could not have been obtained pursuant to the search warrant alone. And Perez does not claim that the copy provided to law enforcement contained any information that Perez had attempted to modify or delete from his account prior to execution of the warrant, which would tend to show that the copy resulted from the preservation request. The mere fact that a preservation request was made and granted does not in and of itself show that Facebook responded to the Government’s subsequent search warrant with data from the preservation request, instead of simply creating a contemporaneous, new copy of the Facebook account at the time of the search warrant.

There was no clear error in the district court’s finding that the preservation request was not a “but-for” cause of the challenged evidence being obtained. That is, we are not left with the “definite and firm conviction that a mistake has been committed” by the district court. *United States v. Walter-Eze*, 869 F.3d 891, 912 (9th Cir. 2017) (quoting *Leavitt v. Arave*, 646 F.3d 605, 608 (9th Cir. 2011)). We do not reach the merits of Perez’s constitutional claims.

**AFFIRMED.**