NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

JAMES TIMOTHY COBB, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

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

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I. QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred when it affirmed the district court's denial of Appellant's pretrial motion to suppress?

II. PARTIES TO THE PROCEEDING

Mr. James Timothy Cobb is the Petitioner. The United States of America is the Respondent in this matter.

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V. OPINIONS BELOW

The published opinion by the United States Court of Appeals for the Fourth Circuit in this case, *United States v. James Cobb*, 19-4172, is attached to this Petition as Appendix A. The Order denying the Appellant's Petition for Rehearing or Rehearing *En Banc* is attached as Appendix B. The judgment of the United States Court of Appeals for the Fourth Circuit is attached as Appendix C. The final judgment order of the United States District Court for the Northern District of West Virginia is unreported and is attached to this Petition as Appendix D.

VI. JURISDICTION

This Petition seeks review of a published opinion of the United States Court of Appeals for the Fourth Circuit, decided on August 11, 2020. In this appeal, Appellant filed a timely Petition for Rehearing or Rehearing *En Banc* on June 30, 2020, and the Fourth Circuit denied the petition on September 22, 2020. Pursuant to Miscellaneous Order of March 19, 2020, Appellant files the instant Petition within 150 days of the Order denying of the Petition for Rehearing or Rehearing *En Banc*. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3. of this Court.

VII. CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation and application of the Fourth Amendment to the United States Constitution, which provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, 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.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction.

Because these charges constituted offenses against the United States, the district court had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Factual Background.

On September 7, 2014, this case began as a straightforward homicide investigation in a rural area of north central West Virginia. After James Timothy Cobb (hereinafter "Cobb") fought with his cousin in their home, his cousin died by suffocation. Cobb's elderly parents witnessed the fight, and his mother called 911. The police responded immediately and arrested Cobb at the home.

During the brief investigation, the police listened to some of Cobb's initial calls from the jail and speculated that a computer in Cobb's home might contain information about "motive or premeditation or something else." J.A. 110.[1] The police drafted two search warrants. The first warrant sought firearms, computers, cell phones, and "any and all evidence of a crime." The second warrant dated September 23, 2014, sought the entire contents of a Gateway computer they seized during the execution of the first warrant.

[1] References to "J.A." are to the Joint Appendix filed by the parties in the United States Court of Appeals for the Fourth Circuit in this matter.

The constitutionality of the second search warrant for the contents of the computer is at issue in this appeal. The second search warrant failed to satisfy the particularity requirement for search warrants, and it was overly broad. In fact, the second search warrant had no limits. It was in no way tailored to the facts presented to the police about the homicide. The warrant included no explanation about the types of files sought, the location of the files, the timeframe, or the relationship between the files and information about the homicide.

Specifically, the second search warrant authorized a search for:

> Any material associated with the homicide of Paul Dean Wilson Jr. stored internally on a Gateway laptop computer serial # NXY1UAA0032251C66F1601 dark gray in color belonging to or used by James Timothy Cobb. Any and all evidence of any other crimes.

J.A. 40. The police officer who drafted the warrant, Detective Kevin Alkire, met with a county magistrate judge. The meeting took place for "maybe five minutes, total." J.A. 122. Alkire had no experience searching computers, but he proceeded to search the contents of the computer anyway.

C. Procedural History.

Based upon images discovered by Alkire, on May 1, 2018, a federal grand jury sitting in Clarksburg returned an indictment charging Cobb with possession of child pornography. J.A. 2, 9. On July 6, 2018, Cobb moved to suppress the physical evidence seized at his home pursuant to the search warrant obtained by police and executed on September 16, 2014, as well as the second warrant obtained on

September 23, 2014, where the police sought to search the contents of the laptop computer. J.A. 11-12.

Cobb argued that the second warrant for the contents of the computer was "unconstitutionally broad in scope and it entirely lacks particularity of the information or electronic files to be seized . . . leav[ing] all of [] Cobb's personal information contained in the laptop at the unfettered discretion of the State." J.A. 94.

The parties presented evidence and argument on the motion to suppress on July 19, 2018, before the United States Magistrate Judge Michael John Aloi. J.A. 99. Cobb called Detective Alkire to testify. J.A. 100. Alkire participated in the investigation of Cobb's homicide case along with Detective Jeannette Williamson, who drafted the affidavit for the first search warrant. J.A. 97, 106-107. Alkire testified that he participated in executing both search warrants. J.A. 108. With respect to the first search warrant, Alkire testified that the police were looking to find the items listed in the warrant. J.A. 108.

Alkire testified that he drafted the second search warrant relating to the internal contents of the laptop seized at the time the first search warrant was executed. J.A. 110. According to Alkire, the police were concerned, upon hearing Cobb's recorded calls from the jail, that "he made mention to his father about wiping down or cleaning down the computer." J.A. 110. Alkire further noted that the police believed that there may have been information on the computer that might lead to Cobb's "motive or premeditation or something else." J.A. 110. As

stated above, Alkire requested permission to search for virtually anything and everything within the computer. J.A. 40. Akire admitted that the warrant was "pretty broad," and he agreed that it gave him "a lot of latitude." J.A. 150.

Alkire included the language in the second search warrant affidavit "any and all evidence of any other crimes" because he uses it in almost every search warrant. J.A. 40, 113-114. Alkire testified that he was looking for something that might be associated with the homicide but "you never know what you're going to find." J.A. 116, 118. Including this language, according to Alkire, was standard practice in his department. J.A. 118, 124.

Though he had never conducted such a search of a computer before, Alkire himself conducted a search of the contents of the laptop. J.A. 124. By randomly opening files, he quickly discovered files that contained images of child pornography. J.A. 125. Alkire testified that the police never determined the actual motive for the murder. J.A. 132.

Alkire testified that when the police applied for the search warrants, the police did not have probable cause to believe that there were any other crimes that Cobb was involved in other than the homicide. J.A. 149. He testified that there was no probable cause to believe that there would be evidence of any other crimes in the computer. J.A. 149-50. Alkire testified that the reason the police seized the items listed in the first search warrant was to discover information about the homicide, especially Cobb's "motive or premeditation or something else." J.A. 110.

Magistrate Judge Aloi recommended that Cobb's motion to suppress be

granted in part and denied in part. J.A. 160. First, his Report and Recommendation indicated that Cobb's motion to suppress be denied as to the first search warrant. J.A. 169. It recommended that Cobb's motion to suppress be granted with respect to the second search warrant for the computer's contents, which Alkire applied for on September 23, 2014, because the second warrant was so lacking in particularity that the warrant constituted a "general warrant" that allowed for "exploratory rummaging" into the entirety of Cobb's life. J.A. 175.

The lack of particularity finding was based upon two considerations by the U.S. Magistrate Judge Aloi: (a) the investigating officers had complete and absolute discretion as to the scope of the broad language of the warrant, and (b) the flexibility and ambiguity of the language in the warrant could have been limited based on the information known to the officer at the time of the application for the warrant. J.A. 175. Further, U.S. Magistrate Judge Aloi noted that the language of a warrant cannot be so flexible to allow a search of the entire computer where information was known to the police, allowing them to make the search more particular. J.A. 177. Finally, the Magistrate Court determined that the good-faith exception of *Leon* did not apply to save the constitutionally flawed warrant. J.A. 192-95.

The government objected to the findings of the Magistrate Judge Aloi's Report and Recommendation. J.A. 196. The district court sustained the government's objections and adopted in part and rejected in part the findings of the Report and Recommendation. J.A. 237. The district court concluded that both

warrants were not only supported by probable cause but were sufficiently particular to survive Fourth Amendment scrutiny as well. J.A. 242. Regarding the second warrant, the district court reasoned that "the need to review the contents of Cobb's laptop in order to determine which files were authorized for seizure does not make the warrant unconstitutionally overbroad." J.A. 247. The district court concluded that the second warrant was sufficiently particular because it limited official discretion to search for and seize only evidence of homicide. J.A. 250. It concluded that the evidence of child pornography was admissible under the plain-view exception to the warrant requirement. J.A. 250. Furthermore, the district court stated, the *Leon* good-faith exception applies, as the officer who requested the second warrant would not have known that it was so facially deficient as to be invalid. J.A. 252.

After the close of the suppression proceedings, Cobb entered a conditional plea of guilty to Count One against him, specifically reserving his right to appeal the denial of his pre-trial motion to suppress physical evidence. J.A. 260-61, 276, 311-12, 347. On March 6, 2019, the district court imposed a sentence of 110 months, to be followed by ten years of supervised release, concurrent with the remainder of his state sentence for second degree murder. J.A. 340, 352.

D. The United States Court of Appeals for the Fourth Circuit.

On appeal, Cobb argued against the constitutionality of the second search warrant for the contents of the computer, specifically that the second search warrant failed to satisfy the particularity requirement for search warrants, and it

was overly broad. The second search warrant had no limits. It was in no way tailored to the facts presented to the police about the homicide. The warrant included no explanation about the types of files sought, the location of the files, the timeframe or the relationship between the files and information about the homicide.

Making matters worse, the second search warrant included the language "any and all evidence of any other crimes," which essentially permitted the police to peruse and seize anything and everything on the computer. Even Alkire who drafted the search warrant admitted that he had never submitted a search warrant that was so broad. Accordingly, it did not pass constitutional muster by a long shot, and a reasonable police officer should have known it. No reasonable magistrate judge could have granted the search warrant outside a "rubber stamp" scenario. The unlimited search of the computer and the unfettered discretion given to police in this case embodies precisely one of the great evils the Fourth Amendment intended to prevent.

In the Opinion, the panel rejected Cobb's challenge that the district court erred in denying his motion to suppress images seized from his computer pursuant to a search authorized by an unconstitutional search warrant. The Opinion recognized that a warrant "need not – and in most cases, cannot – scrupulously list and delineate every item to be seized." *Id.* at 12 (internal quotations omitted). Based upon *United States v. Dickerson*, 166 F.3d 667, 693-94 (4th Cir. 1999), and a line of related precedents, the Opinion concluded that where, as here, "a warrant does not *otherwise* describe the evidence to be seized, that gap can be filled, at least

sometimes, if the warrant instead specifies the relevant offense." *Id.* The Opinion held that "the search warrant challenged in this case was sufficiently particular because it too confined the executing officers' discretion by allowing them to search the computer and seize evidence of a specific illegal activity – Wilson's murder on September 7, 2014." *Id.* at 13. This Fourth Circuit affirmed Cobb's conviction and sentence. Judge Floyd wrote the dissenting opinion, agreeing with Cobb that "the search warrant was unconstitutional for lack of particularity as to the items to be seized, that the government cannot rely on the plain-view exception for the seizure of the child pornography on the laptop, and that the good-faith exception to the exclusionary rule does not apply." *Id.* at 23.

Cobb petitioned the Fourth Circuit for a Rehearing/Rehearing *En Banc*, asking the Fourth Circuit to reconsider its opinion in this case, based upon the arguments he raised on appeal and Judge Floyd's cogent dissent. The Fourth Circuit denied the Petition for Rehearing and Rehearing *En Banc* on September 22, 2020, with no judge requesting a poll under Federal Rule of Appellate Procedure 35.

IX. REASONS FOR GRANTING THE WRIT

The writ should be granted to determine whether the district court properly denied Appellant's pretrial motion to suppress evidence found on a laptop computer at Cobbs home following a search based on a constitutionally defective and overly broad search warrant. The second warrant unlawfully authorized an exploratory

rummaging of the laptop's entire contents, in a plain view search for "any and all evidence of any other crimes." This unlimited search coupled with the unfettered discretion afforded police embodies precisely one of the evils the Fourth Amendment was intended to prevent. Appellant respectfully requests that this Honorable Court grant the writ in order to settle an important issue of federal law, to clarify a person's privacy right to the information contained on a personal home computer or laptop.

X. ARGUMENT

The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, 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. Probable cause exists when, "given all the circumstances set forth in the affidavit…, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). "Unlike the probable cause requirement, which concerns the showing made by an officer *seeking* a search warrant, the particularity requirement is focused as well on the officer *executing* a warrant, and ensures that the search 'will be carefully tailored to its justifications' rather than becoming a 'wide ranging exploratory search[]' of the kind the 'Framers intended to prohibit'." *United States v. Blakeney*, 979 F.3d 851, 861 (4th Cir. 2020) (quoting *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)).

"As always, 'the ultimate touchstone of the Fourth Amendment is reasonableness'." *United States v. Lyles*, 910 F.3d 787, 791 (4th Cir. 2018) (quoting *Fernandez v. California*, 571 U.S. 292, 298 (2014)). "When it comes to particularity, we construe search warrants in a 'commonsense and realistic' manner, avoiding a 'hypertechnical' reading of their terms." *Blakeney*, 949 F.3d at 862 (quoting *United States v. Williams*, 592 F.3d 511 (4th Cir. 2010)). "[W]here a warrant does not *otherwise* describe the evidence to be seized, that gap can be filled, at least sometimes, if the warrant instead specifies the relevant offense." *Blakeney*, 949 F.3d at 862-63; *see also United States v. Dickerson*, 166 F.3d 667, 693-94 (4th Cir. 1999) (upholding warrant that authorized officers to seize "[e]vidence of the crime of bank robbery"), *rev'd on other grounds, Dickerson v. United States*, 530 U.S. 428 (2000).

A. *Dickerson* should not have dictated the outcome of Cobb's case.

In the Fourth Circuit's Opinion, it appears the majority misapplied *United States v. Dickerson*, 168 F.3d 667 (4th Cir. 1999).[2] *Dickerson* is not similar, not helpful, and it should not have dictated an outcome adverse to Cobb. In *Dickerson*, the search warrant directed agents to search for "evidence of the crime of bank robbery." *Id.* at 694. Although it failed to list particular types of evidence, this Court held that a warrant is sufficiently particular "so long as [it] at least minimally

[2] *Dickerson* is part of a line of cases from the Fourth Circuit upholding the particularity of a search warrant based on the use of the criminal statute at issue or specific criminal offense, rather than a particularized list of the evidence sought. *See United States v. Ladd,* 704 F.2d 134 (4th Cir. 1983); *United States v. Fawole*, 785 F.2d 1141, 1144 (4th Cir. 1986); *United States v. Blakeney*, 979 F.3d 851 (4th Cir. 2020).

confines the executing officers' discretion by allowing them to seize only evidence of a particular crime.'" *Id.* at 694.

The warrant in *Dickerson* involved a bank robbery, which is an offense that, by its very nature, has a limited universe of evidence, such as "guns, masks, bait money, dye-stained bills and clothing, [and] carrying bags." *Id.* at 693-694 (a warrant authorizing a search for evidence of a "specific illegal activity" like "narcotics or theft of fur coats" would include evidence "reasonably subject to identification . . ."). What's more, the agent in *Dickerson* described the types of evidence at issue and actually knew, based upon the investigation, what to look for specifically, including "guns, money, bait bills, dye-stained money and clothes, disguises, carrying bags, and gloves." *Id.* at 677, 693.

Evidence of homicide, to include murder, on the other hand, is very different. There are no standard "tools of the trade" for murder. Murder happens in myriad ways. Therefore, the evidence of murder is diverse and almost impossible to specifically describe in many cases. In this case, unlike in *Dickerson*, no agent itemized the types of evidence he or she sought. To the contrary, Alkire did not know what he was looking for. Alkire could only engage in speculation and merely offered that he was looking generally for evidence of motive, premeditation or "*something else*."

As Judge Floyd recognized in his dissent, "[i]n today's modern world, such unrestricted searches [of personal electronic devices] are in many ways more invasive than the rifling of one's home." Opinion at 42. An exploratory rummaging by way of

unrestricted searches into every corner of a person's life—whether it be done in the home or the home computer—is precisely what the Fourth Amendments protects against.

The offense of murder can include an almost unlimited amount of information and evidence, particularly when the search involves the contents of a computer, which is loaded with personal information, including, for example, documents, pictures, emails, videos, instant messages, etc. The evidence of murder sought in this case was extraordinarily open-ended because Alkire had no idea about the particular evidence for which he was searching. And unlike the agents in *Dickerson*, who found a gun, dye-stained money, ammunition, and gloves, which are "reasonably associated with the crime of bank robbery," Alkire found evidence of child pornography, not murder. *Id.* at 694.

The Fourth Circuit, in *Dickerson,* explicitly recognized that a warrant that merely authorizes a search for evidence relating to a "'broad criminal statute or general criminal activity'" is overbroad because it fails to provide "'readily ascertainable guidelines for the executing officers as to what items to seize.'" *Dickerson*, at 694 (quoting *United States v. George*, 975 F.2d 72 (2nd Cir. 1992)). That is exactly the problem here, which the Fourth Circuit failed to recognize, much less explain, thereby creating a conflict between *Dickerson* and the Opinion. Accordingly, this Court should find that the search warrant lacked particularity and, therefore, did not pass constitutional muster.

B. The evidence was not admissible under the plain-view exception.

This Court has recognized that digital searches are uniquely invasive, different from that which came before. *Riley v. California,* 573 U.S. 373 (2014). Indeed, doctrines that apply in analog searches should not be extended in a knee-jerk fashion to digital searches. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Following the Ninth Circuit opinion in *United States v. Comprehensive Drug Testing*, 621 F.3d 1162 (9th Cir. 2010), courts are increasingly applying such protocols. ACLU Amicus Brief at 10-11. Statements of the Supreme Court over 40 years ago in the context of analog searches simply are not determinative of appropriate Fourth Amendment-protections now.

Search protocols have been used in warrants at least since *United States v. Hunter,* 13 F.Supp.2d 574, 578 (D.Vt. 1998). More recently, in *United States v. Bonner*, 2013 WL 3829404, at *17 (S.D. Cal. 2013), the search warrant contained limitations for the identification and extraction of relevant data, in sum, requiring that "All forensic analysis of the imaged data will employ search protocols directed exclusively to identification of data within the scope of this warrant." There are many such examples.

Increasingly, courts refer approvingly to search protocols and limited queries, even if they do not require them under the facts of the particular case at bar. For example, in *United States v. Galpin*, 720 F.3d 436, 451 (2d Cir. 2013), the Second Circuit found that a search warrant was facially overbroad and thus violated the Fourth Amendment. It remanded for the district court to determine whether the warrant was severable – i.e., whether it is possible to carve out the sufficiently

particularized portions of the warrant from the constitutionally infirm remainder. On remand, if the warrant were severable, the district court would then have to decide whether evidence not covered by the warrant was in plain view in the course of the authorized search. The Court counseled:

> Unlike the Ninth Circuit, we have not required specific search protocols or minimization undertakings as basic predicates for upholding digital search warrants, and we do not impose any rigid requirements in that regard at this juncture. *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1176 (9th Cir.2010) (en banc) (per curiam). However, the district court's review of the plain view issue should take into account the degree, if any, ***to which digital search protocols target information outside the scope of the valid portion of the warrant. To the extent such search methods are used, the plain view exception is not available***.

Id. at 451 (emphasis added). In other words, evidence discovered via searches targeting information for which there is no valid warrant (or probable cause) is not in "plain view" and should be suppressed. *Galpin* also shows that in 2013, search protocols for digital forensics were in common use.

In *United States v. Schesso*, 730 F.3d 1040, 1050 (9th Cir. 2013), investigators obtained a warrant to search the defendant's digital devices for child pornography. Under the facts of *Schesso*, there was no need for the magistrate to have imposed a search protocol before execution of the warrant. A specialized computer expert and not the case agent performed the digital search and that expert did not disclose to the case agent "any information other than that which [was] the target of the warrant." The investigators did not rely on "plain view" to justify seizure of any evidence -- all

the searches and seizures were authorized under the warrant. Nevertheless, the court advised that:

> Although we conclude that the exercise of "greater vigilance" did not require invoking the *CDT III* search protocols in Schesso's case, judges may consider such protocols or a variation on those protocols as appropriate in electronic searches. We also note that Rule 41 of the Federal Rules of Criminal Procedure sets forth guidance for officers seeking electronically stored information.[] Ultimately, the proper balance between the government's interest in law enforcement and the right of individuals to be free from unreasonable searches and seizures of electronic data must be determined on a case-by-case basis. The more scrupulous law enforcement agents and judicial officers are in applying for and issuing warrants, the less likely it is that those warrants will end up being scrutinized by the court of appeals.

Id. at 1050. In other words, protocols may not only be appropriate, but also necessary to ensure that individuals are free from unconstitutional searches and seizures. This assessment must be determined on a case-by-case basis, and this is one of those cases. At the very least, it shows why investigators cannot just randomly open files, as Alkire did here.

In the case *In re Search of W. West End*, 321 F. Supp. 2d 953, 961 (N.D. Ill. 2004), the court considered the search and seizure of several computers found in a home for evidence of tax fraud. The court and the investigators should use, says the opinion, heightened scrutiny for particularity in the context of computer searches. *Id.* at 961 citing *United States v. Carey*, 172 F.3d 1268, 1275 n. 7 (10th Cir.1999) ("the storage capacity of computers requires a special approach" in assessing the particularity requirement); *United States v. Barbuto*, No. 2:00CR197K, 2001 WL

670930, *4 (D.Utah Apr.12, 2001) ("searches on computers are unique because of their abundant storage capacity and the likelihood of discovering 'intermingled documents' . . ."); *United States v. Hunter*, 13 F.Supp.2d 574, 583–84 (D.Vt.1998) ("Computer searches present the same problem as document searches—the intermingling of relevant and irrelevant material—but to a heightened degree," which requires that each computer search be "independently evaluated for lack of particularity"). This is because, first, investigators normally seize computers that contain far more information than is relevant to the warrant and search them later. Almost certainly, then, documents evidencing the alleged crime are intermingled with documents that the government has no probable cause to seize. Given the extraordinary volume of information that computers store, these private and non-responsive documents are predominant. Again, the availability of forensic tools and the value of search protocols are unsurprising and uncontroversial in 2004. *W. West End,* in particular, explains why analogies between a filing cabinet and a computer are unpersuasive.

C. *Leon*'s good faith exception does not apply to salvage the insufficient and un-particularized computer search warrant.

There is no colorable claim of good faith on the part of the officers in this case. The warrant is so facially deficient in failing to particularize the places to be searched or the things to be seized in the computer that the executing officers cannot reasonably presume it to be valid. *United States v. DeQuasie*, 373 F.3d 509, 519–20 (4th Cir. 2004) (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984).

No reasonable officer could rely upon *Dickerson*, *Jacob* and *Williams* in crafting such a broad warrant. The government and the district court oversimplified these

cases and failed to recognize the dramatic difference between these precedents and Cobb's case. *Dickerson*, *Jacob* and *Williams* involved search warrants that were more particular than the warrant in this case, which was not particular at all and authorized a search for "Any and all evidence of any other crimes," rendering it as broad as a search warrant could be.

Evidence of a homicide – where the officers had no idea what they were looking for -- is much more vague than the evidence of the bank robbery, in *Dickerson*, which involves well-known tools of the trade and the storage of U.S. currency. *Id.* at 693-694.

The Fourth Circuit in *Jacob* determined that the language "including but not limited to" was superfluous and did not invalidate an otherwise sufficiently particular search warrant. *Id.* at 52. Yet, in Cobb's case, the words "Any and all evidence of any other crimes" stands alone. This sentence is not superfluous. It did not merely modify or place in context the other language in the search warrant. It was not juxtaposed with a list of specific items. And Alkire interpreted it to give him full freedom to search for whatever he chose in any and every location on the computer. J.A. 40, 116, 118, 150.

A reasonable officer in this case could not rely upon *Williams* either. *Williams* involved a search warrant that authorized the seizure of pictures and digital storage media and the officers in *Williams* searched for and found illegal pictures on a DVD. Thus, the conduct of law enforcement was entirely in line with the language of the search warrant. Here, on the other hand, the warrant had no list of what could be

seized, it did not identify pictures, or any other type of evidence for that matter, and Alkire randomly hunted for unspecified evidence of murder, in all places, from all times, in all forms. The computer search warrant in this case and Alkire's procedure were vastly different than in *Williams* and emphatically Alkire did ***not*** act in good faith.

Finally, the government argued "the fact that Sgt. Alkire conferred with Pat Wilson, the state prosecutor, in obtaining the search warrants . . . is further, important evidence of Sgt. Alkire's good faith." United States' Response Brief at 27. On the contrary, Alkire's testimony at the hearing on the motion to suppress makes it abundantly clear that prosecutor Wilson's involvement in the drafting of the application for the computer warrant was minimal:

> Q: Did you consult with Pat Wilson before you presented this? Did you show him a copy of this, get him to clear it for you?
>
> A: I did not show him a copy, no. But, yes,
>
> Q: All right.
>
> A: I did confer with him.
>
> Q: In other words, you had a meeting with him or you had some discussion with him that there would be a search warrant for the contents of the computer?
>
> A: Yes.
>
> Q: All right. Did he give you any guidance there or he just said "Okay. Do it."?
>
> A: Yeah, pretty much – just "do it."

J.A. 122-23.

While the state prosecutor may have been involved in the ***investigation***, it is apparent that his involvement as to the ***warrant*** was merely to agree with Alkire that there should be a search warrant for the contents of the computer. It is not accurate to characterize Wilson as "involved" with the computer warrant itself. What happened here is distinct from the facts of *United States v. Clutchette*, 24 F.3d 577 (4th Cir. 1994), which the government cites in support of a finding of good faith.

In *Clutchette*, while officers were in a stakeout, surveilling the residence of a fugitive, the officer in charge decided to get search warrants for two homes. However, the officers all believed that none of them could be spared from the mission to go obtain warrants from a magistrate judge. *Id.* So, the detective contacted the Assistant State's Attorney ("ASA") for legal guidance as to how to proceed in obtaining the warrants by telephone. The ASA consulted with other attorneys and concluded that the officers could apply for the warrants by telephone. The ASA conveyed to the detective that the procedure was "legal and feasible" and that it had been done before. *Id.* Accordingly, the ASA in *Clutchette*, unlike Wilson here, researched the issue and provided guidance to the detective as to how to go about applying for the warrants. The ASA in *Clutchette* also assured the detective that the warrants would be valid under these circumstances. When it ultimately turned out that the warrants were invalid because they were done over the phone, the Fourth Circuit applied the good-faith exception to evidence seized pursuant to the warrants because, under these circumstances, the officers' reliance on the warrants ***was*** objectively reasonable.

XI. CONCLUSION

For these reasons, Appellants respectfully request that this Honorable Court grant a writ of certiorari and review the judgment of the Court of Appeals.

Respectfully submitted,

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