No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KELVIN BAEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals err in expanding the inevitable discovery doctrine to affirm the admission of evidence obtained during an unlawful search, where the police officer conceded it did not "occur" to him "to go and . . . get a warrant" at the outset of the search, and did not "want[] to get the warrant" until after conducting the unlawful search?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Kelvin Baez was a defendant in the district court and an appellant in the Eighth Circuit.

Respondent, the United States of America, prosecuted the case in the district court and was the appellee in the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kelvin Baez respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at 983 F.3d 1029 (8th Cir. 2020), and is reproduced in the Appendix at A-1.

The court of appeals order denying rehearing and rehearing *en banc* is not reported but is reproduced in the Appendix at A-19.

The sentencing decision of the United States District Court for the District of Minnesota, *United States v. Kelvin Baez,* is not reported and reproduced in the Appendix at A-20.

JURISDICTION

The court of appeals issued its opinion on December 29, 2020, and its order denying rehearing and rehearing *en banc* on February 9, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This appeal involves the Fourth Amendment of the United States Constitution, which is reproduced in the Appendix at A-21.

STATEMENT OF THE CASE

The Eighth Circuit panel ruled that a police officer's inchoate, unstated, and unpursued intention to potentially seek a search warrant, if he had not received

consent to search the hotel room from one of the room's occupants, was sufficient to apply the inevitable discovery doctrine and admit the evidence seized during the ensuing warrantless and unlawful search. This ruling—based solely on an individual officer's unpursued probable cause determination—conflicts with the decisions of this Court, other Eighth Circuit panels, and other courts of appeal, which have consistently held that the inevitable discovery doctrine applies only where the wrongfully evidence seized would have been acquired lawfully by independent means that were *already substantially underway*, and not based solely on an officer's purported probable cause determination. *See, e.g.*, *Nix v. Williams*, 467 U.S. 431, 443-44 (1984) ("On this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found."); *Walter v. United States*, 447 U.S. 649, 657 n. 10 (1980) ("if probable cause dispensed with the necessity of a warrant, one would never be needed"); *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."); *United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997) (inevitable-discovery doctrine applies only if the government shows not only (1) "that the evidence would have been discovered by lawful means in the

absence of police misconduct" but also (2) "that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation."); *United States v. James*, 353 F.3d 606, 617 (8th Cir. 2003) (rejecting inevitable discovery, and stating that "[w]hile a warrant to search . . . might perhaps have been obtained, that is beside the point"); *United States v. Madrid*, 152 F.3d 1034, 1041 (8th Cir. 1998) ("[w]hatever balance is to be achieved by the inevitable discovery doctrine, it cannot be that police officers may violate constitutional rights the moment they have probable cause to obtain a search warrant").

I. PROCEDURAL HISTORY

On June 6, 2017, the original indictment issued, charging Baez, his wife (Zyaira Gavino), and Rodolfo Anguiano with one count of conspiracy to distribute and possess with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846, and one count of possession with intent to distribute and distribute methamphetamine, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). (DCD 28.)

Gavino pleaded guilty to one count of use of a communication facility to commit a drug trafficking offense on September 26, 2017, and was sentenced to 18 months' imprisonment. (DCD 121, 123, 233.) Anguiano likewise pleaded guilty to one count of possession with intent to distribute and distribute methamphetamine on January 9, 2018, and was sentenced to 132 months' imprisonment. (DCD 165, 262.)

A superseding indictment against Baez was issued on February 14, 2018, which removed Gavino and Anguiano and added an additional count of conspiracy to distribute and possess with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. (DCD 181.) On April 18, 2018, the Government obtained a second superseding indictment, which added Heriberto Banuelos Barron as a co-defendant and alleged four counts against Baez: (1) conspiracy to distribute and possess with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A),and 846; (2) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); (3) conspiracy to possess firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and (4) possession with intent to distribute and distribute methamphetamine, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). (DCD 243.)

Barron pleaded guilty to distribution of methamphetamine, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1) and (b)(1)(A), on September 24, 2018, and was sentenced to 150 months' imprisonment. (DCD 377, 522.)

The third superseding indictment against Baez issued on November 20, 2018, removing Barron and dropping the possession of a firearm in furtherance of a drug trafficking crime charge against Baez. (DCD 389.) Baez filed motions regarding the four indictments and his defense, and opposed other motions brought by the Government.

As relevant to this petition, Baez moved to suppress evidence obtained as a result of searches of a hotel room and vehicle (DCD 41, 53, 292). The district court denied the motion to suppress (DCD 160, 384) and the Eighth Circuit affirmed the denial, in part, on the basis of the inevitable discovery doctrine (A-1).

An eight-day jury trial commenced on January 7, 2019. The jury convicted Baez of four counts on January 16, 2019. (DCD 513.) Baez filed a motion for new trial on January 30, 2019 (DCD 517), which the district court denied (DCD 557).

On August 20, 2019, Baez was sentenced to 168 months' imprisonment and ordered to pay a special assessment of $300.00. (DCD 579.) Baez timely filed a notice of appeal.

The Eighth Circuit affirmed the district court in all respects. (A-1.) As relevant to this petition, the Panel held that the inevitable discovery doctrine applied and the evidence obtained by the unlawful and warrantless search of the hotel room was properly admitted at trial. (*Id.*) The Eighth Circuit denied Baez's Petition for Rehearing *En Banc*. (A-20.)

II. FACTS

A. Petitioner's Personal Background

Baez is a combat veteran who served from July 2001 until his medical discharge in July 2005. (Tr. 811.) During Operation Enduring Freedom, Baez served in the 82nd Airborne Division as a parachutist who deployed to active combat and "imminent danger" areas in Afghanistan. (*See* Tr. 812-13, 699.) Baez provided early warning intelligence and saw consistent combat throughout his deployment, including armed conflict two or three times a week. (*See* Tr. 813; *see also*

Tr. 701-02.) Baez earned many medals for his service, including the National Defense Service Medal, Global War on Terrorism Service Medal, Army Service Ribbon, and Parachutist Badge. (Tr. 819-22.)

While deployed to Afghanistan, Baez was injured when his parachute malfunctioned during a jump into enemy territory. (Tr. 815-17; *see also* Tr. 705; 08-13-2018 Tr. 31.) Despite breaking his sacroiliac joint and pelvis during the fall, Baez was not able to be evacuated immediately. (08-13-2018 Tr. 31-32.) Instead, Baez spent approximately ten days in cramped quarters with other soldiers while facing constant enemy fire. (08-13-2018 Tr. 32; *see also* Tr. 702-03.) Even after extraction, and despite his injury, Baez continued in active service through September 2003. (Tr. 817.) In July 2005, Baez was honorably discharged for medical reasons arising from his combat injuries. (Tr. 819.)

Although undiagnosed at the time of his discharge, Baez also suffered from post-traumatic stress disorder ("PTSD"). (Tr. 824.) After leaving the military, Baez's began to suffer from service-related panic attacks, flashbacks, and anxiety. (Tr. 824, 827; 08-13-2018 Tr. 34-35.) To numb his back pain and mental pain as he transitioned to civilian life, Baez turned to alcohol—which he had already used heavily as part of the military culture—and then progressed into prescription and harder drugs, including cocaine, heroin, and methamphetamine. (Tr. 827-28; 08-13-2018 Tr. 36-37.) By 2016, "addiction pretty much took control of [Baez's] life." (Tr. 832.) Baez has been diagnosed with both PTSD and substance abuse disorder

by the United States Veterans Affairs Hospital (the "VA"). (Tr. 826, 830.) Baez then had the unfortunate fate to meet and become involved with Anguiano.

B. Relevant Facts

1. Anguiano's Arrest

On May 5, 2017, Officer Jacob Gruber while patrolling a hotel area in Bloomington, Minnesota became suspicious that a vehicle with out of state license plates and expired tags driven by Anguiano may have been involved in narcotics trafficking, and conducted a traffic stop based upon the expired tabs and another minor traffic violation. (Tr. 246-47.) During the stop, Anguiano who was from California told Gruber he was staying at the nearby Embassy Suites and he was in town for a cousin's wedding. (Tr. 253, 263.) Anguiano was ultimately arrested as a result of the stop based on, among other things, Gruber's observation of numerous fabric dryer sheets in the vehicle and Anguiano's inconsistent statements as to the purpose of his visit. (Tr. 263.) The district court concluded Anguiano's arrest was unlawful and lacking in probable cause. (DCD 160 at 13.) The district court held, however, observations made by Gruber during the stop created a reasonable suspicion that Anguiano was engaged in drug trafficking. (*Id.* at 15-16.)

2. Warrantless Search of the Embassy Suite

After arresting Anguiano, Gruber went to the Embassy Suites, where Anguiano said he had been staying. (Tr. 263-64.) The hotel front desk personnel confirmed Anguiano was the sole registered guest of room 714. (Tr. 264, 281.) Room 714 was a suite, with a front living room and pull-out couch, bathroom, back bedroom, and back bedroom sink. (*See* Tr. 270.) Gruber did not seek a search

warrant for the hotel room at that time, and instead knocked on the door. (Tr. 264.) Further, Gruber conceded that it did not "occur" to him "to go and . . . get a warrant" when he and the other officers arrived at the suite. (A-9-A-10.) When Anguiano knocked on the door to room 714, Gavino stepped back and waved her arm to indicate Gruber and Sergeant Cardenas could enter. (Tr. 264-65, 293.)

When officers entered the hotel room, Baez was sitting on a couch in the front room. (Tr. 265-66.) All doors within the hotel suite were open when the officers entered, giving anyone in the suite access to both the front room and back bedroom. (Tr. 284.) Gavino told the officers she and Baez were at the hotel visiting a friend and had stayed with him for a couple of days. (DCD 160 at 7; 07-31- 2017 Tr. 75.) Gruber and Cardenas observed a glass methamphetamine pipe with residue on an end table near Baez. (Tr. 266.) Gruber also observed a set of GM keys on the living room couch. (Tr. 269.)

Gruber asked for Gavino's consent to search the hotel room, and she said "yes" and pointed to her suitcase, backpack, and bags in the front room. (*See* Tr. 267-68; 07-31- 2017 Tr. 75.) Gruber found an owner's manual for a Chevrolet Equinox and a small bag with bullets in Gavino's backpack. (Tr. 268-69.) Gruber then proceeded to search the rest of the hotel suite including the back bedroom, believing Gavino had consented to—and had the authority to consent to—a search of the entire suite. (*See* Tr. 267, 270; *see also* DCD 160 at 8-9.)

In the back bedroom, Gruber observed a large, locked armoire with a rigid chain lock. (Tr. 275; DCD 160 at 21.) In addition, a cell phone was propped up to

face the armoire in the corner of the bedroom and appeared to be streaming a live video, monitoring the armoire. (Tr. 286, 740-41; DCD 160 at 8, 21; *see also* Tr. 286, 289.) The Government, however, never determined who the cell phone belonged to or that it was, in fact, live-streaming the armoire. (*See* Tr. 286, 289, 742.)

Shortly after the hotel suite search began, Officer Matthew Jones arrived at the Embassy Suites. (Tr. 293.) Jones was given the key found in the hotel living room, and identified an Equinox in the hotel parking lot that the key belonged to. (Tr. 294.) Shortly thereafter, a K-9 unit arrived at the vehicle, and the dog indicated there were narcotics present in the vehicle. (Tr. 295.)

Baez was not asked for, and did not give, his consent to search the front room or back bedroom of the hotel suite, the Equinox, or any of his personal belongings. (07-31-2017 Tr. 174-75.) While the officers were conducting the warrantless search, Gruber asked Baez, "if there were narcotics in the room where would they be?" (Tr. 276.) Gruber testified that Baez responded, "Well, in the armoire, obviously." (Tr. 276.) Gruber confirmed, however, that Baez affirmatively stated "there were no amounts of large drugs in the room, to the best of [his] knowledge" and that "[i]f there were drugs, they belonged to the room renter." (Tr. 285-86.)

In searching the back bedroom, Gruber found, hidden underneath the sink in the bedroom and behind the panel of the sink cabinet, two larges bags of methamphetamine. (Tr. 273.) Gruber conceded that it was not until he "found the meth" under the sink that he "wanted to get a warrant." (A-9-A-10.) Upon finding the methamphetamine under the sink, officers arrested Baez (07-31-2017 Tr. 82)

and decided to freeze the scene and to obtain a search warrant to search the armoire and Equinox. (Tr. 273-74; DCD 160 at 21; 07-31-2017 Tr. 79-80.)

Baez sought to suppress the evidence obtained as a result of the warrantless search of the hotel room suite and the search warrant. (DCD 41, 53, 292.)

3. The Hotel Room and Equinox Search Warrant

After freezing the scene, officers obtained a search warrant for the Embassy Suite hotel room and the Equinox. (07-31-2017 Tr. 135; DCD 160 at 21-22.) In executing the search warrant on the locked armoire in the back bedroom, officers discovered a locked safe, suitcase, and plastic bag containing papers. (Tr. 512-14.) The safe contained a handgun, scale, and methamphetamine. (Tr. 514; DCD 160 at 9.) The suitcase contained a title for the Equinox. (Tr. 525.) Between the suitcase and plastic bag, officers recovered a number of items with Anguiano's name on them, including his passport. (*See, e.g.*, Tr. 519, 523, 690, 692-93.) Nothing belonging to Baez was found in the locked armoire, suitcase, plastic bag or back bedroom.

In executing the search warrant on the Equinox, officers discovered a backpack containing some methamphetamine and a gun. (Tr. 298-99.) Officers also discovered a locked, movable safe in the rear cargo compartment. (Tr. 297.) Inside the safe, officers found a storage lease agreement with Baez's name on it, various other paperwork, and firearm ammunition. (*See* Tr. 304, 306-09.)

REASONS FOR GRANTING THE WRIT

The Panel's decision conflicts with the decisions of this Court, other panels within the Eighth Circuit, and other courts of appeal on an important federal

question of constitutional law and criminal procedure—the scope of the inevitable discovery doctrine. The Panel's decision has the potential to impact thousands of criminal cases every year. In effect, the Panel's ruling turns the inevitable discovery doctrine into a probable cause determination by the police and eviscerates the warrant requirement under the Fourth Amendment. Consideration by this Court is therefore necessary to secure and maintain uniformity of the Court's decisions and to resolve both inter and intra-circuit conflicts as to the scope of the inevitable discovery doctrine.

ARGUMENT

In concluding that the inevitable discovery doctrine permits the government to conduct unconstitutional, warrantless searches by subsequently claiming that they would have been able to obtain—but were not in the process of seeking—a lawful warrant, the Panel's decision disregards important Fourth Amendment protections in the precedent from this Court and the Eighth Circuit. *See, e.g.*, *Nix*, 467 U.S. at 443-44; *Walter*, 447 U.S. at 657 n.10; *Johnson*; *Conner*, 127 F.3d at 667; *James*, 353 F.3d at 617; *Madrid*, 152 F.3d at 1041. This disrupts "[t]he precarious balance struck by the Fourth Amendment's warrant requirement and the inevitable discovery doctrine," which is designed to "deter[] police officers from violating constitutional protections and prevent[] prosecutors from benefitting from the illegality." *Madrid*, 152 F.3d at 1037-38. In protecting this balance, this Court, the Eighth Circuit, and other courts have consistently rejected the notion that the inevitable discovery doctrine is invoked by the mere existence of probable cause.

I. The Panel's Decision Ignores this Court's Precedent in *Nix*

For instance, in *Nix*, this Court applied the inevitable discovery doctrine because a systematic, detailed alternative investigation and search for the evidence at issue—a child's body—was already underway when the constitutional violation occurred. *Nix*, 467 U.S. at 443-44. This Court made clear that the analysis under the inevitable discovery doctrine must focus upon "demonstrated historical facts capable of ready verification or impeachment," and not speculation. 467 U.S. at 444 n.5.

There, the police had "organized and directed some 200 volunteers" to search for the child's body in a grid fashion through two counties beginning at approximately 10:00 a.m. *Id.* at 448-49. The police further instructed the volunteers "to check all the roads, the ditches, any culverts. . . . If they came upon any abandoned farm buildings, they were instructed to go onto the property and search those abandoned farm buildings or any other places where a small child could be secreted." *Id.* at 448-49. When the defendant volunteered to cooperate with the police at approximately 3:00 p.m., the search was suspended. *Id.* at 449. Had the defendant not promised cooperation, the search would have "continued using the same grid system." *Id.* The defendant led the police to the body, two-and-a-half miles from where the search had stopped, in what would have been the easternmost grid to be searched. *Id.* When the defendant later challenged discovery of the body, testimony established that "it would have taken an additional three to five hours to discover the body if the search had continued; and the body was found near a culvert, one of the kinds of places the teams had been specifically directed to

search." *Id.* Based on the record, this Court said it was clear "that the search parties were approaching the actual location of the body," and it was "satisfied . . . that the volunteer search teams would have resumed the search had [the defendant] not earlier led the police to the body and the body inevitably would have been found." *Id.* at 449-50.

By contrast, here, there was no alternative investigation underway at all. Based on the traffic stop of Anguiano—where no drugs were found—officer Gruber went to Anguiano's hotel suite, knocked on the door, asked to come in, and looked around after Gavino stepped back and waved her arm. (Tr. 264-65, 293.) Officer Gruber conceded, and the Panel acknowledged, "that it did not 'occur' to him 'to go and. . . get a warrant' when he and the other officers arrived at the suite, and it was not until he 'found the meth' under the sink that he 'wanted to get the warrant.'" (A-9-A-10.) Nonetheless, the Panel found that it was enough that Officer Gruber testified that "he 'understood that [getting a warrant] was an option' when he asked Gavino's consent to search the room, and he 'would have . . . called for a search warrant' had Gavino refused to consent." A-10. According to the Panel, this implied "Officer Gruber was at least disposed to execute an alternative plan if Gavino refused to consent, even if he did not consciously have such a plan in mind." *Id.*

The Panel's reasoning is not supported by the holding in *Nix.* Nothing in *Nix* suggests that an officer's subjective and unarticulated intent to execute an alternative plan by applying for a search warrant based on his determination of probable cause is enough to apply the inevitable discovery doctrine. Nor is the

reasoning supported by *Walter* 447 U.S. at 657 n. 10 ("if probable cause dispensed with the necessity of a warrant, one would never be needed") or *Johnson*, 333 U.S. at 14 ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.").

II. The Panel's Decision Creates Unresolved Inconsistencies within Eighth Circuit Precedent

The Panel's ruling is likewise contrary to the Eighth Circuit's clear precedent. Recognizing that its opinion appears facially inconsistent with its precedent in *Conner*, the Panel attempted to justify its opinion in light of *Conner*, or, alternatively, explain why *Conner* did not apply. A-7, A-11. But the Panel's analysis ignores the second prong of *Conner* and eviscerates the Fourth Amendment's search warrant requirement by turning the inevitable discovery doctrine into a mere probable cause analysis, permitting the government to use evidence seized during warrantless searches so long as they could have obtained a warrant.

A. The Panel's Decision is Inconsistent with the Eighth Circuit's Binding Precedent in *Conner* and Its Progeny

In *Conner*, consistent with this Court's analysis and holding in *Nix*, the panel held that the inevitable discovery doctrine applies only where the government shows (1) "that the evidence would have been discovered by lawful means in the absence of police misconduct" and (2) "that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional

violation." 127 F.3d at 667. This clear articulation of the test for the inevitable discovery doctrine rejected the notion that all evidence is admissible if the government could, theoretically, have obtained the evidence through lawful means. Rather, the government had to have been "actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation." *Conner*, 127 F.3d at 667 (emphasis added).

Although the Panel acknowledged "Officer Gruber did not consciously have [an alternative investigative] plan in mind" and testified that it did not "occur" to him to seek a warrant until after the constitutional violation occurred, the Panel nevertheless concluded that the inevitable discovery doctrine applied by questioning whether "*Conner*'s test is controlling" and asserting that the tests applied post-*Conner* have been "inconsistent." A-8-A-10. *Conner* has never been overruled, however, and the Panel did not purport to overrule *Conner*. Rather, the Panel acknowledged that substantial Eighth Circuit case law cites to the two-element test set forth by *Conner*. *Id.* at 8 (citing *United States v. Glenn*, 152 F.3d 1047, 1049 (8th Cir. 1998); *United States v. Thomas*, 524 F.3d 855, 860 62 (8th Cir. 2008); *United States v. Munoz*, 590 F.3d 916, 923 (8th Cir. 2010)). To avoid the same conclusion here, the Panel claimed "inconsistency" by pointing to four decisions in which this Court cited pre-*Conner* inevitable discovery case law or seemingly did not apply the two-element Conner test. *Id.* at 8-9.

None of the allegedly "inconsistent" cases cited by the Panel are, in fact, inconsistent with *Conner* or *Nix*, however. In *United States v. Reinholz*, the

inevitable discovery doctrine is only mentioned once as an exception to the exclusionary rule and was not part of the Court's evidentiary rulings. 245 F.3d 765, 779 (8th Cir. 2001). In *United States v. Craddock*, the Court generally described the inevitable discovery rule but declined to assess the doctrine because the issue had not been raised before the district court. 841 F.3d 756, 760 (8th Cir. 2016). In *United States v. Sallis*, "the warrant [was] already being pursued even without the additional information added after the officers" conducted the warrantless search. 920 F.3d 577, 582-83 (8th Cir. 2019). Finally, under the unusual circumstances in *United States v. Chandler*, the Court concluded that "the inevitable discovery doctrine applies, not because the government was actively pursuing a substantial alternative line of investigation, which is the typical inevitable discovery situation, but because the law enforcement agency's legitimate interests as employer would have inevitably led it to discover the contraband before Chandler, a suspended employee, could remove it." 197 F.3d 1198, 1201 (8th Cir. 1999) (emphasis added).

The Panel, therefore, fails to cite any inconsistent treatment of the inevitable discovery doctrine in the Eighth Circuit post-*Conner*, and also fails to consider several additional Eighth Circuit cases that consistently apply the *Conner* test. For instance, in *Madrid*, the Eighth Circuit analyzed the "precarious balance" between the Fourth Amendment and inevitable discovery doctrine where officers obtained a search warrant using evidence observed or obtained from a warrantless walk-through of a house following detention of its occupants. 142 F.3d at 1040-41. In rejecting the district court's conclusion that the warrant would have been obtained

even without the evidence from the unlawful search, the Eighth Circuit noted that "the Fourth Amendment's warrant requirement can effectively serve its deterrent function only if police officers may not constitutionally search a residence, hold its occupants hostage, and, in short, exploit their presence simply because the warrant application process has begun." *Id.* at 1040. As the Eighth Circuit explicitly noted in *Madrid*, "it cannot be that police officers may violate constitutional rights the moment they have probable cause to obtain a search warrant." *Id.* at 1041. Likewise, the Eighth Circuit rejected the application of the inevitable discovery doctrine in *James*, finding that a general investigation of the defendant for child sexual misconduct charges could not support inevitable discovery of content unlawfully seized from his computer discs where "there is no evidence in this record that the detectives were pursuing" that evidence. *James*, 353 F.3d at 617. Ongoing Eighth Circuit precedent thus establishes that *Conner* is still valid and biding law.

Confusingly, the Panel also cites to one pre-*Conner* case to suggest that Conner itself was improperly issued contrary to binding Eighth Circuit precedent. A-10 (citing *United States v. Durant*, 730 F.2d 1180, 1185 (8th Cir. 1984)) ("if a contemporaneous alternative line of investigation was not present in *Durant*, which applied the inevitable-discovery doctrine anyway, then Conner's second condition conflicts with prior-panel precedent . . . [and] *Conner* would not be controlling"). This position is wrong. Whereas *Conner* contains a clear articulation of the inevitable discovery doctrine and its test, consistent with the holding in *Nix*, *Durant* merely recognizes the existence of an exception to the warrant requirement when

the evidence would have been inevitably discovered and concludes that the evidence was admissible. *Compare Conner*, 127 F.3d at 667 *with Durant*, 730 F.2d at 1185 (8th Cir. 1984). Moreover, *Durant* was decided several months before *Nix*. Therefore, *Conner* in no way conflicted with prior precedent in *Durant* and remains controlling.

In attempting to explain away *Conner* and applying the inevitable discovery doctrine notwithstanding any active pursuit of an alternative investigation, the Panel's holding allows its interpretation of the inevitable discovery doctrine to swallow the Fourth Amendment warrant requirement. As numerous Eighth Circuit cases have held: "The Fourth Amendment protects individuals against unreasonable searches and seizures by the government" and requires warrants supported by probable cause before the government may conduct non-consensual searches and seizures. *See, e.g.*, *United States v. Ramirez*, 676 F.3d 755, 759 (8th Cir. 2012) (quoting *United States v. Williams*, 521 F.3d 902, 905 (8th Cir. 2008)) (internal quotation marks omitted). "With limited exceptions, evidence acquired during, or as a consequence of, a search that violates the Fourth Amendment is inadmissible." A-4 (citing *Utah v. Strieff*, 579 U.S. _, 136 S. Ct. 2056, 2061 (2016)). The Panel therefore erred in applying the inevitable discovery doctrine in this case, where there was no active alternative plan of investigation.

B. The Panel's Decision Ignores the Evidence in Concluding There Was Any Substantial, Alternative Line of Investigation at the Time of the Constitutional Violation

The Panel also erred in its alternative conclusion that *Conner*'s second requirement—"that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation," *Conner*, 127 F.3d at 667—is met here. A-9-A-11. To the contrary—the Panel recognized that the government was not actively pursuing an alternative investigative plan at the time of the unconstitutional search:

> Officer Gruber conceded that it did not "occur" to him "to go and . . . get a warrant" when he and the other officers arrived at the suite, and it was not until he "found the meth" under the sink that he "wanted to get a warrant."

Id. at 9-10. Despite this clear recognition that there was no active pursuit of an alternative investigation at the time of the unlawful search, the Panel relied upon two cases to conclude that *Conner*'s second requirement was met.

First, the Panel concludes that Officer Gruber's testimony that he "understood that [getting a warrant] was an option" satisfied the Conner's inevitable discovery test because "it [is] enough to constitute 'actively pursuing a substantial, alternative line of investigation' for officers to have in mind 'an alternative plan' that they would have executed if the constitutional violation had not occurred." A-9 (citing *United States v. Hammons*, 152 F.3d 1025, 1030 (8th Cir. 1998)). This Panel misconstrues *Hammons*, however, which is clearly distinguishable from the present case. Indeed, the panel in *Hammons* concluded that an alternative line of investigation was actively being pursued at the time of

the unlawful search because "the officer [told] Hammons that he would call a drug-canine unit if Hammons did not consent to the search." *Hammons*, 152 F.3d at 1030. It was thus clear that "the officer had initiated an alternative plan at the time of the constitutional violation: if Hammons did not consent, the officer was prepared to walk back to his patrol car and radio the drug-canine unit." *Id.* Here, on the other hand, it did not "occur" to Officer Gruber to seek a warrant until after the unlawful search, such that there was no active pursuit of an alternative investigation plan at the time of the constitutional violation. *See* A-9.

Alternatively, the Panel concluded that "*Conner*'s second condition is met here" because "it is more plausible that a contemporaneous alternative line of investigation was present here than in *Durant*." A-10-A-11. As previously discussed, however, *Durant* was decided both pre-*Conner* and pre-*Nix*, and does not reflect the applicable standard when assessing the inevitable discovery doctrine. Indeed, *Durant* did not purport to set forth any test for assessing the inevitable discovery doctrine, instead merely recognizing that the doctrine existed. *Durant*, 730 F.2d at 1185 ("We have recently recognized a third exception when the evidence would have been inevitably discovered absent the illegal conduct."). Rather, *Nix* and the two-part *Conners* test govern, both of which plainly require an active pursuit of an alternative investigation for the inevitable doctrine to apply. *Nix*, 467 U.S. at 449-50; *Conner*, 127 F.3d at 667; *see also, e.g.*, *Madrid*, 152 F.3d at 1038; *Williams*, 181 F.3d at 954; *Pruneda*, 518 F.3d at 604; *Allen*, 713 F.3d at 388.

Under *Nix* and *Conner*, the inevitable discovery doctrine cannot apply because the government was not actively pursuing any alternative, lawful method of investigation until after the unconstitutional search under the sink occurred. Any other conclusion is contrary to the holding in *Nix* and dilutes the second *Conner* element to a point where savvy officers could always satisfy the inevitable discovery doctrine with clever testimony that they "knew" a warrant could have been obtained, despite not taking any step to actually obtain said warrant. This would functionally turn the inevitable discovery doctrine into a mere probable cause analysis by the police, permitting the government to use evidence seized during warrantless searches so long as they could have obtained a warrant. In effect, the Fourth Amendment warrant requirement would be rendered pointless, giving the government free rein to conduct warrantless searches and justify the searches after-the-fact by claiming a warrant could have been obtained.

This Court's decisions in *Nix, Walter*, and *Johnson,* along with the Eighth Circuit's decisions in *Conner* and its progeny, reject such a degradation of the Fourth Amendment. *See Nix*, 467 U.S. at 449-50; *Walter v. United States*, 447 U.S. at 657 n.10 (1980) ("if probable cause dispensed with the necessity of a warrant, one would never be needed"); *Johnson*, 333 U.S. at 14 ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."). Rather, they strongly dictate that inevitable

discovery cannot apply just because officers could have obtained—but were not actively pursuing—a warrant

Officer Gruber's testimony makes clear the government was not pursing an alternative investigation method at the time of the unlawful search under the sink. The Panel thus improperly expanded the holding in *Nix* and in violation of *Walter*, *Johnson* and *Conner*.

III. The Panel's Decision Conflicts with Inevitable Discovery Doctrine Precedent of Other Circuits

The Panel's decision is likewise inconsistent with assessment of the inevitable discovery doctrine in other circuits, creating conflicting decisions over this important issue under the Fourth Amendment. For instance, the Eleventh Circuit has explicitly recognized that the inevitable discovery doctrine "requires the prosecution to show that 'the lawful means which made discovery inevitable were being *actively pursued* prior to the occurrence of the illegal conduct.'" *United States v. Virden*, 488 F.3d 1317, 1322 (11th Cir. 2007) (quoting *Jefferson v. Fountain*, 382 F.3d 1286, 1296 (11th Cir. 2004)) (emphasis in original). "Any other rule would effectively eviscerate the exclusionary rule, because in most illegal search situations the government could have obtained a valid search warrant had they waited or obtained the evidence through some lawful means had they taken another course of action." *Id.* at 1322-23.

Other circuits have similarly held. *See, e.g.*, United States v. Jones, 72 F.3d 1324, 1334 (7th Cir. 1995) ("Inevitable discovery is not an exception to be invoked casually, and if it is to be prevented from swallowing the Fourth Amendment and

the exclusionary rule, courts must take care to hold the government to its burden of proof."); *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986) ("to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment."); *United States v. De Reyes*, 149 F.3d 192, 195 (3d Cir. 1998) ("It is the government's burden to show that the evidence at issue would have been acquired through lawful means, a burden that can be met if the government establishes that the police, following routine procedures, would inevitably have uncovered the evidence. However, the Supreme Court made clear in *Nix* that the analysis should focus upon the historical facts capable of ready verification, and not speculation.") (internal citation omitted); *United States v. Neugin*, 958 F.3d 924, 935 (10th Cir. 2020) ("If Deputy Clinton had not opened the camper, we cannot say he inevitably would have seen the ammunition, run a criminal history check, or found the gun. Without the violation, therefore, Mr. Neugin would not inevitably have been arrested. And without the arrest, the truck would not inevitably have been impounded and searched.").

As discussed above, the Panel's decision that the inevitable discovery doctrine applied here, where the officer conceded that it did not "occur" to him to get a warrant until *after* the unlawful search of the sink, A-9-A-10, conflicts not only with this Court's precedent and other Eighth Circuit precedent, but with precedent of other circuits as well.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court to grant the writ.

This the 10th day of May, 2021.

Respectfully submitted,

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