

Appendix A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 3 2021

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONNY JOSEPH DITIRRO, Jr.,

Defendant-Appellant.

No. 19-10163
19-10250

D.C. No.
2:16-cr-00216-KJD-VCF-1

MEMORANDUM*

On Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Submitted February 1, 2021**
San Francisco, California

Before: IKUTA and NGUYEN, Circuit Judges, and EATON,*** Judge.

Lonny Joseph Ditirro, Jr. appeals his convictions following a jury trial on four counts of sexual exploitation of children in violation of 18 U.S.C. § 2251(a) and (e), and one count of possession of child pornography in violation of 18 U.S.C.

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

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

*** Richard K. Eaton, Judge for the United States Court of International Trade, sitting by designation.

§ 2252A(a)(5)(B) and (b)(2). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

1. Ditirro argues that the district court erred in denying his motion to suppress photo and video evidence obtained from an SD card. We review the district court's ruling on a motion to suppress de novo, *United States v. Crews*, 502 F.3d 1130, 1135 (9th Cir. 2007), and give "great deference" to the issuing judge's finding of probable cause, which we review for clear error, *United States v. Underwood*, 725 F.3d 1076, 1081 (9th Cir. 2013).

Because police officers' initial search of Ditirro's SD card exceeded the scope of previous searches by private individuals, the officers conducted a warrantless search that presumptively violated the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. 109, 117 (1984) ("The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated."). The district court therefore correctly excised any reference to the initial search from the probable cause affidavit used to obtain a search warrant for the SD card.

Once the tainted evidence was properly excised, the district court had to "determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to issue a warrant." *United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987). It properly found that the remaining evidence in the

affidavit—which includes first-person accounts attesting to the existence of child pornography on the SD card—provided ample probable cause that evidence of child pornography or exploitation would be found on the SD card. *See Underwood*, 725 F.3d at 1081.¹

2. Ditirro also argues that all statements from his interrogation should have been suppressed because he repeatedly requested to speak with an attorney during the interrogation and was ignored in violation of his Fifth Amendment rights. Ditirro makes this argument for the first time on appeal. “[A] theory for suppression not advanced in district court cannot be raised for the first time on appeal’ absent a showing of good cause.” *United States v. Guerrero*, 921 F.3d 895, 897 (9th Cir. 2019) (quoting *United States v. Keesee*, 358 F.3d 1217, 1220 (9th Cir. 2004)); *id.* at 898 (“Rule 12(c)(3)’s good-cause standard continues to apply when . . . the defendant attempts to raise new theories on appeal in support of a motion to suppress.”). Ditirro fails to show good cause. The magistrate judge specifically noted that Ditirro had not raised any claims under the Fifth Amendment in his motion to suppress, yet Ditirro still failed to raise the argument before the district court.

AFFIRMED.

¹ Because probable cause existed, we do not address the government’s alternative argument that the SD card evidence is admissible under the exceptions to the exclusionary rule.

Appendix B

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

LONNY JOSEPH DITIRRO, JR.

Date of Original Judgment: 5/9/2019
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 2:16-cr-00216-KJD-VCF-1

USM Number: 53326-048

David Fischer

Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
☒ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
☒ was found guilty on count(s) 1, 2, 3, 4, and 5 of the Superseding Indictment.
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. § 2251(a) and (e)	Sexual Exploitation of Children	8/12/2015	1
18 U.S.C. § 2251(a) and (e)	Sexual Exploitation of Children	8/12/2015	2
18 U.S.C. § 2251(a) and (e)	Sexual Exploitation of Children	8/12/2015	3

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) _____ ☐ 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.

5/1/2019

Date of Imposition of Judgment



Signature of Judge

KENT J. DAWSON, UNITED STATES DISTRICT JUDGE

Name and Title of Judge

7/19/19

Date

CASE NUMBER: 2:16-cr-00216-KJD-VCF-1

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC § 2251(a)and(e)	Sexual Exploitation of Children	8/12/2015	4
18 USC § 2252A(a)(5)(B)	Possession of Child	8/12/2015	5
Pornography (b)(2)			

DEFENDANT: LONNY JOSEPH DITIRRO, JR.

CASE NUMBER: 2:16-cr-00216-KJD-VCF-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the following 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	\$ 500.00	\$ 25,000.00	\$ N/A	\$ 80,859.16

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

☐ The defendant shall 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>
(Sealed Restitution List)	\$80,859.16	\$80,859.16	

TOTALS	\$ 80,859.16	\$ 80,859.16
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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 ☐ 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.

DEFENDANT: LONNY JOSEPH DITIRRO, JR.
CASE NUMBER: 2:16-cr-00216-KJD-VCF-1

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$ 81,359.16 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance with ☐ 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:

Restitution is to be paid first to S.M. and T.H. in full before it is distributed evenly amongst the other victims.

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 clerk of the court.

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

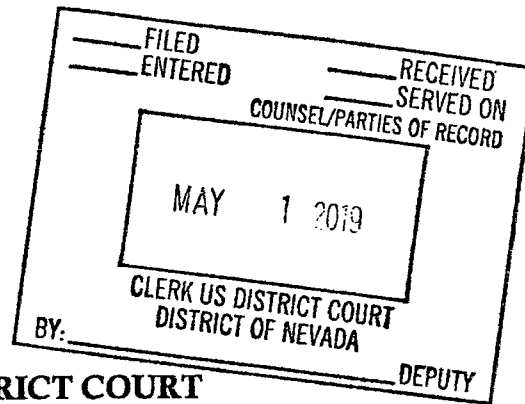
☐ Joint and Several

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:

Final Order of Forfeiture attached.

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) JVA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.



**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

LONNY JOSEPH DITIRRO, JR.,

Defendant.

2:16-CR-216-KJD-VCF

Final Order of Forfeiture

The United States District Court for the District of Nevada entered a Preliminary Order of Forfeiture pursuant to Fed. R. Crim. P. 32.2(b)(1) and 18 U.S.C. § 2253(a)(1), 2253(a)(2), and 2253(a)(3), based upon the jury verdict finding Lonny Joseph Ditirro, Jr., guilty of the criminal offenses, forfeiting specific property set forth in the Bill of Particulars and the Forfeiture Allegation of the Superseding Criminal Indictment and shown by the United States to have the requisite nexus to the offenses to which Lonny Joseph Ditirro, Jr., was found guilty. Superseding Criminal Indictment, ECF No. 80; Bill of Particulars, ECF No. 86; Minutes of Jury Trial, ECF No. 121; Jury Verdict, ECF No. 123; Preliminary Order of Forfeiture, ECF No. 124.

This Court finds that the United States may amend this order at any time to add subsequently located property or substitute property to the forfeiture order pursuant to Fed. R. Crim. P. 32.2(b)(2)(C) and 32.2(e).

This Court finds the United States published the notice of forfeiture in accordance with the law via the official government internet forfeiture site, www.forfeiture.gov, consecutively from October 31, 2018, through November 29, 2018, notifying all potential

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Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 1 2021

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONNY JOSEPH DITIRRO, Jr.,

Defendant-Appellant.

No. 19-10163
19-10250

D.C. No.
2:16-cr-00216-KJD-VCF-1
District of Nevada,
Las Vegas

ORDER

Before: IKUTA and NGUYEN, Circuit Judges, and EATON,* Judge.

The court has received appellant Ditirro's February 19, 2021 pro se filing (Docket Entry No. 48). Appellant Ditirro is reminded that, because he is represented by counsel, only counsel may file motions. Accordingly, we decline to entertain appellant Ditirro's filing and deny the motion for leave to file pro se for lack of sufficient good cause.

The Clerk shall serve this order on counsel and appellant individually at Lonny Ditirro # 53326048, U.S.P. Tucson, U.S. Penitentiary, P.O. Box 24550, Tucson, AZ 85734.

* The Honorable Richard K. Eaton, Judge for the United States Court of International Trade, sitting by designation.

Appendix D

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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 LONNY DITIRRO,

14 Defendant.
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Case No. 2:16-CR-00216-KJD-VCF

ORDER

16 Before the Court for consideration is the Report and Recommendation (#43) of Magistrate
17 Judge Cam Ferenbach entered April 17, 2017, recommending that Defendant's Motion to Suppress
18 Evidence (#23) be granted in part and denied in part. The Defendant filed Objections (#67) and
19 Supplemental Objections (#74). The Government filed a response to the Objections and Supplement
20 (#75).

21 The Court has conducted a *de novo* review of the record in this case in accordance with 28
22 U.S.C. § 636(b)(1) and LR IB 3-2. The Court determines that the Report and Recommendation
23 (#43) of the United States Magistrate Judge entered April 17, 2017, should be **ADOPTED** and
24 **AFFIRMED**.
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1 IT IS THEREFORE ORDERED that the Magistrate Judge's Report and Recommendation
2 (#43) entered April 17, 2017, are **ADOPTED** and **AFFIRMED**, and Defendant's Motion to
3 Suppress Evidence (#23) is **GRANTED in part and DENIED in part**.

4 DATED this 5th day of December 2017.

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8 Kent J. Dawson
9 United States District Judge
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Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LONNY JOSEPH DITIRRO, JR.,

Defendant.

Case No. 2:16-cr-00216-KJD-VCF

REPORT & RECOMMENDATION

Before the Court are Defendant Lonny Joseph Ditirro, Jr.'s Motion to Suppress Evidence (ECF No. 23), the Government's Response to Defendant's Motion to Suppress Evidence (ECF No. 32), and Ditirro's Reply in Support of Motion to Suppress Evidence (ECF No. 34). For the reasons stated below, Ditirro's Motion to Suppress Evidence is granted in part and denied in part.

I. Background

On September 9, 2015, Rachel Ismail¹ discovered a Secure Digital card ("SD card") stuck to her leg.² See Evidentiary Hearing, ECF No. 41 (April 6, 2017). She placed the SD card in her cellphone to check its contents. *Id.* She discovered that the card contained child pornography. *Id.* Upon making this discovery, Ismail immediately removed the SD card from her phone. *Id.* Based on the images she viewed, she concluded that the SD card belonged to her ex-boyfriend, Defendant Lonny Joseph Ditirro, Jr. *Id.*

¹ Rachel Saito changed her last name to Ismail after getting married in March 2016. See Evidentiary Hearing.

² See *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1084 (9th Cir. 2014) (noting that a Secure Digital card is a form of flash memory card that is widely used in consumer electronics devices such as cellular phones and digital cameras).

1 On September 10, 2015, Ismail brought the SD card to her friend and neighbor, Stephen Torrez.
2 *See* Evidentiary Hearing. *Id.* Torrez inserted the SD card into his cellphone and viewed its content. *Id.*
3 He concluded that the SD card contained child pornography and promptly contacted the Las Vegas
4 Metropolitan Police Department ("Metro"). *Id.* A short while later, Metro Officers arrived and viewed
5 the images on the SD card using Torrez's cellphone. *Id.* They determined that the SD card contained
6 child pornography. *Id.* At some point while Metro Officers were at Torrez's apartment, Ismail arrived.
7 *Id.* In addition to describing the images she viewed on the SD card, she told Metro Officers that she
8 believed Dittiro had traveled to Texas to meet an underage girl. Ismail also provided a voluntary statement
9 that memorialized these facts. ECF No. 23-1 at 8. Based on these facts, Metro Officers seized the SD
10 card.

11 On December 2, 2015, Metro Detective Shannon Tooley applied for and was granted a state search
12 warrant for the SD card. *Id.* at 16. Shortly thereafter, Metro Detective Scott Miller took over this case
13 from Detective Tooley. *See* Evidentiary Hearing. Detective Miller submitted a formal request to process
14 and analyze the SD Card to Metro's forensic lab on February 16, 2016. *Id.* On March 7, 2016, the forensic
15 examiner issued his report. ECF No. 23-1 at 24. Metro examiner Matt Trafford found hundreds of images
16 that he categorized as possible child pornography. *Id.*

17 In May 2016, Dittiro was arrested on state child pornography charges. ECF No. 23-2 at 2. He
18 was released on bond on his state charges. On June 16, 2016, Dittiro was arrested on a federal arrest
19 warrant. *Id.* at 38. His apartment was also searched pursuant to a federal search warrant. *Id.* Before he
20 made his initial appearance in federal court, Dittiro was interrogated by Detective Miller and FBI Special
21 Agent Sue Flaherty. *Id.* The interview lasted approximately one hour. During the interview, Dittiro
22 provided user names and passwords for his various social media accounts. *See* Evidentiary Hearing. After
23 the interview Dittiro was booked on federal child pornography charges. On July 19, 2016, a federal grand
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1 jury indicted Ditirro on one count of sexual exploitation of a child and one count of possession of child
2 pornography.

3 Ditirro now moves to suppress evidence found on the SD card, as the fruits of an unlawful search,
4 and his statements during the FBI interrogation, as having been obtained in violation of his Fifth
5 Amendment rights. ECF No. 23.

6 II. Discussion

7 1. Ditirro Has Standing to Challenge the Search of the SD Card

8 “A defendant who voluntarily abandons property has no standing to contest its search and seizure.”
9 *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000). “The abandonment inquiry is primarily a
10 question of intent, and intent may be inferred from words, acts, and other objective facts.” *United States*
11 *v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984). The abandonment determination “is made in light of the
12 totality of the circumstances, and two important factors are denial of ownership and physical
13 relinquishment of the property.” *United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986).

14 In *Nordling*, the defendant was escorted off a commercial flight from San Diego to Seattle on
15 suspicion of murder. *Id.* at 1468. The defendant denied having any carry-on luggage, despite being seen
16 with a gray tote bag prior to boarding his flight. *Id.* He left the plane empty handed. *Id.* After being
17 eliminated as a suspect in the murder, law enforcement officers intercepted the tote bag in Seattle. *Id.* at
18 1469. Inside, officers found nearly a pound of cocaine along with the defendant’s wallet and identity
19 documents. *Id.* The trial court denied the defendant’s motion to suppress the cocaine discovered in the
20 bag because the defendant had abandoned the bag and thus relinquished any expectation of privacy in it.
21 *Id.*
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1 The Ninth Circuit upheld the trial court's finding that the defendant had abandoned the bag. *Id.* It
2 focused on two objective facts, the denial of ownership and the relinquishment of physical custody. *Id.*
3 Both facts demonstrated that the defendant intended to abandon the bag on the airplane. *Id.*

4 The Government argues that Ditirro abandoned the SD card when he gave it to Ismail. *See* ECF
5 No. 32 at 20; *see also* Evidentiary Hearing. In support of its argument, the Government cites Ditirro's
6 own admission that he gave Ismail an SD card. *Id.* This statement was made at approximately the forty-
7 five-minute mark of an hour-long police interview. ECF No. 24. This isolated statement, however, does
8 not allow the Court to infer that Ditirro intended to abandon the SD card.

9 Immediately prior to his admission, Ditirro stated that he had two or three SD cards and gave one
10 of them to Ismail. It is not clear whether the gifted SD card was the same card which contained the child
11 pornography.

12 Additionally, Ismail's account of Ditirro's behavior around the time she turned over the SD card
13 to law enforcement undercuts the Government's argument. In a November 30, 2015, phone interview
14 Ismail stated that Ditirro had been at her apartment and had lost an SD card. ECF No. 24. Ismail
15 discovered that SD card stuck to her leg. *Id.* Once Ismail realized what the SD card contained, she
16 immediately attempted to get the SD card to the proper authorities. She described Ditirro's behavior
17 around this time as "really wanting it back" and that "[h]e just thought he'd lost it." *Id.*

18 Although Ditirro did not have physical possession of the card, Ismail's account of his search efforts
19 and the uncertainty regarding whether the gifted SD card contained child pornography support a
20 conclusion that Ditirro did not abandon the SD card. *Nordling*, 804 F.2d at 1469. He has standing to
21 challenge the search of the card.

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2. Stephen Torrez's Search of the SD Card Does Not Constitute Government Action

“[T]he Fourth Amendment generally does not protect against unreasonable intrusions by private individuals.” *United States v. Reed*, 15 F.3d 928, 930-31 (9th Cir. 1994). But “the Fourth Amendment does prohibit unreasonable intrusion by private individuals who are acting as government instruments or agents.” *Id.* “The defendant has the burden of showing government action.” *Id.*

Courts use a two-part test to determine whether a private individual is acting as a government instrument or agent: “(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends.” *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982).

Ditirro contends that Torrez was acting as a government agent when he searched through the SD card.³ The police report is unclear regarding whether Torrez searched the SD card before or after Metro Officers arrived. But at the April 6, 2017 evidentiary hearing, Torrez testified that he searched the SD card before the Metro Officers arrived. *See* Evidentiary Hearing. Indeed, statements from Ismail to Torrez that morning about the contents of the SD Card—*e.g.*, that the SD card contained images of Ditirro engaging in sexual relations with a teenage girl she recognized from Facebook—and Torrez's own search and discovery of “explicit images” on the SD card compelled him to call Metro. *Id.* Metro Officers could not have known or acquiesced to any conduct they were unaware of. Therefore, the Court finds that Torrez conducted his search of the SD card as a private actor. The scope of the Metro Officers' subsequent search would be defined by the extent of Ismail's and Torrez's searches.

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³ Ditirro does not argue that Ismail was acting as a government agent when she searched through the SD card. ECF No. 23.

1 enlarged images exceeded the scope of the technician's search. *Id.* The Ninth Circuit held that the
2 detective's search did not exceed the scope of the private search. *Id.* at 822. It was irrelevant that the
3 technician had limited his search to a particular format; the critical inquiry was whether the technician had
4 viewed that specific image. *Id.* If he had, law enforcement could view the same image, in any format,
5 without exceeding the scope of the private search. *Id.*

6 It is unclear if Metro Officers exceeded the scope of the private searches. In a voluntary statement
7 filled out the day of the incident, Ismail wrote in her own words that she "saw so much porn which included
8 kiddi porn children in full penetration and oral with grown men. Children were 5-10 various ages." ECF
9 No. 23-1 at 8. She also stated that she saw images of "[a] young girl whom graduates 2017 a teen – whom
10 is on Lonny Joseph Dittiro's FB was with him few weeks ago..." *Id.* According to her phone interview
11 with Detective Tooley, however, Ismail "[d]idn't look that far" into the SD card. ECF No. 24. At the
12 evidentiary hearing, Ismail stated that she observed a "restricted file" which contained explicit images
13 involving adult men having sexual relations with young children. *See Evidentiary Hearing.*

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15 Torrez also viewed the content of the SD card on his cellphone. Torrez stated that Ismail told him
16 about the pornographic images involving children that she saw. *See Evidentiary Hearing.* Torrez testified
17 that he did not see all the images. *Id.* But he stated that he looked at enough to immediately call police.
18 *Id.* He also was not sure if Dittiro was in the explicit images he viewed with the underage girls; he just
19 knew there was explicit material so he called Metro. *Id.*

20 The Metro Officers' report states that they discovered "multiple pornographic images" on the SD
21 card. ECF No. 23-1. The report then goes on to describe the images. One of the descriptions matches an
22 image Ismail claims she had previously viewed. ECF No. 24. At the evidentiary hearing, both Officer
23 Bianco and Officer Wilson testified that they initially viewed several non-pornographic images on the SD
24 card using Torrez's cell phone. *See Evidentiary Hearing.* But when they started seeing pornographic
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1 “Probable cause demands factual specificity and must be judged according to an objective
2 standard, taking into account the nature and trustworthiness of the evidence of criminal conduct available
3 to the police.” *United States v. Struckman*, 603 F.3d 731, 743 (9th Cir. 2010). “[I]n seeking to establish
4 probable cause, officers may not solely rely on the claim of a citizen witness ..., but must independently
5 investigate the basis of the witness’ knowledge or interview other witnesses.” *Id.*

6 Any images from the SD card that Ismail or Torrez viewed are admissible. Because the Officers’
7 search likely exceeded the scope of Ismail and Torrez’s search, the Court will suppress the Officers’
8 statements or testimony about what they viewed while searching the images contained in the SD card.
9 ECF No. 23-1 at 13 (“Officers, using [Torrez’s] cell phone viewed the SD card. Officers observed several
10 images of females, who appeared to be under the age of 16, engaged in sexual acts”). But even when
11 excised of those Officers’ statements, the December 2015 state search warrant did not lack probable cause.

12 Ditiirro does not contest that Ismail, acting as a private citizen, viewed images on the SD card.
13 Torrez also viewed images on the SD card. When Metro Officers arrived to investigate, Torrez informed
14 them of the explicit images he saw and then allowed them to use his cellphone to investigate. *See* 2 Wayne
15 R. LaFave, *Search & Seizure* § 3.4(a) (5th ed. 2016) (“... when an average citizen tenders information to
16 the police, the police should be permitted to assume that they are dealing with a credible person in the
17 absence of special circumstances suggesting that such might not be the case”). Shortly after viewing the
18 content of the SD card using Torrez’s cellphone, Ismail arrived. Metro Officers promptly questioned
19 Ismail regarding the SD card. The Court is satisfied that the testimony that Torrez and Ismail provided to
20 the Metro Officers established a fair probability that a crime had been committed. *See United States v.*
21 *Smith*, 790 F.2d 789, 792 (9th Cir. 1986); *see also Maryland v. Pringle*, 540 U.S. 366, 370, 124 S.Ct. 795,
22 157 L.Ed.2d 769 (2003) (“[T]he probable-cause standard is a practical, nontechnical conception that deals
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1 with the factual and practical considerations of everyday life on which reasonable and prudent men, not
 2 legal technicians, act.” (internal quotations and citation omitted)).

3 Moreover, those images combined with Ismail’s November 30, 2015 telephone interview with
 4 Detective Tooley further support that there was probable cause. Even if the search warrant lacked
 5 probable cause, there would be no Fourth Amendment violation if the Government shows that Metro
 6 Officers relied in good-faith on the warrant. *United States v. Leon*, 468 U.S. 897, 920, 104 S.Ct. 3405, 82
 7 L.Ed.2d 677 (1984) (“In the ordinary case, an officer cannot be expected to question the magistrate’s
 8 probable cause determination or his judgement that the form of the warrant is technically sufficient”).

9 **b. Delay in Obtaining Search Warrant**

10 “An unreasonable delay between the seizure of a package and obtaining a search warrant may
 11 violate the defendant’s Fourth Amendment rights. The touchstone is reasonableness.” *United States v.*
 12 *Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015); *but see United States v. Syphers*, 426 F.3d 461, 469 (1st Cir.
 13 2005) (The Fourth Amendment itself “contains no requirements about *when* the search or seizure is to
 14 occur or the *duration*”) (citing *United States v. Gerber*, 994 F.2d 1556, 1559–60 (11th Cir. 1993)). Courts
 15 “determine whether the delay was reasonable under the totality of the circumstances, not whether the
 16 Government pursued the least intrusive course of action.” *United States v. Hernandez*, 313 F.3d 1206,
 17 1213 (9th Cir. 2002). When considering the totality of the circumstances, courts “must balance ‘the nature
 18 and quality of the intrusion on the individual’s Fourth Amendment interest against the importance of the
 19 governmental interest alleged to justify the intrusion.’” *Sullivan*, 797 F.3d at 633 (quoting *United States*
 20 *v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2193, 165 L.Ed.2d 250 (2006)). There is no bright-line rule for
 21 unreasonableness. *See United States v. Mitchell*, 565 F.3d 1347, 1352 (11th Cir. 2009) (“... we emphasize
 22 again that we are applying a rule of reasonableness that is dependent on all of the circumstances”).
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1 On the individual person's side of this balance, the critical question relates to any possessory
2 interest in the seized object. *See Sullivan*, 797 F.3d at 633; *see also United States v. Burgard*, 675 F.3d
3 1029, 1033 (7th Cir. 2012). "A seizure affects only the person's possessory interests; a search affects a
4 person's privacy interests." *Segura v. United States*, 468 U.S. 796, 806, 104 S. Ct. 3380, 3386, 82 L. Ed.
5 2d 599 (1984).

6 In applying this balancing test to the seizure of Ditiirro's SD card, given the totality of
7 circumstances, the Court finds that the extent of the intrusion on Ditiirro's possessory interests were
8 minimal. Ditiirro argues that he maintained a significant possessory interest in the SD card because it had
9 personal (non-contraband) pictures, resumes, and documents stored on it. *See* ECF No. 23 at 18. Ditiirro
10 does not argue that he could have made use of the SD card if Torrez had not given the SD card to Metro.
11 Ditiirro lost the SD card at Ismail's apartment. Ismail found that SD card. She then gave it to Torrez who
12 then gave it to Police. Both Ismail and Torrez refused to tell Ditiirro where the SD card was. *See*
13 Evidentiary Hearing. Furthermore, Ditiirro had multiple SD cards. He could still use the remaining SD
14 cards in his possession. And Ditiirro "never sought return of the property." *Sullivan*, 797 F.3d at 633-34.
15 From the time the SD card was given to Metro Police until the search was completed, Ditiirro did not assert
16 a possessory claim to it. *See Burgard*, 675 F.3d at 1033. The Court finds that Ditiirro's possessory interests
17 and the actual interference with those interests were minimal.

18
19 Turning to the Government's side, the Court must consider the degree to which the seizure and
20 retention of the SD card was necessary for the promotion of legitimate governmental interests. *Sullivan*,
21 797 F.3d at 634. Under the circumstances of this case, the Government had a reasonable basis for retaining
22 and searching the SD card based on the likelihood that it contained evidence of child pornography. *See*
23 *Burgard*, 675 F.3d at 1033 ("The state has a stronger interest in seizures made on the basis of probable
24 cause than in those resting only on reasonable suspicion ... the Fourth Amendment will tolerate greater
25

1 delays after probable-cause seizures"). Furthermore, here, two private individuals freely and voluntarily
2 gave the SD card to Metro Police; the Government did not affirmatively take or seize the SD card from
3 Ditirro.

4 Ditirro argues that Metro was not diligent in submitting the warrant application and that there was
5 "no discernable excuse in the discovery for Metro's lengthy delay." ECF No. 23 at 18. Torrez gave the
6 SD card to Metro Officers on September 10, 2015. Metro assigned this case to Detective Tooley in late
7 November. Shortly after she was assigned the case, Detective Tooley applied for a search warrant on
8 December 2, 2015. Around the same time, Detective Tooley transferred out of the Internet Crimes Against
9 Children Taskforce to Metro's Sexual Assault Unit. *See* Evidentiary Hearing. Detective Tooley's
10 replacement, Detective Miller, took over Tooley's cases, including the instant case. *Id.* Both Detectives
11 testified at the evidentiary hearing about their heavy caseload at any given time and as a result they were
12 forced to prioritize cases. *Id.*

13
14 The Court finds that the Government's course of conduct was reasonable under the totality of the
15 circumstances given the Government's interest in retaining and searching the SD card for evidence of
16 crimes. Even if the Government could have moved faster to obtain a search warrant, the Government is
17 not required to pursue the "least intrusive course of action." *Sullivan*, 797 F.3d at 634. Police imperfection
18 is not enough to warrant reversal. *See Mitchell*, 565 F.3d at 1353 ("... where the resources of law
19 enforcement are simply overwhelmed by the nature of a particular investigation ... a delay that might
20 otherwise be unduly long would be regarded as reasonable"). With the benefit of hindsight, courts "can
21 almost always imagine some alternative means by which the objectives of the police might have been
22 accomplished," but that does not necessarily mean that the police conduct was unreasonable. *United*
23 *States v. Sharpe*, 470 U.S. 675, 686–87, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). To be sure, Metro may
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25

1 theoretically have been able to work more quickly, but their delay was not the result of bad faith, complete
2 abdication of their work, or failure to “see any urgency.”

3 This case presents different circumstances than *Sullivan*, *Dass*, and *Mitchell*. In each of those
4 cases, the government affirmatively took property allegedly containing contraband as opposed to the
5 present case where two private citizens freely gave the SD card that one of them found to the Government.

6 In *Sullivan*, the Ninth Circuit held that an unexplained 21-day delay in obtaining a search warrant
7 for a seized laptop was reasonable. *Sullivan*, 797 F.3d at 635. The defendant in *Sullivan* was a parolee
8 and had agreed to warrantless searches of his person and property as a condition of parole. Government
9 agents affirmatively seized several of his personal items, including a laptop computer containing child
10 pornography, during a parole search of the defendant’s car. Further, the defendant had given his consent
11 to search the laptop. *Id.* The *Sullivan* court relied on the defendant’s lowered expectation of privacy, due
12 to his parolee status and prior consent, to find that a twenty-one-day delay was reasonable.

13 In *Dass*, the government seized over 1000 packages from ten selected post offices in Hawaii as
14 part of a joint state/federal task force assembled to slow the flow of drugs mailed from Hawaii. *United*
15 *States v. Dass*, 849 F.2d 414, 416 (9th Cir. 1988) (Alarcon, dissenting). They allowed police dogs to sniff
16 the suspicious packages. *Id.* at 414. If the dog alerted, suggesting the presence of marijuana, then the
17 agents would retain the package in order to obtain a search warrant. *Id.* The court held that law
18 enforcement acted unreasonably by detaining packages for 7 to 23 days before executing a search warrant.
19 *Dass* implicitly determined that such a lengthy retention of mailed packages constituted a substantial
20 intrusion into the possessory interests of the individuals who placed the packages in the mail. But *Dass*’s
21 conclusions regarding the interests of a member of the public putting a package in the mail are not
22 applicable here. Most important, *Dass* involved affirmative government planning and action to seize the
23 property at issue potentially containing contraband.
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1 *Mitchell* is also distinguishable from the facts of this case. In *Mitchell*, ICE agents went to the
2 defendant's residence based on their suspicion that he was engaged in distributing and receiving child
3 pornography. *Mitchell*, 565 F.3d at 1349. After the defendant consented to a search of his laptop, the
4 agents removed and retained the computer's hard drive, but did not obtain a search warrant until 21 days
5 later. *Id.* On the narrow facts of that case, the Eleventh Circuit held that the delay was unreasonable
6 because the defendant had a substantial possessory interest in the hard drive, which was likely to contain
7 information "of exceptional value to its owner," and the "detention of the hard drive for over three weeks
8 before a warrant was sought constitute[d] a significant interference with Mitchell's possessory interest."
9 *Id.* at 1351. On the other side of the balance, the court held that there was no compelling justification for
10 the government's delay. Like *Sullivan* and *Dass*, *Mitchell* involved affirmative government action to seize
11 property potentially containing contraband. To the contrary, here, Ismail and Torrez, two private citizens,
12 gave the SD card potentially containing contraband that Ismail found to Metro.

13
14 Ditirro does not argue that he made any request for the SD card's return. He had a minimal
15 possessory interest because he lost the SD card at Ismail's residence. Ditirro had multiple SD cards that
16 he could use. On the government-interest side of the balance, the government had a reasonable basis for
17 its delay based on the likelihood that the SD card contained evidence of child pornography. The Court
18 finds that Metro's delay in obtaining and executing the state search warrant did not violate Ditirro's Fourth
19 Amendment rights.

20 ///

21 ///

22 ///

5. Ditirro's Statements Were Made Voluntarily⁴

"Before a criminal defendant's statement can be used against him, the government must prove its voluntariness by a preponderance of the evidence." *United States v. Leon Guerrero*, 847 F.2d 1363, 1365 (9th Cir. 1988). "An inculpatory statement is voluntary only when it is the product of a rational intellect and free will." *Id.* at 1366.

"A statement is involuntary if it is 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promise, however slight, [or] by the exertion of improper influence.'" *Id.* (quoting *Hutto v. Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976)). "[C]oercive police activity is a necessary predicate to the finding that a confession is not voluntary." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). "Ordinarily, to determine the voluntariness of a confession, [courts] consider the totality of the circumstances surrounding it." *United States v. Jenkins*, 938 F.2d 934, 937 (9th Cir. 1991).

Ditirro argues that his early morning seizure by armed SWAT Officers combined with his mental impairment and physical discomfort overcame his free will and rendered his statements involuntary. ECF No. 23 at 21. To support his argument, Ditirro cites his responses to the interrogators questions. Some responses allegedly demonstrated his mental impairment, his interests included "drawing [and] basketball" and that adults were "big people." ECF No. 24. Other responses showed that he was under physical duress as he repeatedly complained of light headedness and clouded thinking. *Id.*

His responses do not suggest that Ditirro suffered from a mental impairment sufficient to overcome his free will. Ditirro's interests are not particularly juvenile for a man in his 30s, and Ditirro has not

⁴ Ditirro emphasizes that his interrogators continued to ask him questions after he allegedly invoked his right to counsel. ECF No. 23. However, Ditirro did not raise the issue of a violation of his Fifth or Sixth Amendment right to counsel in his motion. *Id.*

1 ACCORDINGLY, and for good cause shown,

2 IT IS HEREBY RECOMMENDED that Ditiirro's Motion to Suppress (ECF No. 23) be
3 GRANTED in part and DENIED in part.

4 IT IS FURTHER RECOMMENDED that any evidence initially obtained through private searches
5 of the SD card be admitted. This includes evidence later viewed by Metro Officers so long as such
6 information was first discovered by a private actor. However, the Metro Officers' testimony about what
7 they viewed while searching the images contained in the SD card should not be admitted.

8 IT IS FURTHER RECOMMENDED that any evidence obtained from Ditiirro's interrogation
9 should be admitted.

10 IT IS SO RECOMMENDED.

11 DATED this 17th day of April, 2017.

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15 CAM FERENBACH
16 UNITED STATES MAGISTRATE JUDGE
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Appendix F

**Additional material
from this filing is
available in the
Clerk's Office.**