No. _____

In the

Supreme Court of the United States

LISA MARIE CANO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Whether a court of appeal's inference regarding the future course of an investigation, unsupported by testimony from the investigating officer or by evidence of routine procedures, satisfies the government's burden to prove the inevitable discovery exception by means of demonstrated historical facts capable of verification or impeachment.

Statement of Related Proceedings

- *United States v. Lisa Marie Cano*,
  - No. 5:18-cr-00066-JGB-1 (C.D. Cal. July 18, 2019)
- *United States v. Lisa Marie Cano*,
  - No. 19-50240, 2021 WL 3878652 (9th Cir. Aug. 31, 2021)

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LISA MARIE CANO, Petitioner

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Petition for Writ of Certiorari

Lisa Cano petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The opinion of the court of appeals is unreported. App. 1a-10a. The rulings of the district court are also unreported. App. 11a-53a.

Jurisdiction

The judgment of the court of appeals was entered on August 31, 2021. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision Involved

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Statement of the Case

This case arises out of a warrantless search conducted by Riverside County Sheriff Department ("RCSD") deputies. The district court found that two deputies had lied about a search of petitioner's motel room in February 2018, and it suppressed evidence seized from the room accordingly. But the district court declined to suppress fruits of the unlawful motel-room search—namely, evidence of fraudulent credit-card transactions—that it concluded would have been inevitably or independently discovered. The government introduced that evidence at petitioner's trial, and petitioner was convicted of use of unauthorized access devices. In a divided decision, the Ninth Circuit upheld the admission of the fraudulent credit-card transactions evidence on inevitable discovery grounds.

1. On February 3, 2018, T.G.'s purse was stolen from a parked car in Palm Desert, California. (ER-681–682.) The purse contained several credit cards and a driver's license, each in T.G.'s name. (ER-682–683.) T.G. left a voicemail message for the Palm Desert police department and canceled her credit cards. (ER-683.) The police called back a couple days later, and T.G. filed a police report. (ER-683.)

On February 18, 2018, RCSD Deputy Bryce Hubbard located, among other evidence of access-device fraud, (1) T.G.'s credit cards and driver's license, (2) T.G.'s insurance cards and business cards; (3) a forged driver's

license with T.G.'s information and petitioner's photograph; and (4) a paper interim driver's license with T.G.'s information. (ER-843–849.) Whether he retrieved those items, collectively referred to by the parties as "the T.G. Documents," from a Toyota Tacoma truck or petitioner's motel room became the focus of subsequent litigation on petitioner's suppression motions.

2. Deputy Hubbard claimed that he found the T.G. Documents in a Toyota Tacoma parked in a Motel 6 lot in Thousand Palms, California. (ER-846.) He reported that the Tacoma also contained an embossing machine, dozens of gift cards and credit cards, an interim driver's license bearing petitioner's photograph and another woman's name, multiple blank driver's licenses with petitioner's photograph, and a receipt for a StorAmerica unit rented to petitioner. (ER-1429.)

Deputy Hubbard's police report made no mention of searching petitioner's room at Motel 6. (ER-846–849.) During discovery related to petitioner's suppression motions, however, the government disclosed body-worn camera footage showing Deputy Hubbard and Deputy Alisha Espinoza at petitioner's motel-room door. (ER-1397) In his subsequently filed declaration, Deputy Hubbard stated that the motel manager let him and Deputy Espinoza into petitioner's motel room, where they conducted a brief search but did not find or seize anything. (ER-1430-1431.)

Petitioner filed a declaration stating that the T.G. Documents were seized from her motel room, not from the Tacoma truck. (ER-1392.) She further stated that she had left the room to go to a restaurant; when she returned, all her belongings had been removed, and the front desk informed her that Deputy Hubbard had taken the items. (ER-1392.)

3. It was undisputed that, on that same day, Deputy Hubbard drove to StorAmerica, a storage facility in Palm Desert, California, to ask about the receipt. (ER-847.) A StorAmerica employee, Enereo Remigio, told Hubbard that petitioner and another woman had rented a storage locker the previous evening, and had unloaded the contents of a dark truck into the locker. (ER-847.) Remigio showed Hubbard petitioner's contract and printed out a copy of the driver's license, in petitioner's name, that she had provided. (ER-847.) Deputy Hubbard reported running a computer inquiry on petitioner, which revealed her prior arrests, probation status, and federal arrest warrant for mail theft. (ER-847.)

At some point, Deputy Hubbard researched T.G. and learned that she had been the victim of a recent car break-in. (ER-847.) He called her and learned that her purse, which contained her driver's license and credit cards, had been stolen; the credit cards had been used to make fraudulent charges at Home Depot and Walmart. (ER-847.) T.G. told Deputy Hubbard that she would obtain her statements and contact him once she received them. (ER-

847.) Hubbard also spoke to the daughter of G.S., whose driver's license had been found along with the T.G. documents; G.S.'s daughter informed Hubbard that G.S.'s driver's license and credit cards had been stolen during a break-in and that someone had unsuccessfully tried to open lines of credit in G.S.'s name. (ER-847–848.)

On February 19, 2018, Remigio called Deputy Hubbard to report that petitioner had returned to the storage unit. (ER-848.) Deputy Hubbard went to StorAmerica, where he arrested petitioner and searched her car and storage unit. (ER-848.) After being read her *Miranda* rights, Cano stated that she had borrowed the Tacoma truck from her friend Tina, who had rented it. (ER-849.) The Tacoma had been rented using the credit and identification cards of a woman named Ashley Tinajero. (ER-1414.) Tinajero's identity had been stolen, and the car rental employee confirmed that Tinajero was not the woman who had rented the car. (ER-1414.)

4. Cano filed motions to suppress the evidence seized from the motel room and the rented Toyota Tacoma, and the fruits thereof. (ER-1.) The district court held two hearings, over parts of three days, on the suppression motions. (ER-2.) One key issue was whether the deputies had used a housekeeper's key to enter Room 119, or whether they had been allowed to enter by a manager. The other major point of dispute involved what, if any, evidence had been found in the motel room.

As to the method of entry into the motel room, body-worn camera footage showed the deputies knocking on the door of Room 119 and speaking to a Motel 6 housekeeper regarding the occupants of the room. (ER-1397.) The housekeeper asks, "Do you want to borrow my key?" and Deputy Espinoza responds, "Sure." (ER-1382.) The recording ends with Deputy Hubbard turning off his body camera. (Ex. 12 at 3:19.)

Three Motel 6 employees testified. Victoria De Lara, a Motel 6 housekeeper, testified regarding the body camera video in which she appeared. (ER-237–238.) She testified that she was approached by the deputies, offered them use of her master key, dropped the key, and left for lunch. (ER-238.) She did not see whether anyone picked up the key or whether the deputies entered the motel room or took anything from the room. (ER-238–239.) De Lara stated that the motel had a new manager/owner who has allowed deputies to enter rooms on occasion, but the manager "wasn't there." (ER-239.) Motel 6 housekeeper Carmen Cervantes, who was also present, likewise testified that there were no managers around at the time. (ER-348–349.)

Motel 6 manager Bryan Patel testified that he was not present at the motel on Sunday, February 18, 2018, that he did not usually work Sundays at that property, and that he did not let the deputies use his key to enter Room

119. (ER-450-472-473.) He further testified that no manager was onsite that day, and that he did not hear about the incident later. (ER-450–451.)

Deputy Espinoza backed up Deputy Hubbard during the motel room search. (ER-243.) She did not recall speaking to the housekeeper, being offered a key, saying "Sure" in response, or using the key. (ER-243–244-248–249.) Deputy Espinoza testified that while RCSD policy required her body camera to be on while contacting a suspect or performing a search, she was not sure whether her camera was activated, and she did not find any footage. (ER-245–246.) She testified that she and Deputy Hubbard searched the room for less than a minute, and that neither of them removed anything from the room. (ER-249–250-257.)

Deputy Hubbard testified that he deliberately turned off his body camera after Deputy Espinoza accepted the housekeeper's offer of a key. (ER-379–380-384.) He further testified that the manager opened the door to Room 119, and both he and Deputy Espinoza entered to search for a minute or two. (ER-400–401.) According to Deputy Hubbard, he found the T.G. Documents in the truck, not in the motel room. (ER-394–396-1669–1674.)

A manager at the tow yard testified that he notified law enforcement after finding numerous cards with names on them in the Toyota Tacoma, but that he could not recall the exact nature of the cards. (ER-263–271.)

Petitioner testified that the T.G. Documents were in the motel room at the time Deputy Hubbard and Deputy Espinoza searched it. (ER-308-310–311-1665–1666.) She gave conflicting testimony as to whether other items—including a MetroPCS receipt and a piece of note paper containing T.G.'s current and former addresses but no name—were located in the Tacoma truck or in the motel room. (ER-313–314-334–336-338-429-1643 [Ex. 103-10]-1650 [Ex. 103-17].)

Postal Inspector Galvez testified that he believed that the MetroPCS receipt had been recovered from the truck, and that Deputy Hubbard had told him that the T.G. Documents had originally been in the truck as well. (ER-423–424.) Galvez described how he contacted a MetroPCS sales associate after contacting T.G. and learning about a large fraudulent MetroPCS transaction on her account. (ER-427.)

5. The district court granted petitioner's suppression motions in part. While it concluded that petitioner had not established a legitimate privacy interest to challenge the search of the Tacoma, it granted petitioner's motion to suppress the T.G. Documents. (App. 15a–16a, 21a.)

First, the district court found that the deputies' claim they had been let into the motel room by a manager was contradicted by the three witnesses who worked at Motel 6 and the video showing Deputy Espinoza accepting the housekeeper's offer of a key. (App. 16a–17a.) The district court did not find

credible the deputies' assertion that a motel manager arrived at this point to provide the deputies with another key. (App. 17a.) This adverse credibility finding rested on Deputy Hubbard's multiple inconsistent statements as to when and where he searched the Tacoma, both deputies' failure to write a report documenting the search of the motel room, both deputies' failure to record the search (and Deputy Hubbard's turning off of his body camera immediately prior to the search), both deputies' vague testimony regarding the manager's asserted involvement in the search, and Deputy Espinoza's combative demeanor toward defense counsel at the hearing. (App. 17a–19a.)

Next, the district court then turned to the issue of which evidence had been seized from the motel room, as opposed to from the Toyota Tacoma. The district court credited petitioner's testimony that the T.G. Documents were seized from the motel room. (App. 20a.)

6. Shortly before trial, Cano argued that testimony and evidence concerning the MetroPCS, Walmart, and Home Depot transactions must be suppressed as fruits of the unlawful Motel 6 search, in which deputies recovered the T.G. Documents. (ER-490–496.) The government responded that the evidence was admissible based on the doctrines of independent source, inevitable discovery, and attenuation, and that the motion was untimely. (ER-503–514.) Ruling from the bench, the district court concluded that the challenged evidence regarding the fraudulent transactions on T.G's

credit cards "would have been inevitably discovered through independent means." (App. 46a.)

At petitioner's trial, the government presented evidence of her involvement in the fraudulent transactions on T.G's credit cards at MetroPCS, Walmart, and Home Depot. (ER 540–548, 577–604, 609–620.) T.G. testified that her credit cards had been stolen, and that she did not make the post-theft MetroPCS, Walmart, and Home Depot transactions or authorize anyone else to do so. (ER-682–689.)

The jury convicted petitioner of unauthorized use of access devices. (ER-778.) The district court denied petitioner's post-trial motion for a judgment of acquittal or a new trial, including a renewed challenge to the court's inevitable discovery ruling. (App. 50a–51a.)

7. The Ninth Circuit affirmed petitioner's conviction in a divided memorandum disposition issued on August 31, 2021. (App. 1a–10a.) The panel majority noted that circuit precedent permitted the government to meet its burden by pointing to "routine procedures," and that a previously initiated, independent investigation was not required. (App. 2a.) It went on to conclude that the district court did not clearly err by determining that law enforcement would have inevitably discovered victim T.G. and the fraudulent transactions on T.G.'s credit cards, even if Deputy Hubbard had not found the suppressed T.G. Documents during the unlawful search of the motel room.

(App. 2a-3a.) The majority noted that an address matching the address on T.G.'s driver's license was on a list of addresses lawfully recovered from the Tacoma, that the Tacoma contained evidence of fraud, and that Deputy Hubbard had actively pursued other leads in the investigation, such as the storage unit receipt he found in the Tacoma and the tip that petitioner had returned to the storage facility. (App. 2a-3a.)

Judge Paez dissented from the majority's inevitable discovery analysis. (App. 5a.) He noted that, unlike in other cases where the inevitable discovery exception applied, the government had not submitted specific testimony from the deputy as to the investigative steps he would have taken in the absence of the T.G. Documents. (App. 5a-6a.) Judge Paez rejected the government's argument that the deputy would have discovered T.G. by investigating each of the twenty-five addresses found on scraps of paper in the Tacoma; although three of the addresses were connected to T.G., T.G.'s name did not appear on the lists, and the record showed that the deputy did not consult the address lists during his investigation. (App. 7a.) Further, Judge Paez observed that the district court did not credit the deputy's testimony with respect to the motel-room search, so there was no reason to assume that the deputy would have investigated the addresses, or that the addresses would have led the deputy to T.G. (App. 7a.) Finally, he argued that the exception for "routine procedures" was inapplicable to the majority's assumption that

the deputy would have investigated all potential leads, because neither the majority nor the government identified a routine procedure that was the inevitable next step. (App. 8a-9a.)

Reasons for Granting the Petition

This Court should grant certiorari because the Ninth Circuit's relaxed standard for proving the inevitable discovery exception to the exclusionary rule conflicts with *Nix v. Williams*, 467 U.S. 431 (1984), multiple federal courts of appeal, and several state supreme courts. To justify admitting unconstitutionally-obtained evidence under the inevitable discovery doctrine, the government must prove by a preponderance of the evidence "that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police." *Id.* at 447. Here, the Ninth Circuit applied the inevitable discovery exception even though the record was devoid of any testimony regarding investigative next steps or routine procedures that would have resulted in discovery of T.G. and the fraudulent transactions made on T.G.'s credit cards.

1. "[T]he inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source." *Utah v. Strieff*, 579 U.S. 232, 238 (2016). To satisfy its burden to show inevitable discovery, the government must rely not on "speculative elements," but rather on "demonstrated historical facts capable of ready

verification or impeachment." *Nix*, 467 U.S. at 444 n.5. In *Nix*, this Court provided a primer as to how the government could make this showing, ruling that a volunteer search party in the area would have inevitably discovered a body even though the murder suspect's statement that in fact led police to the body had been suppressed due to a violation of the right to counsel. *Id.* at 436-37, 449-50. Crucially, the government in *Nix* had made a detailed record to support its claim of inevitable discovery: a law-enforcement agent who organized the search testified regarding (1) the search's scale and progress, (2) the instructions given to volunteers to search specific grids marked off on a map, (3) the agent's plans for organizing a search into the next county, and (4) an estimate that it would have taken the searchers an additional three to five hours to discover the body had the search continued. *Id.* at 448-49. These were "demonstrated historical facts" that could be verified by the government or impeached by the defense.

By contrast, the Ninth Circuit disregarded the "speculative elements" limitation on the inevitable discovery exception. The government in this case presented no testimony from Deputy Hubbard as to the steps he would have taken had he not discovered the T.G. Documents during the illegal search of the motel room. The Ninth Circuit's admission of the T.G. evidence in the absence of such demonstrated historical facts in the record conflicts not only with *Nix* but with the decisions of several circuits to consider similar

scenarios. In *United States v. Holmes*, 505 F.3d 1288 (D.C. Cir. 2007), officers illegally seized the defendant's keys during a *Terry* stop, leading to the discovery of defendant's car and a gun and ammunition inside. *Id.* at 1292. The D.C. Circuit rejected as overly speculative the government's inevitable discovery argument that the officers would have discovered the car based on their lawfully obtained knowledge that the defendant possessed keys in his pocket and further questioning: "The government points to no evidence in the record with which it can attempt to meet its burden to prove that Holmes's car, and ultimately the pistol therein, would inevitably have been discovered absent the unlawful seizure of Holmes's keys." *Id.* at 1293. The government's failure to make a record was also dispositive in *United States v. Carrion-Soto*, 493 F. App'x 340 (3d Cir. 2012). There, the government never asked any of the officers to testify about the procedures they would have followed had they not found heroin during an unlawful search of the defendant's suitcase in the trunk of a car. *Id.* at 342. Although the officers had obtained consent to search the car, which contained cocaine, the Third Circuit dismissed the district court's conclusion that the heroin would have been inevitably discovered as "little more than speculation based on the court's view of what would have followed based on 'best practices' or the court's concept of reasonably thorough police work." *Id.*

Other circuits have given teeth to this Court's "speculative elements" limitation in cases with far more developed records on inevitable discovery. In *United States v. Allen*, 159 F.3d 832 (4th Cir. 1998), the district court applied the inevitable discovery exception to admit drugs found in a duffel bag despite an unlawful search of the bag, reasoning that a drug-sniffing dog would have found the drugs. *Id.* at 838. The Fourth Circuit reversed, based on "the lack of evidentiary support" for the district court's conclusion: "We have no doubt that [the officer] *could* have used the dog, but whether she *would* have presents an entirely different question." *Id.* at 840. Even though one officer had testified that she would have used a drug-sniffing dog absent the illegal search, there was no evidence that a dog had previously been used in such situations, and the officer's actions belied her testimony. *Id.* Similarly, in *United States v. Wilson*, 36 F.3d 1298 (5th Cir. 1994), *overruled on other grounds by United States v. Gould*, 364 F.3d 578, 586 (5th Cir. 2004) (en banc), the Fifth Circuit held that a postal inspector's testimony that he or local police would have pursued an alternate lead was insufficient to establish inevitable discovery, where there was no evidence that the lead had been followed or would have been linked to defendant. *Id.* at 1305.

Further, the government cannot avoid its burden to prove inevitable discovery by resort to routine procedures, as it failed to create any record of a routine procedure—such as a policy to investigate every address found in a

vehicle associated with credit-card fraud—that would have led law enforcement to T.G. In *United States v. Gorski*, 852 F.2d 692 (2d Cir. 1988), the Second Circuit rejected the government's argument that cocaine discovered during an illegal search of an arrested defendant's bag would have been inevitably discovered during an inventory search at the FBI office, because a "thorough review of the record reveals no evidence that such searches were an invariable, routine procedure in the booking and detention of a suspect at the particular FBI office involved." *Id.* at 696; *see also United States v. Doxey*, 833 F.3d 692, 706 n.2 (6th Cir. 2016) (declining to rule on government's inevitable discovery argument because "[w]hile it is certainly possible that the Muskegon County Jail routinely strip-searches incoming detainees as part of its intake processing, and that the drugs would have been discovered at that time, there is no evidence in the record about the Muskegon County Jail's procedures"); *United States v. Infante-Ruiz*, 13 F.3d 498, 504 (1st Cir. 1994) (rejecting inevitable discovery argument where "[t]here was no testimony, and no evidence otherwise, that the car would have been impounded or seized if the gun had not been found" and government failed to introduce "any evidence that [law enforcement] actions were controlled by established procedures and standardized criteria").

State supreme courts, too, have interpreted *Nix* to require the government to provide specific testimony or evidence to support its

counterfactual scenario regarding the course of the investigation absent the illegal search. In *State v. Banks-Harvey*, 96 N.E.3d 262 (Ohio 2018) (plurality op.), the Ohio Supreme Court declined to apply the inevitable discovery exception on the ground that a local officer would have conducted a search, based on lawful probable cause, in the absence of a state trooper's discovery of drugs during an illegal search of a purse; it noted that there was "no evidence" to support this theory, "in large part because the local officer did not testify at the suppression hearing." *Id.* at 271; *see also State v. Milliorn*, 794 S.W.2d 181, 187 (Mo. 1990) ("While it may be true that the State would have discovered the marijuana in the camper of the pickup truck, the State bears the burden of proving by a preponderance of the evidence that such discovery was inevitable. Neither witness for the State . . . testified regarding routine inventory procedures for impounded vehicles. Thus, the State failed to meet its burden."). At a minimum, state supreme courts confronting underdeveloped records on inevitable discovery have remanded for further fact-finding. *See, e.g.*, *State v. Robinson*, 159 A.3d 373, 387 (N.J. 2017) (remanding because "insufficient" record "does not reveal the steps that [officers] would have taken had they not found the gun and impounded the vehicle to seek a warrant").

Instead of requiring sworn testimony or specific testimony regarding what Deputy Hubbard would have done had he not unlawfully searched

petitioner's motel room without a warrant, the Ninth Circuit extrapolated from what it viewed as Deputy Hubbard's active pursuit of the investigation. But as the Utah Supreme Court has observed, "[c]ases that rely upon individual behavior as a crucial link in the inevitable discovery chain, particularly when that behavior is heavily influenced by the illegality that did occur, rarely sustain an inevitable discovery theory." *State v. Topanotes*, 76 P.3d 1159, 1164 (Utah 2003). Thus, Deputy Hubbard's prompt reporting to petitioner's storage unit upon learning she had returned, which the Ninth Circuit treated as a fact supporting inevitable discovery (App. 3a), must be considered in the context of his discovery of the highly incriminating T.G. Documents in the motel room the day before.

"In carving out the 'inevitable discovery' exception to the taint doctrine, courts must use a surgeon's scalpel and not a meat axe." Wayne LaFave, 6 Search & Seizure § 11.4(a) (6th ed. 2017). The Ninth Circuit's interpretation of the exception threatens to swallow the exclusionary rule by permitting a finding of inevitable discovery whenever a plausible sequence of events *could* have led to the evidence in question, even when the record contains no basis for determining what *would* have happened absent the illegal search. The purpose of the inevitable discovery doctrine is to put law enforcement in the same "position[] . . . they would have been in had the impermissible conduct not taken place," thus balancing "the interest of society in deterring unlawful

police conduct and the public interest in having juries receive all probative evidence of a crime." *Nix*, 467 U.S. at 443, 447. Failing to hold the government to the "demonstrated historical facts" standard put law enforcement in a better position than they would have been in had they refrained from searching petitioner's motel room without a warrant. The district court had previously found Deputy Hubbard to be not credible in his account of the motel room search, a strong basis for impeachment. But the Ninth Circuit's reliance on speculation as to what the deputy would have done prevented the defense from cross-examining on this point.

2. This Court last addressed the inevitable discovery exception nearly forty years ago, in *Nix*. Petitioner's case provides an ideal vehicle for this Court to resolve questions regarding the government's required showing to prove the exception, as well as the applicability of the routine procedures exception to case-specific investigative efforts. The government presented no sworn testimony regarding Deputy Hubbard's investigative next steps or evidence of policies that would dictate the future course of the investigation; the district court thus made no specific findings about what Deputy Hubbard would have done, and what he would have discovered about T.G., had he not first located T.G. through the items unlawfully seized during the motel-room search. (App. 46a.) The issue was cleanly presented and outcome-determinative on direct appeal, and is ripe for this Court's review.

Conclusion

For the foregoing reasons, Ms. Cano respectfully requests that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

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DATED: November 29, 2021

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