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OPINION OF THE NEBRASKA SUPREME COURT (JUNE 10, 2022)

NEBRASKA SUPREME COURT
311 Nebraska Reports
State v. McGovern
Cite as 311 Neb. 705

STATE OF NEBRASKA,

Appellant and Cross-Appellee,

v.

JAKE J. MCGOVERN,

Appellee and Cross-Appellant.

No. S-21-144

Appeal from the District Court for Hall County: Mark J. Young, Judge.

Before: HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

PER CURIAM

I. Introduction

This criminal case appeal presents two primary issues: whether evidence obtained following a search

of a cell phone should have been suppressed and whether a sentence of probation for a Class II felony was excessively lenient. Because the first search warrant was supported by probable cause and was sufficiently particular and because law enforcement reasonably saw evidence of a different crime during the initial search, the court did not err in overruling a suppression motion. And because the overall sentencing was not an abuse of discretion, we affirm the judgment of the district court.

II. Background

1. Initial Incident

On September 25, 2018, just after 6 a.m., Officer Brad Newell was dispatched to an apartment in Kearney, Nebraska. Newell spoke with J.S., who reported that upon leaving his garden-level apartment, he saw a man crouched down by a window to the apartment's bathroom. The window had blinds, but they had a small gap. When J.S. went outside, J.S.' girlfriend had just entered the bathroom to shower. J.S. did not mention seeing the individual holding a cell phone. J.S. told Newell that he yelled at the person, who then "took off" running. J.S. chased the person and saw him cut through a yard.

Newell asked J.S. to show him the path the person took. Approximately half a block from the apartment, J.S. discovered a cell phone and handed it to Newell. After observing that the phone's screen was locked, Newell took the phone to the police station. Newell met with Investigator Dan Warrington, who assisted Newell in preparing an affidavit to search the phone.

2. September 2018 Search Warrant and Investigation

(a) Affidavit

Newell completed an affidavit in support of a search warrant, asking the judge for permission to examine the cell phone for evidence of the crime of unlawful intrusion on September 25, 2018. In the affidavit, Newell stated that he had investigated many crimes where a cell phone contained evidence of the commission of the crime being investigated.

In the affidavit, Newell set forth information obtained from J.S. concerning the incident. J.S. reported that on September 25, 2018, "shortly before 0604 hours," his girlfriend said that she was going to shower. As J.S. left the apartment building, he saw a man looking into the ground-level window to the bathroom of J.S.' apartment, where J.S.' girlfriend was preparing to shower. J.S. observed the man "crouched down at the window with his head lowered so that he could see through a small area in the window blinds where one of the blind slats was missing." J.S. yelled at the man, who then fled. J.S. chased the man and observed him run through a yard and then run south. After Newell was dispatched to J.S.' apartment, he and J.S. retraced the man's path of flight. In doing so, J.S. located a cell phone "right where the suspect ran."

Newell observed J.S. locate the cell phone and took custody of it for evidentiary purposes. Newell believed the phone "may contain evidence of the crime of Unlawful Intrusion, whereby the suspect viewed [J.S.' girlfriend] in a state of undress, and may have also captured photographs and or video of [her] in a state of undress." Newell also stated that the cell

phone would contain evidence of the subscriber of the phone's account, who could be the suspect. Newell further confirmed that the window was to the bathroom of J.S.' apartment and that "there was a void in the blinds where a person could see into the bathroom area."

Warrington supplied Newell with a template he used for a cell phone search, and Newell incorporated that language into the affidavit. The affidavit stated that according to Warrington, "it has become commonplace for individuals to communicate with others using cellular telephones or other electronic devices to communicate activities, develop plans, coordinate schedules and to otherwise pass along information in a variety of formats." Warrington had over 400 hours of training regarding forensic searches of electronic devices.

Warrington would testify that there are two general types of data extractions from electronic devices using computer software programs. In a logical extraction, the software "makes read-only requests of specific data to the device" and the device responds by extracting the designated information. The logical extraction is limited in scope and is unable to access photographs or messages stored in third-party applications, to access information stored in a folder different from the default folder, or to access deleted items. In contrast, a physical extraction is comprehensive and "captur[es] a complete picture of the usage and contents of an electronic device." A physical extraction creates a copy of the device's flash memory.

Based on this information, Newell requested a search warrant to examine the cell phone for evidence relating to unlawful intrusion. Newell set forth that

the examination may include searching the phone for the following:

> Data that may identify the owner or user of the above-described cellular phone including the phone number assigned to the phone; Call Histories and logs (missed, incoming and outgoing); Photographs and their associated metadata; Contact lists and address books; Calendar entries; Messages (SMS, MMS, Recorded Messages, iMessages, or Messages communicated through other third-party application(s)) contained in any place throughout the device; Audio and video clips; Global Positioning System data including, but not limited to coordinates, waypoints and tracks, Documents and other text-based files; Internet world wide web (WWW) browser files including, but not limited to, browser history, browser cache, stored cookies, browser favorites, auto-complete form history and stored passwords; Email messages and attachments (whether read or unread) accessible from the cellular phones listed above; Access and search for communication on any third-party applications located on the above-described cellular phones; and, any deleted and/or unallocated content relating to the above-described types of information.

(b) Warrant

A Buffalo County Court judge signed a search warrant the same day. According to the search warrant, the issuing judge was satisfied that probable cause

existed based upon the affidavit "attached hereto and made a part hereof by reference." The warrant allowed for a search of all of the above-quoted categories of cell phone data and any "SD [c]ards" located within the device for "evidence relating to the offenses of Unlawful Intrusion."

(c) Search

Newell returned to the police station and provided Warrington with a copy of the signed warrant. Warrington then extracted data from the phone. After extracting the contents of the phone, he used software to examine the data. The software categorized the data, and one of the categories was "user profiles." Before the end of the day, Warrington provided Newell with the name of the phone's user: Jake J. McGovern.

The software also pulled together anything identified as a possible image and placed it in a gallery. Warrington searched all imagery on the device by clicking on the tab for photographs. None of the images appeared to be taken through a window or a missing blind slat. He did not locate any photographs taken during the September 25, 2018, event.

The following day, Warrington performed an additional extraction of the phone. In the images folder, Warrington found imagery of women in a state of undress. Those images appeared to be "thumbnails" from videos on the device. Warrington selected a tab in the software for videos and tried to match the thumbnails to a video based on file names.

After observing women in a state of undress, Warrington reviewed the phone's "search web history." He explained, based on his training and experience,

that law enforcement will find files or search history associated with a possible crime that the user could be committing. Warrington located several items such as "spy bathroom" and "voyeur bathroom," which were consistent with unlawful intrusion.

Because Warrington observed women in a state of undress, which was consistent with what one could be looking for in the offense of unlawful intrusion, he continued to examine the videos on the phone. Warrington observed imagery of a woman who appeared to be nude and sleeping. One video showed a woman who appeared to be sexually assaulted while unconscious. Some of the videos had "2017" in the title, indicating a possibility that the video was recorded in 2017.

After watching the videos, Warrington was aware that a potential sexual assault was involved. He next tried to identify the victim and to determine whether the event occurred in Kearney. To make the identification, Warrington testified: "I began looking at the complete totality of all of the data associated with the video and image files which consisted of, yes, the date and time stamps. It consisted of the metadata. It consisted of the files themselves." He used that information to determine whether the date and time stamps could be accurate. Warrington then examined communication that may have occurred during the timeframe that the videos and images had been produced and located text messages and communication with a particular woman prior to that incident. Warrington testified that there was a "[p]ossibility" that he could have validated the date stamps prior to playing the videos.

Law enforcement identified the possible victim as K.S., a woman who lived in Grand Island, Hall County, Nebraska. Members of the Kearney Police Department traveled to Grand Island to speak with K.S. In an interview, K.S. said that she had been in a relationship with McGovern from October 2017 to January 2018. It was established that the touching in the videos occurred in Grand Island.

Kearney law enforcement officers provided a Grand Island police sergeant with a "CD" which contained the download of the cell phone recovered in Kearney, along with a copy of the search warrant and affidavit from Buffalo County. The sergeant thereby gained access to the download, which included a video depicting a woman in an unconscious state with her clothes being removed and sexual contact occurring. He began investigating a potential sexual assault, which was believed to have occurred in Grand Island in October 2017. In looking through the contents of the device, the sergeant was not attempting to find any information regarding the September 2018 Kearney incident. Prior to opening the contents of the phone, no one with the Grand Island Police Department received a search warrant other than the search warrant obtained by the Kearney Police Department.

An intelligence research specialist employed by the Grand Island Police Department performed an analysis of the evidence retrieved by the Kearney Police Department. Although the Kearney search warrant, signed September 25, 2018, stated that a search of the device had to occur in the next 30 days, the specialist examined the device's contents on October 29. In examining the cell phone extraction CD, he found an "associated Google Gmail address." The

specialist prepared a search warrant to send to Google LLC, and a Hall County judge issued a warrant. Because the arguments on appeal are not directed to this warrant or the resulting search, we will not further discuss it.

The State subsequently charged McGovern in Hall County with two counts of sexual assault in the first degree, one count of sexual assault in the third degree, and three counts of recording a person in a state of undress. The State identified K.S. as the victim of each count.

3. First Motion to Suppress

McGovern moved to suppress any information gathered from his cell phone. McGovern alleged that Newell's application for a search warrant lacked probable cause to justify a search of the phone's contents other than for subscriber information. He asserted that members of the Grand Island Police Department improperly searched the contents of his phone without first obtaining a warrant to do so.

During a hearing on the motion to suppress, Warrington agreed that the search warrant affidavit included "a much more broad swath of the phone" than just photographs, videos, or user information. He generally agreed that the template listed "all of the different areas of a phone." Having performed the majority of cell phone searches in Kearney, Warrington testified that he uses a template when he prepares an affidavit seeking to search a cell phone and that typically, the only information that changes from case to case are the device information and the particular crime being investigated.

Warrington understood that he was looking for photographs or videos of the event occurring in Kearney on September 25, 2018. But he testified that he was also looking for data on the phone that may be consistent with the crime. Warrington explained that "the same unlawful intrusion could have been committed days before" and that "there could be search histories in regards to . . . how to conduct voyeurism."

Warrington testified that prior to opening a video, he would "look at the totality of all of the data." That included looking at the file name and metadata that may be available. Warrington testified that some files do not have metadata and that "the ultimate last thing to do is to examine the actual video itself and see if it matches anything that you are looking for." According to Warrington, there was "a possibility" that the file names of the relevant videos were time and date stamps. But Warrington explained that file names can easily be renamed, moved, or modified; thus, he "[did not] put a lot of credit necessarily into the exact file name." Warrington stated that he had to be able to look in all of the different locations within a phone, because of how movable the data is. For example, a video may be found in the video section, in the messaging section, or in a third-party application. And he testified that because videos could be edited, he had to watch them in their entirety to determine whether they were of the September 2018 event.

McGovern hired Shawn Kasal, a digital forensic analyst, to review the contents of the cell phone. Kasal was provided with a copy of the search warrant and affidavit and was granted access to the extraction of the phone conducted by Warrington.

Kasal opened the video folder on the software and "put it in table view." He explained that table view provides the most information about the contents and files, such as where a file may have been stored on the phone and its "modified or created time date stamp."

Focusing on videos in the video folder beginning with the titles "20171022," "20171028," and "20171111," Kasal was asked if—after looking at the files' titles, metadata, and thumbnails—he was able to rule them out as being videos of the September 25, 2018, incident. He answered, "By my understanding of the time dates ascribed to the videos in question, they were roughly 340 to 350 days previous to the issuance of the warrant."

Kasal testified that after watching the entirety of the videos, he determined that they did not match the description of the crime scene identified in the warrant. When asked if he was able to make that determination prior to watching the videos, Kasal answered that he "needed to watch the entire video to make sure that it had not been edited, spliced or otherwise modified to include any of that data."

In March 2020, the court considered McGovern's motion to suppress. The court acknowledged McGovern's argument that the warrant was overbroad and lacked particularity. It stated that the application and affidavit sought "to search a laundry list of cell phone functions and data" and that "[n]o particular effort was made by the officer to articulate what items of possible evidentiary value could be found in the call logs, address book, calendar and et cetera."

But the court turned its attention to McGovern's argument that law enforcement should have sought a

second search warrant to recover evidence regarding the crime in Hall County. The court stated that

> based upon the expert testimony presented, the officer in Kearney had every right to initially view all videos contained on the phone to ensure that the file dates and time stamps were accurate, however, once Officer Newell viewed evidence indicating there was evidence of a further crime in Hall County, Nebraska, a second search warrant should have been applied for outlining the types of evidence which would have been relevant for the Hall County case.

The court granted the motion and suppressed the evidence. The State did not appeal the suppression order.[1]

4. March 2020 Search Warrant

Later in March 2020, Warrington filed an affidavit in support of a search warrant. The affidavit discussed the discovery of the cell phone, the September 2018 search warrant, and the extraction and examination of the phone's data. Warrington's affidavit stated that during the 2018 examination, he observed "recent web history consistent with voyeurism and unlawful intrusion" and videos that were consistent with the crime of first degree sexual assault. Warrington stated that "further examination of the cellular phone would be necessary in determining further evidence of the crime of 1st Degree Sexual Assault, identity of the victim or victims, as well as the location and date of

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1 *See* Neb. Rev. Stat. § 29-824 et seq. (Reissue 2016).

the offenses." Thus, he requested issuance of a search warrant for a cell phone belonging to McGovern and authorization for law enforcement to examine the phone for evidence relating to first degree sexual assault.

A Buffalo County Court judge issued a search warrant the same day. An officer extracted data from the cell phone, and Warrington examined the extraction sometime in April 2020. He did not find evidence different from what he discovered following the first extraction.

5. Second Motion to Suppress

McGovern thereafter filed a second motion to suppress. He sought to suppress all evidence from the search of the cell phone. During a hearing on the motion, Warrington testified that he was aware of the suppression order when he applied for the warrant in March 2020. In seeking the warrant, Warrington asked for legal authority to re-examine the device for additional evidence. He essentially wanted to look at the exact same data that he had looked at in 2018.

The district court overruled the motion to suppress. The court found that the initial review of all of the videos on McGovern's phone pursuant to the first search warrant was a lawful search and that "the videos were first seen in 'plain view.'" The court reasoned that "[b]ecause the lawful viewing showed evidence of another possible crime, law enforcement's second search under the second search warrant is not unlawful exploitation of a prior illegality. . . . "

6. Bench Trial

Prior to the start of trial, the State filed an amended information charging McGovern with sexual assault in the first degree, sexual assault in the third degree, and recording a person in a state of undress. Pursuant to McGovern's waiver of a jury trial, the court conducted a bench trial on the amended information.

At trial, McGovern renewed both of his motions to suppress. He objected to any evidence concerning the contents of the cell phone. He asserted that the September 2018 search warrant (1) was overbroad and lacked sufficient particularity, (2) lacked sufficient probable cause to search the device for photographs or videos, and (3) was exceeded in scope by law enforcement. As to the March 2020 search warrant, McGovern objected that it (1) was granted upon an affidavit that contained information gathered as a product of a prior unconstitutional search, (2) was used by law enforcement to reobtain information and evidence that had been previously discovered pursuant to an unconstitutional search and that had been suppressed by the court, and (3) was not the product of an independent source, inevitable discovery, attenuation, or other justification that would make the evidence properly admissible.

The court overruled the objections but granted a continuing objection to preserve the concerns raised in the motions to suppress. The court stated that the central issue was whether the State could "cure the defects identified in the first search warrant by issuing a second search warrant or requesting getting a second search warrant" and that it would stand on its ruling that the State had the ability to cure.

The trial proceeded on exhibits received by the court. According to investigative reports, K.S. confirmed that she was the woman in videos found on McGovern's phone and that the videos were taken in Grand Island. She denied giving McGovern permission to take such intimate images of her. At least one video showed digital penetration while K.S. was in a state of unconsciousness. The court convicted McGovern of each count alleged in the amended information.

7. Sentencing

For the convictions for sexual assault in the third degree and for recording a person in a state of undress, the court imposed sentences of 1 year's imprisonment, to be served concurrently. As to the sexual assault in the first degree conviction, the court found that McGovern was a fit and proper candidate for probation and imposed a term of 60 months of Community-Based Intervention probation. It found that periodic confinement in the county jail as a condition of probation was necessary, "because a sentence of probation without a period of confinement would depreciate the seriousness of the offender's crime or promote disrespect for the law." Thus, the court ordered jail time of 90 days to be served consecutively to any other sentence imposed.

The State appealed, and McGovern filed a cross-appeal.

III. Assignments of Error

The State's appeal focuses only on sentencing. Because McGovern's cross-appeal addresses admissibility of cell phone evidence, we begin there.

First, McGovern assigns that the initial search warrant affidavit lacked the requisite showing of probable cause and that the warrant was not sufficiently particular.

Second, McGovern assigns that the court erred in overruling his second motion to suppress. This broad assignment has three prongs. First, he attacks the use of information gathered by means of the first warrant to support the second one. Next, he disputes the court's application of the "plain view" doctrine. Finally, he urges that no exclusionary rule exception—such as independent source, inevitable discovery, or attenuation—applies.

The State's appeal assigns that the court abused its discretion by imposing excessively lenient sentences. It focuses on the sentence to probation for first degree sexual assault.

IV. Standard of Review

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[2]

[2,3] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence

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[2] *State v. Short*, 310 Neb. 81, 964 N.W.2d 272 (2021), *cert. denied* ___ U.S. ___, 142 S. Ct. 1155, 212 L.Ed.2d 34 (2022).

imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.[3] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[4]

V. Analysis

1. Suppression

McGovern's assignments of error largely invoke well known Fourth Amendment principles. The State's response articulates two alternate theories of admissibility. In one, the State assumes that the first warrant was invalid but argues that the good faith exception applied. The other—which is more complex—begins with the proposition that the first warrant was at least partially valid and that portions of the challenged evidence were properly viewed. The State then argues that the properly viewed evidence supported issuance of the second warrant, which, the State asserts, was an independent source for the rest of the challenged evidence.

We will address the parties' specific arguments invoking familiar principles. But before doing so, we note the special challenges presented by searches of cell phones.

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[3] *State v. Gibson*, 302 Neb. 833, 925 N.W.2d 678 (2019).

[4] *Id.*

(a) Cell Phone Searches

Cell phones are "minicomputers" with "immense storage capacity."[5] They "collect[] in one place many distinct types of information . . . that reveal much more in combination than any isolated record."[6] Further, "[a]lthough the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different."[7]

Two approaches with respect to digital evidence searches have emerged.[8] One is to view a digital device, such as a cell phone, as a filing cabinet or form of a container and the data thereon as forms of documents.[9] The other calls for "a 'special approach,' requiring unique procedures and detailed justifications, including rejecting the container analogy."[10]

Under the filing cabinet or container approach, courts "look to traditional means to limit the scope of document searches, such as the nature of the criminal activity alleged or the nature of the objects sought."[11] But "a consequence of this view is the potential

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[5] *Riley v. California*, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L.Ed.2d 430 (2014).

[6] *Id.*, 573 U.S. at 394.

[7] *Id.*, 573 U.S. at 395.

[8] Thomas K. Clancy, The Fourth Amendment, Its History and Interpretation § 12.4.8 (3d ed. 2017).

[9] *See id.*

[10] *Id.* at 821.

[11] *Id.* at 818-19.

exposure of vast amounts of data for at least cursory examination if the object of the search could be in a digital format."[12]

A method of the special approach would be "use of the particularity requirement to mandate preauthorization: a search warrant seeking to seize [digital devices] must specify that it covers such items."[13] The search may need to be limited by taking actions such as "'observing file types and titles listed on the directory, doing a key word search for relevant terms, or reading portions of each file stored in the memory.'"[14]

[4,5] This court has not explicitly adopted either approach. We have declared that a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search.[15] What will constitute sufficient particularized information to support probable cause that a cell phone or cell phone information searched will contain evidence of a crime depends upon the nature and circumstances of the crime and what is sought in the warrant.[16]

It can be generally recognized that cell phones tend to accompany their users everywhere, and thus,

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[12] *Id.* at 820-21.

[13] *Id.* at 821.

[14] *Id.* at 822.

[15] *State v. Short, supra* note 2.

[16] *Id.*

it may be inferred that a suspect's cell phone probably accompanied the suspect at the time of the crime.[17] But we have cautioned that law enforcement cannot rely solely on the general ubiquitous presence of cell phones in daily life, or an inference that friends or associates most often communicate by cell phone, as a substitute for particularized information to support probable cause that a specific device contains evidence of a crime.[18]

(b) First Search Warrant

McGovern raises two main issues with respect to the initial search warrant. He claims that the warrant was not supported by probable cause and that it lacked sufficient specificity.

The text of the Fourth Amendment contains three requirements pertaining to the content of a warrant, but only two are contested here. It states that "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."[19] The requirements of probable cause and particularity—the two at issue—are analytically distinct, but closely related.[20]

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[17] *Id.*

[18] *See id.*

[19] U.S. Const. amend. IV. Accord Neb. Const. art. I, § 7.

[20] *See State v. Said*, 306 Neb. 314, 945 N.W.2d 152 (2020).

(i) Probable Cause

[6,7] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause.[21] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test.[22] The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.[23]

[8,9] Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found in the item to be searched.[24] In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.[25]

Regarding probable cause, McGovern makes a concession. He concedes that it existed to search the cell phone in order to determine its owner or user. Newell stated in the affidavit that the cell phone

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[21] *State v. Hidalgo*, 296 Neb. 912, 896 N.W.2d 148 (2017).

[22] *State v. Said, supra* note 20.

[23] *Id.*

[24] *State v. Short, supra* note 2.

[25] *State v. Said, supra* note 20.

would "contain evidence of the subscriber of the cellular telephone account, who could be the suspect in the crime."

McGovern contends, however, that the warrant was unsupported by probable cause to search the phone for photographs and videos. We disagree.

[10] A warrant affidavit must always set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of probable cause.[26] Here, the affidavit set forth that J.S. observed a man looking into the ground-level window to the bathroom of J.S.' apartment, where J.S.' girlfriend was preparing to shower. J.S. yelled; the man fled. Upon retracing the man's path of flight, J.S. found a cell phone "right where the suspect ran." Newell stated in the affidavit that he believed the cell phone "may contain evidence of the crime of Unlawful Intrusion, whereby the suspect viewed [J.S.' girlfriend] in a state of undress, and may have also captured photographs and or video of [her] in a state of undress."

[11] The nexus between the alleged crimes and the article to be searched does not need to be based on direct observation; it can be found in the type of crime, the nature of the evidence sought, and the normal inferences as to where such evidence may be found.[27] It is true that J.S. did not report seeing the suspect holding a phone as the suspect was "crouched down at

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[26] *State v. Short, supra* note 2.

[27] *Id.*

the window with his head lowered," likely viewing J.S.' girlfriend in a state of undress.

[12] Probable cause may be based on commonsense conclusions about human behavior, and due weight should be given to inferences by law enforcement officers based on their experience and specialized training.[28] One reasonable inference is that a person seeking to surreptitiously view another in a state of undress may capture that viewing by video or photograph. Discovery of the cell phone on the suspect's path of flight gives rise to an inference that the phone was not secured on the suspect's person—that the suspect "had it out," in Newell's words—and that perhaps it was used as the suspect peered into the bathroom.

[13] "Probable cause 'is not a high bar.'"[29] A judge's determination of probable cause to issue a search warrant should be paid great deference by reviewing courts.[30] Under the totality of the circumstances, we conclude the issuing judge had a substantial basis for finding the affidavit established probable cause to search the phone for photographs or videos of the September 25, 2018, incident.

(ii) Particularity and Breadth

[14,15] To satisfy the particularity requirement of the Fourth Amendment, a warrant must be sufficiently definite to enable the searching officer to

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[28] *Id.*

[29] *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577, 586, 199 L.Ed.2d 453 (2018).

[30] *State v. Short, supra* note 2.

identify the property authorized to be seized.[31] The degree of specificity required in a warrant depends on the circumstances of the case and on the type of items involved.[32]

McGovern challenges the first warrant's particularity and breadth. He quotes Ninth Circuit cases explaining that "'[p]articularity is the requirement that the warrant must clearly state what is sought'" while "'[b]readth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based.'"[33]

McGovern first points out that the warrant authorized a search of every category of information that could be stored on a cell phone. But this circumstance does not necessarily lead to the conclusion that McGovern seeks.

[16] We have rejected arguments that an expansive list of areas to be searched encompassing practically the entirety of the data contained within a cell phone were insufficiently particular.[34] In doing so, we have recognized that officers cannot predict where evidence of a crime will be located in a cell phone or call records or in what format, such as texts, videos,

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[31] *Id.*

[32] *Id.*

[33] Brief for appellee on cross-appeal at 32, quoting *U.S. v. Hill*, 459 F.3d 966 (9th Cir. 2006), and *U.S. v. Towne*, 997 F.2d 537 (9th Cir. 1993).

[34] *See*, *State v. Short, supra* note 2; *State v. Goynes*, 303 Neb. 129, 927 N.W.2d 346 (2019).

photographs, emails, or applications.[35] And we have stated that there is no way for law enforcement to know where in the digital information associated with cell phones it will find evidence of the specified crime.[36] Consequently, we recently stated that "a brief examination of all electronic data associated with a cell phone is usually necessary in order to find where the information to be seized is located, and such examination is reasonable under the Fourth Amendment."[37] Thus, McGovern's first argument regarding particularity lacks merit.

McGovern also challenges the warrant's lack of any temporal limitation on the scope of the search. The face of the warrant did not limit the search to any timeframe, even though the warrant was sought in response to an incident occurring on a known date and approximate time.

[17] But the warrant referred to an attached affidavit, and the supporting affidavit recounted that the incident occurred "on the morning of September 25, 2018 shortly prior to 0604 hours." An inadvertent defect in a search warrant may be cured by reference to the affidavit used to obtain the warrant if the affidavit is incorporated in the warrant or referred to in the warrant and the affidavit accompanies the warrant.[38] The affidavit and the warrant, read

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[35] *State v. Short, supra* note 2.

[36] *See id.*

[37] *Id.* at 139, 964 N.W.2d at 316.

[38] *State v. Stelly*, 304 Neb. 33, 932 N.W.2d 857 (2019).

together, limited the scope of the search to a particular date.

[18] The most important constraint in preventing unconstitutional exploratory rummaging is that the warrant limit the search to evidence of a specific crime, ordinarily within a specific time period, rather than allowing a fishing expedition for all criminal activity.[39] Here, the warrant named a specific crime, the incorporated affidavit identified a time period, and both documents listed specific areas of the phone to be searched.

The nature of the crime—unlawful intrusion—limited the scope of the search; law enforcement officers knew they were to search for evidence regarding the device's owner or user along with such things as photographs and videos. The warrant also listed specific areas to be searched within the cell phone, which were consistent with those described in the affidavit. We reject McGovern's argument that the first search warrant did not satisfy the particularity requirements of the Fourth Amendment.

(iii) Good Faith

The State argues that even if the first warrant was invalid, a good faith exception applies. We first recall the rationale for the exclusionary rule and then turn to the application of good faith exception here.

a. Exclusionary Rule

[19] The Fourth Amendment does not expressly preclude the use of evidence obtained in violation of

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[39] *State v. Short, supra* note 2.

its commands.[40] Rather, the exclusionary rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.[41] The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.[42] To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter such conduct and sufficiently culpable that such deterrence is worth the price paid by the justice system, as exclusion serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.[43]

The exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree.[44] In situations where the exclusion as a remedy would not deter law enforcement, several exceptions to the exclusionary rule have been recognized.[45] One is the exception for good faith upon which the State relies.

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[40] *State v. Kruse*, 303 Neb. 799, 931 N.W.2d 148 (2019).

[41] *Id.*

[42] *See Id.*

[43] *State v. Short, supra* note 2.

[44] *Utah v. Strieff*, 579 U.S. 232, 136 S. Ct. 2056, 195 L.Ed.2d 400 (2016).

[45] *State v. Jennings*, 305 Neb. 809, 942 N.W.2d 753 (2020), *cert. denied* ___ U.S. ___, 141 S. Ct. 432, 208 L.Ed.2d 128.

b. Good Faith Exception Applied

[20,21] When a search warrant has been issued, the applicability of the good faith exception turns on whether the officers acted in objectively reasonable good faith in reliance on the warrant.[46] In assessing the good faith of an officer's conducting a search under a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.[47]

[22] Under the good faith exception to the exclusionary rule, evidence may be suppressed if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard for the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.[48]

McGovern does not assert that the issuing judge was misled by information in the affidavit. The first ground for suppression does not apply.

Although McGovern argues that the issuing judge wholly abandoned his judicial role, we disagree. As we have already concluded, the affidavit provided

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[46] *State v. Kruse, supra* note 40.

[47] *Id.*

[48] *Id.*

probable cause to search the phone for photographs and videos relevant to the initial event. The second circumstance likewise does not apply.

The probable cause presented by the affidavit also defeats the third ground for suppression. This is particularly true in light of McGovern's concession.

McGovern argues that the fourth ground—facial deficiency precluding an executing officer from reasonably presuming the warrant's validity—applied "because law enforcement's over-reliance on templates had caused the situation to exist"[49] and "[l]aw enforcement could not reasonably presume the matching untailored template warrant, clearly overbroad in scope, was valid."[50] The State concedes that the "warrant could have been drafted better" but argues that the warrant "identified the offense being investigated, delineated the areas of the cell phone to be searched, and did not contain . . . catch-all language."[51] We are not persuaded that the fourth ground for suppression applies here.

(c) Second Motion to Suppress

McGovern argues that the court erred in overruling his second motion to suppress for three reasons. His first reason requires little discussion. We discuss each in turn.

Before doing so, we recall specific factual findings of the district court. The court found that the Kearney

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[49] Brief for appellee on cross-appeal at 40.

[50] *Id.* at 41.

[51] Brief for appellant on cross-appeal at 19.

Police Department received a search warrant to search the cell phone for evidence regarding unlawful intrusion and that during the course of the search, law enforcement officers discovered video evidence they believed tied McGovern to crimes in Hall County. Having reviewed these findings of fact for clear error, we find none. With these facts in mind, we turn to whether they trigger or violate Fourth Amendment protections.

(i) Probable Cause and Particularity of First Warrant

First, McGovern repeats his argument that the first search warrant was unsupported by probable cause and lacked particularly. Based on that argument, McGovern contends that all evidence flowing from the search should be excluded. Because we have already rejected McGovern's probable cause and particularity challenges to the first warrant, this argument fails.

(ii) Probable Cause for Second Warrant

Second, McGovern argues that the probable cause forming the basis of the second warrant was gathered at a time law enforcement was outside the scope of the initial warrant and was not in plain view. The State makes a conclusory statement that the videos were in plain view; however, its principal argument is that the videos were within the scope of the warrant.

a. Plain View

The district court found that the initial review of all of the videos on the phone was a lawful search under the initial search warrant and that the videos were first seen in plain view. The court reasoned that

because the lawful viewing showed evidence of another possible crime, the later search under the second search warrant was not an unlawful exploitation of a prior illegality. This presents a question of law, which we review independently of the trial court's determination.[52]

[23] It is well established that under certain circumstances, law enforcement may seize evidence in plain view without a warrant.[53] Under the plain view doctrine, if police officers are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.[54] When those circumstances are met, "'[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.'"[55] But "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."[56]

Here, the search warrant authorized law enforcement to search photographs and videos. Warrington

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[52] *See State v. Short, supra* note 2.

[53] *State v. Andera*, 307 Neb. 686, 950 N.W.2d 102 (2020).

[54] *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L.Ed.2d 334 (1993). Accord *State v. Andera, supra* note 53.

[55] *Texas v. Brown*, 460 U.S. 730, 738, 103 S. Ct. 1535, 75 L.Ed.2d 502 (1983).

[56] *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971).

testified—and McGovern's expert agreed—that it was necessary to watch the entirety of the videos to determine whether they matched the description of the September 2018 event. Warrington was lawfully in a position to view photographs and videos when he did so. Warrington testified that as he looked through the thumbnails in the video folder, he did not immediately notice a nonconsensual encounter. However, when he watched the actual video, it was immediately apparent to him that the woman was not conscious. Further, Warrington had probable cause to look through the images and videos for unlawful intrusion; thus, he had a lawful right of access to watch the videos in order to perceive whether they were relevant.

Whether the plain view doctrine should apply to digital information stored on a cell phone is a difficult question. In an electronic search of a cell phone, an unprecedented amount of personal information may come within the plain view of an investigator.[57] Such searches, like computer file searches, "present 'a heightened degree' of intermingling of relevant and irrelevant material."[58]

A consequence of analogizing cell phones to filing cabinets or to containers is that "in any legitimate search that permits looking at digital data, potentially all data can be examined to ascertain what it is."[59] Recently, the Oregon Court of Appeals determined that the breadth of a cell phone search made the plain

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[57] *See State v. Bock*, 310 Or. App. 329, 485 P.3d 931 (2021).

[58] Clancy, *supra* note 8 at 818.

[59] *Id.* at 37.

view doctrine inapplicable where state agents, searching for location data, examined each photograph on a cell phone.[60] A different approach, a commentator suggested, would be to impose a use restriction on nonresponsive data obtained pursuant to a warrant, *i.e.*, government agents would be limited in what could be used based on what was actually described by the warrant.[61]

b. Reasonableness

[24] But under the circumstances present here, we need not define the precise contours of the plain view doctrine with respect to electronic data on a cell phone. The ultimate touchstone of the Fourth Amendment is reasonableness.[62]

Here, the initial search warrant authorized an examination of the phone for evidence relating to offenses of unlawful intrusion. Unlawful intrusion includes intruding upon another in a place of solitude or seclusion; it also encompasses photographing or filming the intimate area of another without his or her knowledge and consent.[63]

Given the offense identified, it was reasonable to search files containing images and to view videos to

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60 *See State v. Bock, supra* note 57.

61 See Orin S. Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 Tex. Tech L. Rev. 1 (2015).

62 *See Riley v. California, supra* note 5.

63 *See* Neb. Rev. Stat. § 28-311.08 (Reissue 2016 & Cum. Supp. 2020).

determine whether they were responsive to the warrant. In doing so, law enforcement observed images showing a woman in a state of undress. Such images could be consistent with the crime and fall within the scope set forth on the face of the initial warrant. Further, the viewing of videos was a reasonable search within the scope of the warrant's authorization because discovery of the sexual assault—which was intertwined with filming the intimate area of another—occurred while the officer was searching for evidence of unlawful intrusion.

The evidence viewed was consistent with the crime identified in the search warrant. Here, the evidence uncovered fell within the scope of the search authorized by the warrant.

(iii) Independent Source

Finally, McGovern asserts that the independent source doctrine did not support the second warrant. The State argues otherwise.

[25] Under the independent source doctrine, the challenged evidence is admissible if it came from a lawful source independent of the illegal conduct.[64] The U.S. Supreme Court explained the doctrine's rationale:

> "'[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse,* position that they would have been in if no police

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64 *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015).

> error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.'"[65]

To establish that the independent source doctrine applies to evidence seized pursuant to a warrant obtained after an unlawful entry to a home, the government must show both (1) that the decision to seek the warrant was independent of the unlawful entry—*i.e.*, that police would have sought the warrant even if the initial entry had not occurred—and (2) that the information obtained through the unlawful entry did not affect the magistrate's decision to issue the warrant.[66]

But the doctrine presupposes illegal police conduct.[67] And here, the State argues that "all of that evidence was properly viewed and thereafter seized; the videos pursuant to the plain view doctrine, and the incriminating search history pursuant to the first search warrant."[68] Above, we concluded that the viewing of the videos and photographs was reasonable and the evidence was within the scope of the first warrant. Thus, no illegal police conduct occurred and we need not rely upon the independent source doctrine.

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65 *Murray v. United States*, 487 U.S. 533, 537, 108 S. Ct. 2529, 101 L.Ed.2d 472 (1988), quoting *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L.Ed.2d 377 (1984).

66 *U.S. v. Khabeer*, 410 F.3d 477 (8th Cir. 2005).

67 *See Murray v. United States, supra* note 65.

68 Brief for appellant on cross-appeal at 21.

Because the evidence of the sexual assault was properly viewed and provided support for the March 2020 search warrant, the court did not err in overruling McGovern's second motion to suppress evidence derived from the searches of his phone. We find no merit to McGovern's cross-appeal.

2. Sentencing

Turning to the State's appeal, it argues that the district court imposed an excessively lenient sentence. The court convicted McGovern of three crimes and imposed sentences within statutory limits. For the Class I misdemeanor[69]—punishable by a maximum of 1 year's imprisonment, $1,000 fine, or both[70]—the court imposed a sentence of 1 year's imprisonment. For the Class IV felony[71]—punishable by a maximum of 2 years' imprisonment and 12 months' post-release supervision, $10,000, or both[72]—the court imposed a sentence of 1 year's imprisonment. It ordered the sentences for those two offenses to run concurrently. Then, for the Class II felony[73]—punishable by 1 to 50 years' imprisonment,[74] but with no mandatory minimum—the court imposed a sentence of probation. It is

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69 *See* Neb. Rev. Stat. § 28-320(3) (Reissue 2016).

70 *See* Neb. Rev. Stat. § 28-106(1) (Reissue 2016).

71 *See* § 28-311.08(2).

72 *See* Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2020).

73 *See* Neb. Rev. Stat. § 28-319(2) (Reissue 2016).

74 *See* § 28-105(1).

this sentence of probation that is the focus of the State's challenge.

Before turning to sentencing factors, we address two arguments made by the State. One concerns what the State views as an incongruity in the felony sentences imposed. The other is whether the sentences here must be viewed individually or may be viewed collectively.

(a) Alleged Incongruity

The State highlights that for the court to have imposed imprisonment for the Class IV felony conviction, it had to have concluded that there were "substantial and compelling reasons"[75] to not impose probation. According to the State, it follows that those same reasons would also exist for the Class II felony.

A statute mandates that a sentence of probation be imposed for a Class IV felony unless a delineated exception applies.[76] The exceptions are: (a) the defendant is sentenced to imprisonment for any felony other than another Class IV felony, (b) the defendant has been deemed a habitual criminal, or (c) there are substantial and compelling reasons why the defendant cannot be effectively and safely supervised in the community.[77] The last exception is the only one having potential application here.

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[75] Neb. Rev. Stat. § 29-2204.02(2)(c) (Reissue 2016).

[76] *See id.*

[77] *See id.*

Section 29-2204.02 was a new statute created by 2015 Neb. Laws, L.B. 605.[78] That comprehensive bill was "designed to slow Nebraska's prison population growth, ease prison overcrowding, contain corrections spending, and reinvest a portion of savings in strategies that can reduce recidivism and increase public safety."[79] The policies in the bill addressed three major challenges, one being that "overcrowded prisons house a large number of people convicted of nonviolent, low-level offenses."[80] To address such a challenge, the legislation employed a strategy to use probation for people convicted of low-level offenses.[81] Thus, § 29-2204.02 encompasses a policy decision by the Legislature favoring probationary sentences for Class IV felonies.

We have stated that "§ 29-2204.02(2) effectively adds a general limitation on a court's discretion in choosing between probation and incarceration with respect to a Class IV felony, because it requires a court to impose a sentence of probation for a Class IV felony unless certain specified exceptions are present."[82] In light of the legislative intent behind § 29-2204.02, we cannot say that findings required under this statute apply to sentencing decisions pertaining to higher-level offenses. As recognized in a concurrence, "[T]he determination with regard to a Class IV felony

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78 *See State v. Benavides*, 294 Neb. 902, 884 N.W.2d 923 (2016).

79 Introducer's Statement of Intent, L.B. 605, Judiciary Committee, 104th Leg., 1st Sess. (Feb. 20, 2015).

80 *Id.*

81 *Id.*

82 *State v. Baxter*, 295 Neb. 496, 504, 888 N.W.2d 726, 733 (2017).

under § 29-2204.02(2)(c) is different from the determination with respect to any other class of offense under § 29-2260."[83]

(b) Individual Sentence Versus Aggregate of Sentences

The State also questions whether it is permissible to look at sentences collectively in determining whether the sentencing court abused its discretion. The State points out that in the context of the Eighth Amendment, we have determined the proportionality analysis focuses on individual sentences rather than the aggregate of sentences ordered to be served consecutively to one another.[84]

But this appeal does not involve an Eighth Amendment claim. And, similar to another recent appeal, the State has not pointed to authority requiring "any legal inquiry pertinent to review of a defendant's sentence, which analyzes proportionality vis-a-vis different sentences for different crimes imposed for the same defendant and arising from the same series of events."[85]

When a judge is imposing sentences for several convictions at the same time, we see no reason why a sentencing judge should be prohibited from considering the cumulative effect of the sentences. "[F]or a defendant who has been sentenced consecutively for two or more crimes, we generally consider the aggregate

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[83] *State v. Dyer*, 298 Neb. 82, 95, 902 N.W.2d 687, 696 (2017) (Miller-Lerman, J., concurring).

[84] *See State v. Becker*, 304 Neb. 693, 936 N.W.2d 505 (2019).

[85] *State v. Morton*, 310 Neb. 355, 369-70, 966 N.W.2d 57, 68 (2021).

sentence to determine if it is excessive."[86] We see no reason why the same rule should not apply when considering whether a sentence is excessively lenient. A trial judge is invested with a wide discretion as to the sources and types of information used to assist with the determination of a sentence to be imposed within statutory limits.[87] The collective effect of multiple sentences may be a source of information. If each sentence imposed is within the statutory limit, a sentencing judge need not view those sentences in isolation in determining whether the overall sentence it crafts achieves the sentencing goals of rehabilitating the defendant, deterring others from criminal acts, and providing protection for society. We now consider the statutory sentencing factors and their application to the facts of this case.

(c) Statutory Factors

[26] In reviewing whether a sentencing court abused its discretion in imposing a sentence that was excessively lenient, an appellate court is guided by the factors set forth by Neb. Rev. Stat. § 29-2322 (Reissue 2016), as well as by the statutory guidelines set out for the direction of the sentencing judge in imposing or withholding imprisonment.[88] In determining whether the sentence imposed is excessively lenient, an appellate court shall have regard for the following:

(1) The nature and circumstances of the offense;

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[86] *Id.* at 370, 966 N.W.2d at 68.

[87] *See State v. Janis*, 207 Neb. 491, 299 N.W.2d 447 (1980).

[88] *State v. Gibson, supra* note 3.

(2) The history and characteristics of the defendant;

(3) The need for the sentence imposed:

(a) To afford adequate deterrence to criminal conduct;

(b) To protect the public from further crimes of the defendant;

(c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and

(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and

(4) Any other matters appearing in the record which the appellate court deems pertinent.[89]

A different statute authorizes a court to impose a period of probation in lieu of incarceration. Neb. Rev. Stat. § 29-2260 (Reissue 2016) provides in part:

(2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment

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[89] § 29-2322.

of the offender is necessary for protection of the public because:

(a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;

(b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or

(c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.

(3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:

(a) The crime neither caused nor threatened serious harm;

(b) The offender did not contemplate that his or her crime would cause or threaten serious harm;

(c) The offender acted under strong provocation;

(d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;

(e) The victim of the crime induced or facilitated commission of the crime;

(f) The offender has compensated or will compensate the victim of his or her crime

for the damage or injury the victim sustained;

(g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

(4) When an offender who has been convicted of a crime is not sentenced to imprisonment, the court may sentence him or her to probation.

(d) Application

McGovern committed the serious crime of sexual assault in the first degree. The offense involved sexual contact—preserved on video—at a time when K.S. was incapable of giving consent. At sentencing, McGovern's counsel highlighted that "this is essentially a touching kind of offense . . . we're not talking about intercourse." But that does not diminish McGovern's violation of trust. According to K.S.' statement, McGovern sexually assaulted her on video on the day she was first

introduced to him. They later had a dating relationship for a period of time, and she did not learn of the assaults until after she had ended the relationship. K.S. stated that she has to "live with the embarrassment of the knowledge that at a minimum, numerous law enforcement and criminal justice officials from multiple jurisdictions have seen the videos of [her] sexual assaults, have seen [her] in states of undress."

[27] Evidence regarding a defendant's life, character, and previous conduct, as well as prior convictions, is highly relevant to the determination of a proper sentence.[90] According to the presentence report, McGovern was 39 years old. His prior criminal history included three convictions for driving under the influence between 2001 and 2007 and a conviction for attempted unlawful intrusion based on the September 2018 event that led to discovery of the instant offenses. At the time of sentencing, McGovern was facing charges in Montana for alleged conduct similar to that in the instant case. A testing tool assessed him to be at a "[m]edium-[h]igh" risk to reoffend. He scored in the "maximum risk range on the SAQ alcohol scale." According to the presentence report, McGovern was "highly motivated and engaged in counseling." The report also stated that he "seems to show some remorse for the victim."

[28] A sentencing court must have some reasonable factual basis for imposing a particular sentence.[91] The court expressed difficulty in balancing the need

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90 *State v. Gibson, supra* note 3.

91 *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012).

for rehabilitation against the need for punishment. The court explained:

> On the one hand, there's an absolute violation of trust, and in reviewing the evidence in this case which I had to do on several occasions, you were taking advantage of someone who was absolutely out of it and it appears to be a part of a pattern of conduct not entirely dissimilar from the incident in Kearney, Nebraska, which led to your convictions here ultimately.
>
> On the other hand, I am required by law to consider rehabilitation. I am required to consider the fact that you have done a good job apparently while on probation.

In imposing the three sentences, the court stated they were an "attempt to reach a balance in this case" and that they were "necessary not to depreciate the serious nature of your criminal conduct in your eyes or the eyes of the public." The court then imposed concurrent sentences of 1 year's imprisonment for two offenses and for the other offense, a period of Community-Based Intervention probation for 60 months.

In connection with the sentence of probation, the court levied numerous terms. Obviously, McGovern cannot violate any laws while on probation. He must also refrain from disorderly conduct or acts injurious to others. He cannot associate with persons of "disreputable or harmful character" or persons he knows are involved in illegal activities. He must be gainfully employed or actively seeking employment. The terms of probation affect McGovern's liberty. He

must allow the probation officer to visit at all reasonable times and places. He cannot leave the state without written authorization of the court or the probation officer. McGovern cannot possess a firearm or dangerous weapon. He must submit to a chemical test of his blood, breath, or urine upon request of the probation officer. The court further determined that a period of confinement was necessary and ordered McGovern to serve 90 days in jail, which sentence was to be served consecutively to any other sentence imposed.

As McGovern notes, the court could have placed him on probation for all three convictions. Had it done so, the court would have been limited to a maximum period of incarceration of 90 days as a condition of probation.[92] Instead, the court imposed a sentence of 1 year's imprisonment for the lesser offenses—the maximum sentence for the misdemeanor conviction—and a 90-day period of confinement as a condition of probation in addition to placing McGovern on probation for the maximum period of time allowed.[93] The court attempted to balance the needs for punishment and rehabilitation.

Our review for an abuse of discretion is key. The standard is not what sentence we would have imposed.[94] And as we recognized 20 years ago, "'it is a rare exception'" that a sentence within statutory

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[92] Neb. Rev. Stat. § 29-2262(2)(b) (Cum. Supp. 2020).

[93] *See* Neb. Rev. Stat. § 29-2263(1) (Reissue 2016).

[94] *State v. Gibson, supra* note 3.

limits will be deemed excessive.[95] Because the same standard applies to determining whether a sentence is excessively lenient, the same observation applies here. These sentences do not fall within that category. We cannot say the sentences imposed, particularly when viewed collectively, amounted to an abuse of discretion.

IV. Conclusion

Because law enforcement reasonably observed the evidence of sexual assault during execution of the initial search warrant, the court did not err in overruling McGovern's second motion to suppress evidence derived from the searches of his phone. We further conclude that the sentences imposed, all within the statutory limits, were not excessively lenient. We emphasize that the sentences must be viewed collectively and that we are not permitted to substitute the sentences we might have imposed as a sentencing court. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

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[95] *State v. Decker*, 261 Neb. 382, 398, 622 N.W.2d 903, 917 (2001).

MILLER-LERMAN, J., CONCURRING

I concur. In this case, the opinion evidence from both experts taken as a whole essentially states that, given the technology, it is not possible to review the contents of the cell phone to merely determine the existence of a photograph or video on September 25, 2018, without also looking to some extent at the image. This may seem surprising. Nevertheless, the district court accepted the opinions. These opinions circumscribed the district court's analysis and that of this court upon review. *See Tipp-It, Inc. v. Conboy*, 257 Neb. 219, 234, 596 N.W.2d 304, 315 (1999) (Gerrard, J., concurring) (when appellate court review is guided by expert testimony, review is confined to record before it and "[i]t is not the proper role of an appellate court to become a 'super expert,' randomly imposing its opinion over those opinions properly admitted in evidence"). Given the limitation imposed by the evidence, I cannot disagree with the court's analysis. That leaves for another day a serious Fourth Amendment examination of the hazards of rummaging through digital devices, the making and retention of full forensic copies (or mirrors), the use of data nonresponsive to the warrant, and the constitutional limitations on second warrants as a cure.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS (MARCH 9, 2020)

IN THE DISTRICT COURT OF
HALL COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

v.

JAKE J. McGOVERN,

Defendant.

Case No. CR 19-252

Before: Mark J. YOUNG, District Judge.

A hearing was held on the Plaintiff's Motion to Quash the Defendant's Motion to Suppress and the Defendant's Motion to Suppress on November 25, 2019. The State was represented by Ms. Hinrichs and the Defendant was present with his attorney Mr. Hendricks. By agreement of the parties, a lengthy delay in submission of briefs was granted by the Court. They sought and received an extension of the briefing deadline. As of March 9, 2020, no brief has been received from the State. Given the State's failure to submit a brief, the Court will consider the matter submitted. Based upon the evidence presented, and the relevant law, the Court FINDS that:

1. The State's Motion to Quash should be and hereby is overruled;
2. The Motion to Suppress should be and hereby is granted for the following reasons:

I. Findings of Fact

On September 25, 2018, a person, later identified as the Defendant, was lurking outside of an apartment located in Kearney, Buffalo County, Nebraska. The Defendant was looking into the bathroom of an apartment through a ground floor window when one of the residents of the apartment was in the bathroom preparing to shower.

The other resident of the apartment was outside and saw the Defendant. The Defendant fled and the resident gave chase and apparently called the police. The Kearney Police Department responded. Officer Newell and the resident retraced the chase route and a cell phone was found by the resident and turned over to Newell. Newell applied to a judge of the Buffalo County Court for a search warrant to search the phone to look for evidence of the crime of Unlawful Intrusion.

The search warrant was signed by the judge on September 25, 2018. The affidavit in support of the issuance of the search warrant (Exhibit 4) outlined the facts set forth above and contained numerous paragraphs of general statements that can fairly be described as "boiler plate." The Buffalo County search warrant authorized a search of all categories of information that can normally found contained in a cell phone.

In Buffalo County the Defendant was charged with violating Neb. Rev. Stat. § 28-311.08 (Unlawful

Intrusion) a Class I misdemeanor. Defendant filed a Motion to Suppress alleging the warrant was overbroad on May 29, 2019. On August 29, 2019, his Motion to Suppress was overruled by the Buffalo County Court. On November 7, 2019, the Defendant pled guilty to an amended charge of Attempted Unlawful Intrusion, a Class II misdemeanor. No appeal was taken from the Buffalo County case.

During the search of the Defendant's phone in Kearney the Kearney Police Department found evidence they believe showed criminal activity occurring in Hall County, Nebraska, and the Grand Island Police Department was apparently notified. Officer Wilson of the Grand Island Police Department applied for a search warrant of the Defendant's Google account on October 30, 2018. Wilson did not request a separate Search Warrant for retrieving other data from the Defendant's phone. On October 30, 2018, the Search Warrant for the Defendant's Google account was granted by the Hall County Court Judge.

Based upon the video found by the Kearney Police Department, the Defendant has now been charged with sexual assaults in Hall County and this Motion to Suppress followed.

II. Motion to Quash

The State seeks to quash the Defendant's Motion to Suppress. The State argues that the Defendant is precluded from seeking relief based upon the doctrine of res judicata and collateral estoppel. While the State and the Defendant are the same parties in both cases, the Court finds that claim preclusion should not be applied in this context. Both collateral estoppel and res judicata require that the issues decided in both

actions be identical. *State v. Spang*, 302 Neb. 285, 923 N.W.2d 59 (2019); *State v. Marrs*, 295 Neb. 399, 888 N.W.2d 721 (2016). A search warrant which may be validly issued for one crime charged in one case may be invalid for another charge filed separately based upon the facts and the law applicable to each case.

In this case, the Buffalo County opinion addressed the search in the context of the Buffalo County facts and charge. Arguably, the evidence complained of was not even relevant to the issues presented in the Buffalo County case except as rebuttal. In reaching this decision, the Court is mindful of the Nebraska Supreme Court's comments in *Spang*:

> We were persuaded that concerns of public safety and reaching the right result, which are peculiar to the criminal process, outweigh the efficiency concerns that might otherwise favor application of issue preclusion. *Id.* at 294 Neb.

The Court finds that the Defendant is not precluded from litigating the derivative use of evidence from the Buffalo County search in the context of a completely different charge and Therefore, the State's Motion to Quash is overruled.

III. Motion to Suppress

The Defendant argues that the evidence should be suppressed because the warrant is overbroad and lacks particularity. Officer Newell's application and affidavit seeks to search a laundry list of cell phone functions and data. No particular effort was made by the officer to articulate what items of possible evidentiary value could be found in the call logs, address

book, calendar and et cetera. It is, for example, highly unlikely that the Defendant listed on his calendar for September 25, 2018, "be a Peeping Tom." Normally, the Court would address whether or not the videos viewed are severable. *See United States v. Hill*, 259 F.3d 966 (9th Cir. 2006). In this case, however, the issue of severability of the warrant does not save the evidence for the State.

The Defendant argues that after finding video evidence regarding the crime in Hall County the officer should have sought a second search warrant to recover the evidence regarding the Hall County crime. In the Court's view, based upon the expert testimony presented, the officer in Kearney had every right to initially view all videos contained on the phone to ensure that the file dates and time stamps were accurate, however, once Officer Newell viewed evidence indicating there was evidence of a further crime in Hall County, Nebraska, a second search warrant should have been applied for outlining the types of evidence which would have been relevant for the Hall County case. In the Court's view, this is no different than a situation in which officers validly enter someone's home but cannot be allowed to extend a plain view search by checking serial numbers or engaging in a rummaging expedition through the Defendant's drawers and closets. The Court, therefore, finds that the Defendant's Motion to Suppress should be and hereby is sustained as to any evidence gathered based upon the Buffalo County search warrant.

The Court further finds that the search warrant for the Google account relies almost entirely upon the fruit of the poisonous tree from the Buffalo County search and therefore it must be suppressed as well.

Pursuant to Neb. Rev. Stat. § 29-826 the State is granted until March 19, 2020, to file notice of intent to seek review of this ruling.

BY THE COURT

/s/ Mark J. Young
District Judge

ORDER ON DEFENDANT'S SECOND MOTION TO SUPPRESS (SEPTEMBER 17, 2020)

IN THE DISTRICT COURT OF
HALL COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

v.

JAKE J. McGOVERN,

Defendant.

Case No. CR 19-252

Before: Mark J. YOUNG, District Judge.

A hearing was held on the Defendant's second Motion to Suppress on July 23, 2020. The Plaintiff was represented by Ms. Sarah Hinrichs and the Defendant was personally present with his attorney Mr. John Hendricks. The matter was taken under advisement to consider the evidence and the briefs of counsel. In consideration of the evidence and the law, the Court FINDS that the Motion to Suppress should be overruled.

I. Procedural History and Findings of Fact

After being charged with a number of felonies (including First Degree Sexual Assault), the Defendant

filed a Motion to Suppress the search of his cell phone. A hearing was held on November 25, 2019, and the matter was taken under advisement. An extended briefing schedule was approved by the Court to accommodate counsel on March 9, 2020, the Court entered an Order suppressing the evidence found on the Defendant's phone.

The phone in question had been found during an investigation into an act of unlawful intrusion by the Defendant. After seizing the phone, the Kearney Police Department sought and received a search warrant to search the phone for evidence regarding the unlawful intrusion. During the course of the search police officers discovered video evidence that they believe tied the Defendant to crimes in Hall County. The evidence was then turned over to the Grand Island Police Department and after an investigation this case was filed.

After hearing the evidence the Court rejected the Defendant's argument that the search warrant and search were overly broad and lacked particularity. The Motion to Suppress was granted because, in the Court's view, while reviewing all of the videos in their entirety to determine if they related to the unlawful intrusion was lawful, law enforcement should have sought a second search warrant before initiating a second search when the evidence was turned over to another agency (Grand Island Police Department).

In the ruling suppressing the evidence, the State was granted until March 19, 2020, to appeal the ruling pursuant to NEB. REV. STAT. § 29-824 et seq. No appeal was filed.

Instead of filing an appeal by March 19, 2020, the State on March 31, 2020, sought and received a new search warrant. The second search warrant outlined evidence viewed by Kearney Police Department investigators to conclude a sexual assault had occurred. The second search, unsurprisingly, uncovered the same evidence and the State now seeks to use the previously suppressed but now revived evidence in its case. Defendant seeks to suppress evidence for a second time.

II. Conclusions of Law

In *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014) and *State v. Said*, 306 Neb. 314, 945 N.W.2d 152 (2020) the State sought to correct deficiencies in searches of cell phone with a second warrant. In both of those cases the second search warrant was sought before rulings had been made on motions to suppress. Counsel has provided no cases on point with the procedures used in this case and I have found none.

The Defendant argues that a second search is simply an extension of the first search and is the fruit of the poisonous tree and therefore should be suppressed. In response, the State advances arguments not made in connection with the first Motion to Suppress but asserts the validity of the first search and the State argues that both search warrants are valid.

Neb. Rev. Stat. § 29-824 et seq. allows an erroneous ruling of the district court suppressing evidence to be corrected before jeopardy attaches. In this case, the State (for whatever reason) chose not to appeal and the Court in most circumstances would find that the prior ruling of the Court should control. However, § 29-824 et seq. does not preclude "any other right to appeal" the State might have and the Court cannot

therefore find that the Order on the first Motion to Suppress is a final appealable order and thus the law-of-the-case-doctrine does not preclude a second search.

Based upon the evidence presented, the Court finds that the initial review of all of the videos on the Defendant's phone was a lawful search under search warrant number one and that the videos were first seen in "plain view." Because the lawful viewing showed evidence of another possible crime, law enforcement's second search under the second search warrant is not unlawful exploitation of a prior illegality and the Court must therefore overrule the Defendant's Motion to Suppress.

BY THE COURT

/s/ Mark J. Young
District Judge

JUDGMENT AND CONVICTION
(DECEMBER 14, 2020)

IN THE DISTRICT COURT
OF HALL COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

v.

JAKE J. McGOVERN,

Defendant.

Case No. CR 19-252

Before: Mark J. YOUNG, District Judge.

This matter came on for rearraignment and bench trial on December 8, 2020. The State was represented by Ms. Hinrichs and Mr. McGovern was present with counsel Mr. Hendricks. The State informed the Court that it wished to file an Amended Information and the Defendant indicated that he had no objection to the filing of the Amended Information. The Defendant waived service and reading of the Amended Information and preliminary hearing as to Counts I and III of the Amended Information. The Defendant further waived a re-explanation of the rights he had in connection with this case.

The Defendant, having waived his right to jury trial on October 7, 2020; the matter proceeded to bench

trial. Evidence was presented by the State and argument was presented by both parties. The Court took the matter under advisement to review the evidence presented and to consider the arguments of counsel.

Now on this 14th day of December 2020, the Court being fully advised in the premises and in consideration of the evidence and relevant law, FINDS that the Defendant's objections to the evidence as made in his Motions to Suppress and as further made at trial should be and hereby are overruled. The Court finds that the State has met its burden and has proven beyond a reasonable doubt Defendant is guilty of Count I, Sexual Assault in the First Degree, II FO; Count II, Sexual Assault in the Third Degree, I MO; and Count III, Record Person in State of Undress, IV FO.

The Court sets the matter for sentencing on February 17, 2021, at 10:30 a.m. The Court orders a Presentence Investigation be conducted by the District Nine Probation Office and that Presentence Investigation should include a sex offender evaluation. The District Nine Probation Office may also seek a drug and alcohol evaluation or a further psychological evaluation if their initial testing indicate that would be helpful in determining a just sentence in this case.

The Defendant's bond is continued. The Defendant is ordered to report within three days of receipt of this opinion to the District Nine Probation Office to begin the Presence Investigation and keep all appointments with the District Nine Probation Office for purposes of completing the Presentence Investigation as a condition of his bond.

BY THE COURT:

/s/ Mark J. Young
District Judge

ORDER OF SENTENCE
(FEBRUARY 17, 2021)

IN THE DISTRICT COURT
OF HALL COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

v.

JAKE J. McGOVERN,

Defendant.

Case No. CR 19-252

#137930

Before: Mark J. YOUNG, District Judge.

On February 17, 2021, this matter came on before the Court for sentencing. The State was represented by Ms. Hinrichs, Deputy Hall County Attorney. The Defendant appeared with Mr. Hendricks. Defendant waived hearing on his ability to pay fine and costs. The Nebraska Sex Offender Registration Act forms are executed. The Nebraska Sex Offender Registration Act forms are executed. Allocution offered. Defendant was convicted of:

Count I, Sexual Assault-1st Degree, II FO;
Count II, Sexual Assault 3rd Degree, I MO; and

Count III, Record Person in State of Undress, IV FO.

AS TO COUNTS II AND III IT IS THEREFORE THE JUDGMENT AND SENTENCE OF THE COURT, that the Defendant be, and hereby is ordered imprisoned in the Hall County Department of Corrections as follows:

Count II, for a period of 1 year; credit for 1 day.
Count III, for a period of 1 year; credit for 1 day.

These sentence to be served concurrently to each other.

Defendant is remanded to the custody of the Hall County Department of Corrections for transportation to Hall County Department of Corrections to commence serving his sentence.

A commitment is to issue accordingly.

As to Count I, Sexual Assault-1st Degree, II FO the Court FINDS AND ORDERS that the Defendant is a fit and proper candidate for probation and hereby sentences the Defendant to a term of probation for 60 months through CBI. The Court informs the Defendant that if the Defendant fails to abide to the terms of probation probation could be revoked and Defendant would be sentenced under the original statutes.

The conditions of probation imposed on the Defendant are as follows:

Not violate any laws, refrain from disorderly conduct, or acts injurious to others.

Shall not associate with persons of disreputable or harmful character or persons who are known by the probationer to be involved in any illegal

activities or are the subject of law enforcement investigations involving illegal activities.

Report to probation officer as directed by the officer.

Allow probation officer to visit at all reasonable times and places.

Answer all reasonable inquiries concerning personal conduct or conditions asked by probation officer.

Not leave the State of Nebraska without written authorization of this Court or probation officer.

Not be in possession of a firearm or dangerous weapon.

To meet all family responsibilities.

To be gainfully employed or actively seeking employment.

To keep the probation office continually informed of residential and employment status.

The Court finds a term of imprisonment should be part of this Order because the Court would otherwise sentence the Defendant to a term of imprisonment instead of probation. The Court finds that, while probation is appropriate, periodic confinement in the county jail as a condition of probation is necessary because a sentence of probation without a period of confinement would depreciate the seriousness of the offender's crime or promote disrespect for the law.

Jail: 90 days in the Hall County Department of Corrections commencing immediately; consecutive to any other sentence imposed.

Defendant is approved for work release if determined eligible by the Hall County Department of Corrections.

Refrain from the possession or use of alcohol, alcoholic beverages or any controlled substance not prescribed by a physician.

To submit to chemical test of blood, breath or urine upon request of probation officer to determine the use or possession of alcoholic liquor or drugs. Failure to submit to said test will constitute a violation of probation. To pay to the Clerk of the District Court for any such testing at the rate of $5 per month.

Consent to search and seizure of person, premises, vehicle or electronic devices by or upon request of probation officer and provide passwords to any electronic device.

No social media without approval of the probation officer.

To pay the costs of this action of $138.

Pay $10 SAQ fee.

Defendant shall submit to DNA test as directed by probation and pay for such test.

Pursuant to § 29-2206(3) Defendant's bond is ordered applied toward costs unless an assignment has previously been filed.

Pay Probation Administrative Enrollment Fee of $30 this date. In addition, pay a monthly Probation Programming Fee of $25 per month due and payable to the Clerk of the District Court on or

before the 10th day of each month beginning 9/1/2022.

Follow all directives of the probation office.

Participate in and successfully complete the following treatment programs and pay for such programs. A schedule of commencement shall be established by the probation office.

Relapse Prevention
Sex Offender Counseling
Sex Offender specific MRT/DBT
Sex Offender Group

The following Classes will be completed.

CJC Victim Empathy

Have no contact with Kari Stevens.

Hearing on appeal bond. Arguments presented. Appeal bond approved in the sum of $500,000 10% with the following conditions:

1. Defendant have no contact with Kari Stevens;
2. Defendant to refrain from the use of drugs and or alcohol;
3. Defendant to report weekly to the District Nine Probation Office;
4. Defendant not leave the State of Nebraska without permission of the Court or an order from another state is imposed.

Defendant's bond, if any, is released.

BY THE COURT:

/s/ Mark J. Young
District Judge

AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT (SEPTEMBER 25, 2018)

IN THE DISTRICT COURT/COUNTY COURT
BUFFALO COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

v.

SAMSUNG GALAXY S5 MINI MODEL SM-G800R4
MEID NUMBER 256691518904731478

Defendant.

Case No. 18-11305

COMES NOW Officer Brad Newell who deposes and states as follows:

1. That I am a Police Officer with the City of Kearney Police Department in Kearney, Buffalo County, Nebraska, who can testify to the following information:

2. I have been employed as a law enforcement officer for approximately 16 years. During that time, I have investigated hundreds of criminal cases. I have attended hundreds of hours of training on the subject of the investigation of criminal activity. I have investigated many crimes where an electronic communication device (cellular telephone) had been used in the

commission of the crime or contained evidence of the commission of the crime that was being investigated.

3. On the morning of September 25, 2018 at approximately 0604 hours, your affiant was dispatched to 806 East 37th Street in Kearney, Buffalo County, Nebraska. A reporting party and witness, Jordan Shields, reported observing a male suspect looking in to a ground level window to his apartment. Shields described the suspect as a male wearing a black sweatshirt and blue jeans and accompanied by a white or yellow Labrador sized dog. Shields reported he briefly chased the suspect who ran west, then south. Your affiant responded to the area of 806 E. 37th Street. I briefly searched the area for any suspects matching the description Shields gave and did not locate any.

4. I have a witness, Jordan Shields, who told me he lived in apartment number 4 at 806 E. 37th Street. The apartment was a garden level apartment where the apartment is partially below ground and partially above. Shields stated he lived in the apartment with his girlfriend, Kirsten Grube. Shields can testify that shortly before 0604 hours, he spoke with Grube and she told him she was going to take a shower. Shields can testify that he went out a back door to the apartment building to go to his vehicle. Shields can testify that when he went out the back door, he observed a male suspect looking into the ground level window to the bathroom of his apartment where Grube was taking a shower. Shields said he yelled at the suspect, "what the fuck are you doing". The male replied to him, "nothing", then fled on foot. Shields can testify that he observed the male crouched down at the window with his head lowered so that he could see through a small area in the window blinds where one

of the blind slats was missing. Shields described that the male was very close to the window. When Shields yelled at the suspect, the suspect's dog barked. Shields can testify that he chased the suspect on foot west from the apartment. He observed the male run through a yard on the southeast corner of 37th St. and G Avenue, then run south,

5. I have a witness Jordan Shields, who can testify that he was walking with your affiant while re-tracing the path that the suspect took when he fled, Shields can testify that he located a cellular telephone in the yard of the residence located on the southeast corner of 37th St. and G Avenue. Shields was in the presence of your affiant when he located the cellular telephone and stated it was right where the suspect ran. Shields immediately handed the cellular telephone over to your affiant. The cellular telephone was identified as a Samsung Galaxy 55 Mini.

6. I have a witness, Kirsten Grube, who can testify that she lived at 806 E. 37th Street, Apartment 4. Grube can testify that on the morning of September 25, 2018 shortly prior to 0604 hours, she was preparing to take a shower in the bathroom of her apartment. Grube stated she had gone into the bathroom and had undressed. She stated she was combing her hair prior to getting into the shower. She stated she heard a dog bark very close to the window of the bathroom and thought it was odd that a dog was that close to the window.

7. Your affiant can testify that I observed Jordan Shields locate a Samsung Galaxy 55 cellular telephone in the yard of a residence on the south east corner of 37th Street and G Avenue. I can testify that I took

custody of the phone for evidentiary purposes. The Samsung phone is a model SM-G800R4 Galaxy S5 Mini with an MEID number of 256691518904731478. Your affiant believes the cellular telephone may contain evidence of the crime of Unlawful Intrusion, whereby the suspect viewed Grube in a state of undress, and may have also captured photographs and or video of Grube in a state of undress. The cellular telephone will also contain evidence of the subscriber of the cellular telephone account, who could be the suspect in the crime.

Your affiant can also testify that during the investigation of the scene, I observed the ground level window to apartment number 4 at 806 E. 37th Street. I observed that the window that Shields observed the suspect looking into did go to the bathroom of apartment 4. I observed that there was a void in the blinds where a person could see into the bathroom area.

8. I have a witness, Investigator Warrington, that it has become commonplace for individuals to communicate with others using cellular telephones or other electronic devices to communicate activities, develop plans, coordinate schedules and to otherwise pass along information in a variety of formats. This communication can be in the form of voice calls, voice messages, text message (also known as SMS), photo or video messages (also known as MMS), or other social media formats that simulate the text messaging process through other third party applications that allow communication with other parties.

9. That I have a witness, Kearney Police Department Investigator Dan Warrington who will testify that he has received over 400 hours of training regarding forensic searches of electronic devices, including

completion of the following course: Mobile Forensic Essentials; Cellebrite Mobile Device Examiner; Cellebrite UFED Physical Examiner; Android, Apple iOS and Blackberry Forensics; Apple I device Forensics; Basic Cell Phone Investigations; Online Undercover Investigations; Basic Computer Skills; Access Data Boot Camp; and, Macintosh Triage and Imaging.

10. That I have a witness, Inv. Warrington, who will testify that he has been trained on and utilizes computer software programs to aid in the forensic search of electronic devices. These programs are designed to execute read-only commands on electronic devices. Inv. Warrington will testify that there are two general types of data extractions from electronic devices utilizing computer software programs: logical and physical extractions. In a logical extraction, program makes read-only requests of specific data to the device, such as text messages (SMS), phone book entries, pictures, etc. To which, the device replies to the request by extracting the designated information back to the program. The logical extraction, however, is limited in scope, as it is unable to access photos or messages stored in third-party applications, information stored in a folder different from the default folder in the cellular device, or access any deleted items or other items contained within the file system. In contrast, a physical extraction is the most comprehensive and detailed analysis of an electronic device capturing a complete picture of the usage and contents of an electronic device. Physical extractions access the additional data layers in an electronic device in both the allocated and unallocated space that make up the device's physical memory. Physical extractions are done by creating a bit-for-bit copy of the

mobile device's flash memory that would include: data identifying the owner or users of the phone; the phone number associated with the device; call histories/call logs (including missed, outgoing and incoming calls); photographs and their associated metadata; contact lists and address books; calendar entries; messages (SMS, MMS, recorded messages, iMessages, and messages communicated through other third-party applications); audio and video clips; any deleted and/or unallocated content; access to file systems where third-party application's data may be stored; global positioning system information (including coordinates, waypoints and tracks); internet information (browser history, cache, stored cookies, favorites, auto complete form history, stored passwords, etc.); and, email messages (read and unread) that are accessible through the device. Once an extraction is complete, Inv. Warrington will testify that he directs a report be created by the program in a format which is then available for review by investigators.

11. That I have a witness, Inv. Warrington who will testify that the search, download, and extraction of cellular devices can take multiple hours or even days to complete depending on the amount of data stored in the device and the steps necessary to complete a complete extraction. Inv. Warrington will also testify that currently, there is a backload of devices waiting to be downloaded, but that a period of thirty (30) days should allow these items to be searched.

WHEREFORE, your affiant based upon the aforementioned information prays the Court to issue a search warrant for the Samsung Galaxy S5 Mini, Model SM-0800R4, MEID number 256691518904731 478. Further authorizing law enforcement officers to

examine the above-described cellular phones for evidence relating to the offense of Unlawful Intrusion. This examination may include manually examining the phones as well as the use of computer software to download and search the cellular devices for; Data that may identify the owner or user of the above-described cellular phone including the phone number assigned to the phone; Call Histories and logs (missed, incoming and outgoing); Photographs and their associated metadata; Contact lists and address books; Calendar entries; Messages (SMS, MMS, Recorded Messages, iMessages, or Messages communicated through other third-party application(s)) contained in any place throughout the device; Audio and video clips; Global Positioning System data including, but not limited to coordinates, waypoints and tracks, Documents and other text-based files; Internet world wide web (WWW) browser files including, but not limited to, browser history, browser cache, stored cookies, browser favorites, auto-complete form history and stored passwords; Email messages and attachments (whether read or unread) accessible from the cellular phones listed above; Access and search for communication on any third-party applications located on the above-described cellular phones; and, any deleted and/or unallocated content relating to the above-described types of information.

FURTHER AFFIANT SAYETH NOT

/s/ Brad Newell
Kearney Police Department

STATE OF NEBRASKA)
) ss.
COUNTY OF BUFFALO)

SUBSCRIBED AND SWORN TO before me this 25 day of September 2018.

{signature not legible}
District/County Judge

SEARCH WARRANT

To: Officer Brad Newell, Kearney Police Department and officers under his direction:

WHEREAS, I am satisfied that probable cause exists for issuance of a search warrant based upon the affidavit(s) attached hereto and made a part hereof by reference, and that certain described property:

Samsung Galaxy S5 mini, Model SM-G800R4, MEID number 256691518904731478

May be searched in the following manner for the following items:

The above-named officer, or officers at his discretion, may examine the cellular phones described above for evidence relating to the offenses of Unlawful Intrusion. This examination may include manual examination of the phones as well as the use of computer software to download and search the cellular phone devices for:

- Data that may identify the owner or user of the above-described cellular phones including the phone number assigned to each phone;
- Call Histories/Call Logs (missed, incoming and outgoing);
- Photographs and their associated metadata;
- Contact Lists and Address Books;
- Calendar Entries;
- Messages (SMS, MMS, Recorded Messages, iMessages, or Messages communicated through other third-party application(s)) contained in any place throughout the device;

- Audio and Video Clips;
- Global Positioning System (GPS) data including, but not limited to, coordinates, waypoints and tracks;
- Documents and other text-based files;
- Internet world wide web (WWW) browser files including, but not limited to, browser history, browser cache, stored cookies, browser favorites, auto-complete form history and stored passwords;
- Email messages and attachments (whether read or unread) accessible from the cellular phones listed above;
- Access and search for communication on any third-party applications located on the above-described cellular phones;
- Deleted and/or unallocated content relating to any of the above-described types of information.
- SD Cards that *are* located within the device

are concealed or kept in, on or about the following described, place or person:

Kearney Police Department located at 2025 Avenue A, Kearney, Buffalo County, Nebraska,

and is under the control or custody of:

Kearney Police Department

and that public interest requires that this warrant be served during the daytime.

YOU ARE THEREFORE COMMANDED, with necessary and proper assistance, to search the above described location(s), for the above stated item(s), you are to seize the same make return of this warrant within thirty (30) days after the date hereof. This warrant shall be served during the daytime.

Dated this 25 day of September, 2018 at 11.45 o'clock a.m. or p.m.

{signature not legible}
Buffalo County Judge

SECOND SEARCH WARRANT
AND AFFIDAVIT
(NOVEMBER 15, 2018)

IN THE HALL COUNTY COURT OF
HALL COUNTY, NEBRASKA

Case No. CR18-842

STATE OF NEBRASKA)
) ss.
HALL COUNTY)

To: Inv. Wade Wilson
Grand Island Police Department
111 Public Safety Drive
Grand Island, Nebraska

Affiant: Inv. Wade Wilson
Grand Island Police Department
111 Public Safety Drive
Grand Island, Nebraska

PROBABLE CAUSE: *See* Attached Affidavit

Based upon the affidavit filed by affiant and above findings, as to probable cause, I command you, with necessary and proper assistance, to search the following:

information associated with jakemcgovern1981@gmail.com, from the period of time at issue 08/01/17 to Present, located at Google LLC, 1600 Amphitheatre Parkway, Mountain View, California, 94043. Search

warrants shall be sent to Google LLC electronically via Google's Law Enforcement Response System (LERS): https://sunoortgoogle.com/legal-investigations/contact/LERS.

It appearing that there is reason to believe that the notification of the existence of the warrant to any person will lead to the destruction of or tampering with evidence, or otherwise seriously jeopardizes the investigation or unduly delay a trial.

It is ordered Google LLC shall delay notification of this search warrant, or the existence of the investigation, to the listed subscriber or to any other person for a period of 90 days.

To the extent that the information described above is within the possession, custody, or control of Google LLC, Google is required to disclose the following information for each account listed above.

1. Account Information (including Profile)-Username, primary e-mail address, secondary e-mail addresses, connected applications and sites, and account activity, including account sign in locations, browser information, platform information, and internet protocol (IP) addresses.
2. Mobile Device Information-Device make, model, and International Mobile Equipment Identifier (IMED or Mobile Equipment Identifier (MEID) of all associated devices linked to the Google accounts of the target device.
3. Evidence of User Attribution-Accounts, e-mail accounts, passwords, PIN codes, account

names, usernames, screen names, remote data storage accounts, credit card number or other payment methods, contact lists, calendar entries, text messages, voice mail messages, pictures, videos, telephone numbers, mobile devices, physical addresses, historical GPS locations, two-factor verification information, or any other data that may demonstrate attribution to a particular user or users of the account(s).

4. Google "My Activity"-Chronological activity list with date/time stamps.

5. Android Device Configuration Service—Device and account identifiers, device activity, device attributes, software and security versions, and network connectivity.

6. Google Photos-Images, graphic files, video files, and other media files stored in the Google Photos service to include available deleted content and favorite images.

7. Google Drive-Live and deleted data currently stored in the Google Drive for the listed account.

8. Google Chrome—Chronological activity list with date/time stamps.

9. Search History-All search history and queries.

10. Bookmarks (including Mobile)—Stored web addresses and activity.

11. Google Analytics—Chorological activity log with date/time stamp.

12. Documents-User created documents stored by Google.

13. Calendar-All calendars, including shared calendars and the identities of those with whom they are shared, calendar entries, notes, alerts, invites, and invitees.

14. Contacts-Contacts stored by Google including name, all contact phone numbers, emails, social network links, and images.

15. Gmail-All e-mail messages including by way of example and not limitation, such as inbox messages whether read or unread, sent mail, saved drafts, chat histories, and emails in the trash folder. Such messages will include all information such as the date, time, internet protocol (IP) address routing information, sender, receiver, subject line, any other parties sent the same electronic mail through the 'cc' (carbon copy) or the 'bcc' (blind carbon copy), the message content or body, and all attached files.

16. Location History-All location data whether derived from Global Positioning System (GPS) data, cell site/cell tower triangulation/ trilateration, precision measurement information such as timing advance or per call measurement data, passive location information and Wi-Fi location. Such data shall include the GPS coordinates and the dates and times of all location recordings.

17. Google Voice-All call detail records, connection records, short message system (SMS) or multimedia message system (MMS) messages,

and voicemail messages sent by or from the Google Voice account(s), target device information.

18. Google Pay-All information contained in the associated Google Pay, "G Pay" and Wallet account including transactions, purchases, money transfers, payment methods, including the full credit card number and/or bank account numbers used for the transactions, and address book.

19. Google Home-All information related to Google Home including, but not limited to, device names, serial numbers, Wi-Fi networks, addresses, media services, linked devices, video services, voice and audio activity, and voice recordings with dates and times.

20. Google Assistant & Google Allo-All information related to Google Assistant including, but not limited to, device names, serial numbers, Wi-Fi networks, addresses, media services, linked devices, video services, voice and audio activity, and voice recordings with dates and times.

21. Google Maps–"Your Timeline History", "Your places", All location data whether derived from Global Positioning System (GPS) data, cell site/cell tower triangulation/trilateration, precision measurement information such as timing advance or per call measurement data, passive location information and Wi-Fi location. Such data shall include the GPS

coordinates and the dates and times of all location recordings.

22. Google Hangouts—Message history with date/time stamps and message participants, archived conversations, active conversations, group chats, Hangout requests, and invites sent.

23. Youtube—Search and watch history, uploads, comments, subscriptions, account Information, username, e-mail addresses, and account activity, including account sign in locations, browser information, platform information, and internet protocol (IP) addresses.

Based on experience in requesting online records, your affiant knows this to be a time-consuming process that often requires 30 days or more depending on the resources of the company, the amount of data, the priority of the request, and other factors which may sometimes delay the process. For this reason, your affiant requests additional time beyond the normal ten-day warrant service requirements to be granted. Your Affiant therefore requests the return date be extended to December 17th, 2018. This date would be approximately 35 working days from the date of issuance and well past the 10-day warrant service requirement.

Given under my hand this 30th day of October, 2018.

{signature not legible}
Judge

AFFIDAVIT FOR SEARCH WARRANT

IN THE COUNTY OF HALL COUNTY, NEBRASKA
IN AND FOR THE NINTH JUDICIAL DISTRICT

STATE OF NEBRASKA)

) ss.

COUNTY OF HALL)

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT

I, Wade Wilson, a Grand Island Police Department (GIPD) Police Officer and Homeland Security Investigations (HSI) Task Force Officer, being duly sworn, hereby depose and state as follows:

Introduction and Officer Background

COMES NOW, Wade Wilson, of the Grand Island Police Department. I am a Police Officer with the Grand Island Police Department Patrol Division, and have been since April, 2005. Your affiant is a Cyber Intelligence Investigator, a Homeland Security Investigations Task Force Officer, a Nebraska Human Trafficking Task Force Investigator, a Gang Operations Unit Investigator, a Digital Evidence Acquisition Specialist, and a Seized Computer Evidence Recovery Specialist. I have completed 260 plus hours of training in the observation, collection, preservation and documentation of digital evidence. I have completed 50 plus hours of training in the observation, collection, preservation and documentation of online accounts.

The facts in this affidavit come from my personal observations, my training and experience, and information obtained from other officers and witnesses. This affidavit is intended to show merely that there is sufficient probable cause for the requested warrant and does not set forth all of my knowledge about this matter.

I make this affidavit in support of an application for a search warrant for information associated with a certain e-mail account utilized by Jake J. McGovern, namely jakemcgovern1981@gmail.com, which is stored at premises controlled by Google LLC, an e-mail provider headquartered at 1600 Amphitheatre Parkway, Mountain View, California, 94043.

The information to be searched is described in the following paragraphs and in Attachment A. This affidavit is made in support of an application for a search warrant under 18 U.S.C. §§ 2703(a), 2703(b)(1)(A) and 2703(c)(1)(A) to require Google LLC to disclose to the government copies of the information (including the content of communications) further described in Section I of Attachment B. I have set forth only the facts I believe necessary to establish probable cause to believe that evidence, fruits, and instrumentalities of violations of Nebraska Revised State Statute 28-311.08 Unlawful Intrusion, are presently located within the Google email account of jakemcgovern1981@gmail.com. Where statements of others are set forth in this affidavit, they are set forth in substance and in part.

Statutory Authority

Nebraska Revised State Statute 28-311.08 Unlawful Intrusion includes the following:

(1) It shall be unlawful for any person to knowingly intrude upon any other person without his or her consent or knowledge in a place of solitude or seclusion.

(2) It shall be unlawful for any person to knowingly photograph, film, record, or live broadcast an image of the intimate area of any other person without his or her knowledge and consent when his or her intimate area would not be generally visible to the public regardless of whether such other person is located in a public or private place.

(3) For purposes of this section:

(a) Intimate area means the naked or undergarment-clad genitalia, pubic area, buttocks, or female breast of an individual;

(b) Intrude means either the:

(i) Viewing of another person in a state of undress as it is occurring; or

(ii) Recording by video, photographic, digital, or other electronic means of another person in a state of undress; and

(c) Place of solitude or seclusion means a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, any facility, public or private, used as a restroom, tanning

booth, locker room, shower room, fitting room, or dressing room.

(4)

(a) Violation of this section involving an intrusion as defined in subdivision (3)(b)(i) of this section or violation under subsection (2) of this section is a Class I misdemeanor.

(b) Subsequent violation of this section involving an intrusion as defined in subdivision (3)(b)(i) of this section, subsequent violation under subsection (2) of this section, or violation of this section involving an intrusion as defined in subdivision (3)(b)(ii) of this section is a Class IV felony.

(c) Violation of this section is a Class IIA felony if video or an image recorded in violation of this section is distributed to another person or otherwise made public in any manner which would enable it to be viewed by another person.

PROBABLE CAUSE

- On September 27, 2018, the Kearney Police Department in Kearney, NE responded to a report of a "peeping tom" within Kearney city limits. Upon officer's arrival, the male suspect fled on foot. While in the act of fleeing the police, the suspect dropped his cell phone.
- The Kearney Police Department completed a search warrant on the abandon phone. Digital forensic evidence extracted from the

phone included a video depicting a female subject in a state of unconsciousness being recorded. The video included footage of the female's genitals. The 1st person style phone video recording appears to show the person recording removing the female's clothing and playing with her vaginal area.

- The Kearney Police Department identified the female in the recording as Grand Island resident, Kari Stevens.
- The Kearney Police Department determined the suspect phone to be owned by Jake McGovern.
- During an interview with police investigators, Kari Stevens reported she had been involved in a dating relationship with Jake McGovern from approximately 10/2017 to 01/2018. Kari advised they did have a sexual relationship; however, she was unaware of any videos of a sexual nature being recorded. She did not consent and does not consent to recordings or pictures of such nature. Kari identified portions of the recovered evidence as being recorded in her bedroom.
- Kari confirmed she is the female shown in the suspect video. She confirmed the recordings were made without her knowledge or consent.
- On 10/29/18, while reviewing the related forensic cell phone extraction of Jake McGovern's phone, your Affiant located evidence indicating Jake's Google Gmail address was associated with the mobile device.

- Your affiant knows through training and experience that Google LLC regularly maintains and backs-up data related to mobile devices utilizing Gmail addresses. Therefore, your affiant concludes Google LLC is in possession of additional evidence pertaining to this case.
- Google records sought in this affidavit will also aid investigators determine if the illicit recordings were distributed.

Your affiant believes Google LLC has in its possession additional attribution evidence to linking the suspect, Jake McGovern, to the mobile device and/or the illicit videos recorded without consent of the victim.

BACKGROUND CONCERNING GOOGLE LLC

In my training and experience, I have learned that Google LLC provides a variety of on-line services, including electronic mail ("e-mail") access, to the public. Google LLC allows subscribers to obtain e-mail accounts at the domain name @gmail.com, like the e-mail account listed in Attachment A. Subscribers obtain an account by registering with Google LLC. During the registration process, Google LLC asks subscribers to provide basic personal information. Therefore, the computers of Google LLC are likely to contain stored electronic communications (including retrieved and un-retrieved e-mail for Google LLC subscribers) and information concerning subscribers and their use of Google LLC services, such as account access information, e-mail transaction information, and account application information. In my training and experience, such information may constitute evidence

of the crimes under investigation because the information can be used to identify the account's user or users.

In my training and experience, e-mail providers typically retain certain transactional information about the creation and use of each account on their systems. This information can include the date on which the account was created, the length of service, records of log-in (*i.e.*, session) times and durations, the types of service utilized, the status of the account (including whether the account is inactive or closed), the methods used to connect to the account (such as logging into the account via the provider's website), and other log files that reflect usage of the account. In addition, e-mail providers often have records of the Internet Protocol address (IP address) used to register the account and the IP addresses associated with particular logins to the account. Because every device that connects to the Internet must use an IP address, IP address information can help to identify which computers or other devices were used to access the e-mail account.

Upon becoming a Google LLC subscriber via Gmail, Google LLC begins to collect and store data files in addition to e-mails, such as account information, mobile device information, evidence of attribution, "My Activity"—a chronological activity list, Google Ads, Android device configuration settings, Google Photos, Google Drive, Google Voice, Google Chrome, search history, bookmarks, Google Play Store, Android Auto, Google Analytics, Documents, calendar, location history, Google Home, Google Assistant, Google Maps, Google Hangouts and Youtube activity on servers

maintained and/or owned by Google LLC. Such information can include the subscriber's full name, physical address, telephone number, location history, web browser history, stored media, stored documents, stored calendar events, device identifiers, and numerous other items which are evidence of device and account user attribution relevant to a criminal investigation.

CONCLUSION

Your Affiant is aware through prior experience that Google LLC has an internal policy and practice of notifying their customers upon receipt of legal process. Your Affiant believes such notification would seriously impact the ongoing investigation and eventual prosecution of the suspect(s). Specifically, your Affiant believes upon being notified of the investigation suspects would conceal and/or destroy physical evidence. Therefore, a stipulation of the warrant includes "Do not notify user until further notice from the court."

Your Affiant concludes that based on my training and experience, and the facts as set forth in this affidavit; there is probable cause to believe that on the computer systems in the control of Google LLC there exists evidence of a crime (and contraband or fruits of a crime) which is routinely collected and retained during the normal course of business. Accordingly a search warrant is requested.

Further your affiant saith not,

Respectfully Submitted,

/s/ Wade Wilson
TFO Homeland Security Investigations

Affidavit subscribed and sworn to before me this 30 day of Oct 2018

{signature not legible}
Judge

ATTACHMENT A

PROPERTY TO BE SEARCHED

This warrant applies to information associated with all Google LLC services associated with the accounts listed below which are stored at premises controlled by Google LLC, a company that accepts service of legal process at 1600 Amphitheatre Parkway, Mountain View, California, 94043 and electronic legal process via e-mail at uslawenforcement@google.com:

Jakemcgovern1981@gmail.com between from August 1, 2017 until present.

ATTACHMENT B

PARTICULAR THINGS TO BE SEARCH AND/OR SEIZED

I. Information to be disclosed by Google LLC (the "Provider").

To the extent that the information described in Attachment A is within the possession, custody, or control of the Provider, in the form of emails, records, files, logs, or information that has been deleted but is still available to the Provider, or has been preserved pursuant to a request made under 18 U.S.C. § 2703(0, the Provider is required to disclose the following information to the government for each account or identifier listed in Attachment A for the time period identified in Attachment A:

1. Account Information (including Profile)-Username, primary e-mail address, secondary e-mail addresses, connected applications and sites, and account activity, including account sign in locations, browser information, platform information, and internet protocol (IP) addresses.

2. Mobile Device Information-Device make, model, and International Mobile Equipment Identifier (IMEI) or Mobile Equipment Identifier (MEID) of all associated devices linked to the Google accounts of the target device.

3. Evidence of User Attribution-Accounts, e-mail accounts, passwords, PIN codes, account names, usernames, screen names, remote data storage accounts, credit card number or other payment methods, contact lists, calendar entries, text messages, voice mail messages, pictures, videos, telephone numbers, mobile devices, physical addresses, historical GPS locations,

two-factor verification information, or any other data that may demonstrate attribution to a particular user or users of the account(s).

4. Google "My Activity"-Chronological activity list with date/time stamps.

5. Andriod Device Configuration Service—Device and account identifiers, device activity, device attributes, software and security versions, and network connectivity.

6. Google Photos-Images, graphic files, video files, and other media files stored in the Google Photos service to include available deleted content and favorite images.

7. Google Drive-Live and deleted data currently stored in the Google Drive for the listed account.

8. Google Chrome—Chronological activity list with date/time stamps.

9. Search History-All search history and queries.

10. Bookmarks (including Mobile)—Stored web addresses and activity

11. Google Analytics—Chorological activity log with date/time stamp.

12. Documents-User created documents stored by Google.

13. Calendar-All calendars, including shared calendars and the identities of those with whom they are shared, calendar entries, notes, alerts, invites, and invitees.

14. Contacts-Contacts stored by Google including name, all contact phone numbers, emails, social network links, and images.

15. Gmail-All e-mail messages including by way of example and not limitation, such as inbox messages whether read or unread, sent mail, saved drafts, chat histories, and emails in the trash folder. Such messages will include all information such as the date, time, internet protocol (IP) address routing information, sender, receiver, subject line, any other parties sent the same electronic mail through the 'cc' (carbon copy) or the 'bcc' (blind carbon copy), the message content or body, and all attached files.

16. Location History-All location data whether derived from Global Positioning System (GPS) data, cell site/cell tower triangulation/trilateration, precision measurement information such as timing advance or per call measurement data, passive location information and Wi-Fi location. Such data shall include the GPS coordinates and the dates and times of all location recordings.

17. Google Voice-All call detail records, connection records, short message system (SMS) or multimedia message system (MMS) messages, and voicemail messages sent by or from the Google Voice account(s), target device information.

18. Google Pay-All information contained in the associated Google Pay, "G Pay" and Wallet account including transactions, purchases, money transfers, payment methods, including the full credit card number and/or bank account numbers used for the transactions, and address book.

19. Google Home-All information related to Google Home including, but not limited to, device names, serial numbers, Wi-Fi networks, addresses, media services, linked devices, video services, voice and audio activity, and voice recordings with dates and times.

20. Google Assistant & Google Allo-All information related to Google Assistant including, but not limited to, device names, serial numbers, Wi-Fi networks, addresses, media services, linked devices, video services, voice and audio activity, and voice recordings with dates and times.

21. Google Maps-"Your Timeline History", "Your places", All location data whether derived from Global Positioning System (GPS) data, cell site/cell tower triangulation/trilateration, precision measurement information such as timing advance or per call measurement data, passive location information and Wi-Fi location. Such data shall include the GPS coordinates and the dates and times of all location recordings.

22. Google Hangouts—Message history with date/time stamps and message participants, archived conversations, active conversations, group chats, Hangout requests, and invites sent.

23. Youtube—Search and watch history, uploads, comments, subscriptions, account Information, username, e-mail addresses, and account activity, including account sign in locations, browser information, platform information, and internet protocol (IP) addresses.

II. Information to be seized by the government

All information described above in Section I that constitutes fruits, evidence and instrumentalities of

18 U.S.C. § 2251, those violations involving Jake McGovern for each account or identifier listed on Attachment A, information pertaining to the following matters:

- All illicit images, photos, or media associated with Jake McGovern, any notes, messages, conversations, recordings, or emails between Jake McGovern and identified victim(s), or others involved or solicited to be involved in sexual activity, any and all email receipts for sexual clothing, services, devices, sexual websites or hotels.
- Records relating to who created, used, or communicated with the account or identifier, including records about their identities and whereabouts
- Email communications between jakemcgovern1981@gmail.com and other e-mail users, known or unknown, where possible sexually explicit videos are traded, viewed, sent to, received from, and/or discussed.
- The identity and whereabouts of those persons who created, used, or communicated with the Google account identified in Attachment A.

IN THE HALL COUNTY COURT OF HALL COUNTY, NEBRASKA 9TH JUDICIAL DISTRICT

Received this writ this 30th day of October, 2018. Pursuant to the command thereof, I, Investigator Wade Wilson, searched within the Google LLC account associated with jakemcgovern1981@gmail.com that is stored at premises owned by Google LLC, 1600 Amphitheatre Parkway, Mountain View, California, 94043. After making a diligent search, we found the following articles;

The following was recovered from Google LLC on 11-07-18:

1) Received a true and correct copy of Attachment A: Hash Values for Production Files (Google Ref. No. 2149841) jakemcgovern1981.AccessLogs.Devices_001.zip:

   MD5-61a968b2e4983890ce77c6a3e2b4b789

   SHA512-dacb9a9d5c561ddflbcccc2161c3244fdf029b354c32b5977c1a671422bb7d2f46a96490fel3393d89abc7dd13353090eafbe71b4ffab9ea3a3429b5356bl1e5

2) jakemcgovern1981.AccountInfo.Preserved.txt:
   MD5-cf906b30ecd636e95c8ca5e9d79ada65
   SHA512-9f0001a223b77679b049ec1392d42690727d61a6d96827d3b8987116367d722b695b12823eb4e81293479c6abf74b833da83204e90caff8fe3ebd634b970604f

3) jakemcgovern1981.Accountinfo.txt:
   MD5-0bcfe381f3277f2664dc76ba626bd1c7
   SHA512-

378abf316e0d57bc2fad2e92fl5f477b2466454f24e
a8e08901afc9bffce5e81654d89f435b15
31cfdl4ab0a2a840ea7606958c124b554fb9dcd09b
1bb410590a

4) jakemcgovern1981.Androidl.pdf:
MD5-470f7d5b76e518ab802ca6cb388f14f0
SHA512-
28a6a75cdf43044a7eba9360dabf847b9fd946842c
886cd5cca7483d1026b55c38c14b7d6c
99bb6a60f42a1fd49017d43634b3ab00616b27eae
673bc10c45359

5) jakemcgovern1981.Android2.pdf:
MD5-d2f95bf09d6ae723cd5b79506edfe723
SHA512-
614bdf92f
33b240271fe0c956ec59b1742381260f2fe2lac9734
d65d35586274459044de49 214e19e290b3f663
a8e0f5c7a27fca12b6d52b7372aa069f9014b9

6) jakemcgovern1981.Android3.pdf:
MD5-1638746b8149e80d8dcf8a70d5bf979d
SHA512-
2e43c983871b50d25be9cecdb7120c3241316d5f74
ab40092a2399f8681d1 f9d9191a3f4e0 8ae87f6a2
76e0ba4e2a714772fb64e77acaeb486cfe
6bfa07ea94b

7) jakemcgovern1981.Bookmarks.pdf:
MD5-b205092da35263489f48b187b32aba8d
SHA512-
a49e6a022f7a9059c27010f5b8c7e60185cd0cc0bd
8ecd16e7abb2d1a3e3e9c28bba5a85fa3 29ad7f98
e727cc1dlfb5164a4bc085211251cf7c9
74457d3abb93

8) jakemcgovern1981.Calendar.Events.Preserved.zip:

MD5-083d1366237a52c48522ad9e085c569a
SHA512-
0fa0d9577371c0d69f7e70cb70908e78cd41f87207
822e1c431c9eM2c5b9c5d5a77aa52187
3b9b6ec59c92042b0aced9e4b5246bde720ce8d0b
85755abf2c11

9) jakemcgovern1981.Calendar.Events.zip:
MD5-309b28b5350c1b2c55d69e237f1f69ba
SHA512-3856c7fb8a2656321e72819
8cec9c506f72452f82eal1f015659db7140d137fdff
820a8alba54acc013fe4b5c2fef7bd775b25
a65544f098ba8ccd1ce4ae73c2

10) jakemcgovern1981.Chats.zip:
MD5-9de8425e963b8add5e0b1cdb418b7567
SHA512-6e9213cc7
ebf6355bf692a908f62160c20f6fe2f49accf97a0f139d
66677f405f9893daa7e18
92clef72efc27afbf70fc8b211e1b63fl0al
and839750087ebd

11) jakemcgovern1981.Drive.Metadata.txt:
MD5-28682e2ea0c0627e528afc9f57cb877c
SHA512-
a7b026a78e66da3021b4932bdf4180fe8cc4acfb42
ddffe2b2287ab9e101ffb64137dbcf24c5
200a813d6dd1687a5bd76927a7870ebe790358b6
29ce129363f4

12) jakemcgovern1981.Drive.txt:

13) MD5-f580175fa3dfefc73ebde2ee31fbf036

14) SHA512-
8e368128f4bc198bd09a8ad32f1d715cb467aff41c
8ba9680f6c72e534064ab530949361d5
87fb6bff2c6feb9b0d22fb23325fD0afb376fcaab89
559f45c07ce

15) jakemcgovern1981.Gmail.Contacts.Preserved.vcf:
MD5-d3c780c5a331bc6d8a0e2a839c22cb88
SHA512-
7a97203ealbb5849b99b11643c1fc4f87e7880c02a
e4ca6531068993ce224210d3c72a826b
7bcb9b1247979dac9631dac88d338c0235f895721
6a54859aac6b4

16) jakemcgovern1981.Gmail.Contacts.vcf:
MD5-d3c780c5a331bc6d8a0e2a839c22cb88
SHA512-
7a97203ealbb5849b99b11643c1fc4f87e7880c02a
e4ca6531068993ce224210d3c72a826b
7bcb9b1247979dac9631dac88d338c0235f895721
6a54859aac6b4

17) jakemcgovern1981.LocationHistory.Records_001.
Preserved.zip:

18) MD5-b2P0b3e289e7dba49cec9babdlffb0c4
SHA512-
e2a56c7f4909da0f69aac0a9a5f774ba77154ab2b8
316fc40d2f7a3de6418a4cb37afOff84e3
52a23e9721228b4fc63b75714510a8ae48884aa80
adb8469352a

19) jakemcgovern1981.LocationHistory.Records_001.zip:
MD5-394bb991de4bffbe146b70caef5f4fl7
SHA512-
14e45aa2lcbe3647d1157b7d6639196a0d75a7ccf8
d8262a4314555464469de296eaa99a7c
29419d57dea0ea80ecc499131eb40a7a149661165
4ccb493f2fc53

20) jakemcgovern1981.LocationHistory.Tombstones_
001.Preserved.zip:
MD5-b5c3a30198facd5472f86efl 9a0b9273
SHA512-

9e78bbdf8701ca676858258d24ab439c61a4796c5f
2399580e4476573016ac22c17c7d5981
cae125404d037756ef6500dca3f0bd76bb4658efb7
357ede2d26a4

21) jakemcgovern1981.LocationHistory.
Tombstones_001.zip:

22) MD5-d84be26b7c6285db882e353884b285 lb

23) SHA512-
2b9bf82045409084dfe1779743f1
7708308b9513c80ef9933e48d9fbfa0411556b8adb
6376 7fcdcb4c269d957937088f192735b2fa6b57
9ee51272e452634b15

24) jakemcgovern1981.Photos.Albums.zip:
MD5-44clal 8db71e547ae03d146bbff9e6db
SHA512-
87987b510dad2c3e5e100810405ac3f2b1c2fb82ce
4cc305619adb89421b8acb1892a98760 25a6a58 2
206859559cd694d1a05d579e347479e2bdb77e
009b9753

25) jakemcgovern1981.Photos.zip:
MD5-9e08414cb8d0ed001e409cd4f5a26e8e
SHA512-

26) e6fda83e589bbd8fa83a215bc4edee6cbbc6ca233e5
e069bdc4c3231839a7832b9c36ab6fde
dccb4ba9493651ae6d7d7f28d435fe56760fa631f8
e8df0298ea9

27) jakemcgovern1981.Youtube.Userinfo.Preserved.txt:
MD5-167dae3ce303c3a8e60e8d4072022914
SHA512-
3cb87bace65f393e0397aec637a79ea96fa57e57d4
b6bd765ff0d52e47dc6bee7ba215920fb 07f1115 9f

5b821f995c988634d6a1e90702f2c6d4a8db1lfdc
c6c

28) jakemcgovern1981.Youtube.Userinfo.txt:
MD5-167dae3ce303c3a8e60e8d4072022914
SHA512-

29) 3cb87bace65f393e0397aec637a79ea96fa57e57d4b
6bd765ffDd52e47dc6bee7ba215920fb 07f1115 9f
5b821f995c988634d6a1e90702f2c6d4a8dbllfdc
c6c

30) jakemcgovern1981@gmail.com-
Search.Preserved.txt:
MD5-86e8295d12249434d35b8014f434278b
SHA512-
e3f9ef50183e572158707a042936600ff44dc379e1
6c727206ce975278161ede65b0590d3a b9580ea
ddbl7b84756b96bf7b53d1f151cfa455f467585cd7
60e48

31) jakemcgovern1981@gmail.com-Search.txt:
MD5-ecfcb27c1be21fd83c4ff8df3b1c4fb6
SHA512-

32) 15cb72b211c10b19870eaa6c105536ce9c52396797
a04e6907e39275026aa12794f48f0760
dlddc5441f1121564b83b9076ea1
e90040153a9ef0fb7693ab7754

33) jakemcgovern1981@gmail.com-
YouTubeSearchHistory.Preserved.txt:
MD5-76d4884eaa67fa1013fafd90firebec8
SHA512-
678f3c3a533721964de1901477f22eccl8a7f451685
da6claa7ele0835adc548a8e323614f7
165a0f34887fb870a6968671c95043590bf30e9f33
c8f92994223

34) jakemcgovern1981@gmail.com-YouTubeSearchHistory.txt:
MD5-ace1818f81628c5ae4957b72d1b567c9
SHA512-
c84ble53e7157f509459c84e3ce0bc72351ac2a8dd411a7941ee79232d7e7d8fba760501d0 f60a684017ce2b92d3783dcecld5dac99adf7c764584508d31f004

35) jakemcgovern1981@gmail.com.Gmail.Content.Preserved.mbox:
MD5-594e72794199e184albe87dc46335d58
SHA512-
0b0e8cb58eae4b179bca6f52ec793605a6df6b29e9e18972e45d13bd62909770049bb713c9 d42c2fe c4b08e765c1eae0689aefl
80c578e1aa469e1007e8fc07c

36) jakemcgovern1981@gmail.com.Gmail.Content.mbox:
MD5-fedbf6e3830009b9d4b381bc4687a9b0
SHA512-
462c9854a3bd5176ed5adb6297c38af63b4a07e99a94f5e4eb6841e5e6b08f3af77348395e4
f4b951c7c9217e777fd8019c07492a028d6fcdc8a64bde5cf9924

All done in Hall County, Nebraska
Dated this 15th day of November, 2018.

Grand Island Police Department Grand Island, Hall County, NE

/s/ Wade Wilson
Grand Island Police Department
Grand Island, Hall County, NE

BRIEF OF DEFENDANT IN SUPPORT OF MOTION TO SUPPRESS (DECEMBER 2019)

IN THE DISTRICT COURT OF HALL COUNTY, NEBRASKA IN AND FOR THE NINTH JUDICIAL DISTRICT

STATE OF NEBRASKA,

Plaintiff,

v.

JAKE J. McGOVERN,

Defendant.

Case No. CR19-252

The Defendant makes the following argument in regards to his Motion to Suppress filed on October 28th, 2019 and heard on November 25th, 2019.

I. Lack of Specificity-Particularity and Overbreadth

The Defendant first argues that the Search Warrant issued by the Buffalo County Court on September 25th, 2018 (Exhibit #5) was overbroad and also lacking sufficient particularity, and thus was issued in violation of his Constitutional Rights.

The Fourth Amendment provides that warrants may not be granted "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. Cont. amend IV. The Nebraska Constitution similarly provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Neb. Const. art. I, § 7.

Fourth Amendment "[s]pecificity has two aspects: particularity and breadth. Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *United States v. Hill*, 459 F.3d 966, 973 (9th Cir. 2006). "A warrant, therefore, can be unconstitutionally infirm in two conceptually distinct but related ways: either by seeking specific material as to which no probable cause exists, or by giving so vague a description of the material sought as to impose no meaningful boundaries." *United States v. Cohan*, 628 F.Supp.2d 355 (E.D.N.Y. 2009) citing *Hill*, *supra*.

A. Overbreadth

The Defendant argues that the Warrant is staggeringly overbroad and violates the "requirement that the scope of the warrant be limited by the probable cause on which the warrant is based" *Hill*, *supra*. The Warrant allowed for a wide-ranging search of the phone's contents, into content areas that were not sup-

ported by probable cause, and was a complete mismatch of what had even been discussed as having a basis to search for in the supporting affidavit.

In the Search Warrant Affidavit signed by Officer Newell (Exhibit #4), Newell summarizes his investigation into the incident in Kearney and then states:

> "Your affiant believes the cellular telephone may contain evidence of the crime of Unlawful Intrusion, whereby the suspect viewed Grube in a state of undress, and may have also captured photographs or video of Grube in a state of undress. The cellular telephone will also contain evidence of the subscriber of the cellular telephone account, who could be a suspect in the crime" (Exhibit #4, page 3, No. 7).

Officer Newell set forth his basis for searching the phone's contents for three things-to determine the subscriber, and to determine if there were any pictures or videos of the event. However, in addition to those specific areas and types of content on the phone, the Search Warrant authorizes a search of the phone for a plethora of other items, including:

> "Call Histories/Call Logs (missed, incoming and outgoing);"
>
> "Contact Lists and Address Books;"
>
> "Calendar Entries;"
>
> "Messages (SMS, MMS, Recorded Messages, iMessages, or Messages communicated through other third-party application(s)) contained in any place throughout the device);"

> "Audio [. . .] clips"
>
> "Global Positioning System (GPS) data including, but not limited to, coordinates, waypoints and tracks";
>
> "Documents and other text-based files;"
>
> "Internet world wide web (WWW) browser files including but not limited to browser history, browser cache, stored cookies, browser favorites, auto-complete form history and stored passwords"
>
> "Email messages and attachments (whether read or unread) accessible from the cellular phones listed above"
>
> "Access and search for communication on any third-party applications" (Exhibit #5)

Many, if not a majority of items listed on the warrant, have no relation to determining the owner of the phone or whether the event was recorded. These items are listed in addition to the categories of content of "Data that may identify the owner" and "Photographs" and "Video Clips" (Exhibit #5). There is no discussion in the Affidavit of why there would be a fair probability that these content areas of the phone would hold evidence of the actual offense being investigated.

Especially troubling is the search warrant's broad inclusion of ALL of the areas of the phone dealing with communication-the affidavit does not set forth any rationale as to why evidence of the offense would likely be found in the Defendant's communications with others. Officer Newell testified that he had no

reason to believe that the Defendant had communicated with others during or directly after the event. However, the warrant authorizes the search of the Defendant's emails (read or unread), his text messages (SMS, MMS, or through third party applications), any third party application that can communicate, and the Defendant's call histories (missed, incoming, and outgoing)-all clearly outside Officer Newell's stated scope and basis for probable cause to search. The Search Warrant simply allowed for a search of a broad scope of the phone contents-largely into content areas that are not supported by any rationale or stated probable cause. *See*, *e.g. Buckham v. State,* 185 A.3d 1, 17 (Del. 2018) (When trial court concluded that affidavit set forth probable cause to search phone for GPS data, "the court failed to address the fact that the warrant it upheld was plainly mismatched to the probable cause it cited to justify it", finding that the warrant violated the Fourth Amendment because it included areas "that had nothing to do with GPS location information, like 'incoming/outgoing calls, missed calls, contact history, images, photographs and SMS (text) messages.'").

Testimony established why Officer Newell's Affidavit and the Search Warrant were terribly mismatched in terms of their scope: law enforcement's heavy reliance on templates. Officer Newell testified that he had written the first half of the Search Warrant Affidavit (Nos. 1-7) in regards to his investigation. The remaining part of the Affidavit (Nos. 8-11) was identified as a general template developed by Investigator Warrington for use in cell phone cases, and not specific to the case at hand, which was inserted into the Affidavit by Newell. These entries first set forth a

blanket statement that people use cell phones to communicate and pass along information (No. 8), which is nothing but a general statement (not to mention common knowledge), and does not attempt in any way to link that information to the case at hand. Compare to *State v. Goynes,* 303 Neb. 129, 927 N.W.2d 346, (Neb. 2019) (warrant found to be particular when Affiant "listed several types of data he was seeking to search through the warrant and how the data was relevant to the investigation.") (underline added). The Affidavit was silent as to why call histories, emails, text messages, calendar entries, GPS data, text-based files, contact lists, address books, and internet browser history would hold evidence pertinent to the investigation. The template entries go on to discuss Warrington's qualifications, the general process of a cell phone search, and then No. 11 closes with a paragraph that requests an expansive search of nearly every conceivable type of information that can be stored on a cell phone. The template does not comport with Officer Newell's stated basis to search the phone for owner and photo/video information.

It was also revealed that the Search Warrant (Exhibit #5), also prepared by law enforcement, was simply a general template that had not been tailored at all to fit the case at hand. Investigator Warrington testified that he had developed the search warrant language as a general template for cell phone cases. The template is clearly all-inclusive, allowing for a general search of almost every imaginable type of information that can be stored on a cell phone. There were no efforts taken to narrow the search warrant to align with Newell's suggested scope; consequently, the

template warrant included broad swaths of content that were not supported by probable cause in the Affidavit.

The Nebraska Supreme Court in *State v. Henderson* held: "[W]e conclude that a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search." 289 Neb. 271, 854 N.W.2d 616, (2014). That holding was clearly violated in this case. Officer Newell's initial request to search for subscriber information, photos and videos of the event (Exhibit #4, No. 7), suddenly morphed to include emails, call logs, contact lists, third party applications by the end of the affidavit (No. 11), without any explanation of why he believed there was probable cause that evidence would be found therein. This is due to the Affiant using a general template that was not tailored to his case, which undeniably included areas of content not supported by probable cause in the Affidavit. The Search Warrant that was created by law enforcement-also a template not tailored to the case in regards to the content sought-was equally overbroad. Essentially, what had been requested by Officer Newell was as a very narrow search for specific content (owner, photos and videos of the event)–and with a quick "copy/paste" of a template-the warrant became an all-encompassing search for ALL types of content on the phone.

A very similar case, *United States v. Winn*, 79 F.Supp.3d 904, (2015), the search warrant for a cell phone's contents was found to be overbroad due in part to law enforcement's reliance on a template-and not editing that template to fit the specific case or items sought. The *Winn* Court found that law enforcement "chose not to edit the template of items to be seized to

eliminate the categories of data that had no connection to the suspected crime" and that therefore, the warrant "exceeded the probable cause to support it" *Id*. at 919. The Court in *Winn* went on to discuss the case, the facts of which are eerily similar to the case at hand:

> "Based on the complaint supporting the search warrant, there was probable cause to believe that only two categories of data could possibly be evidence of the crime: photos and videos (*see* Doc. 22-2). The complaint did not offer any basis-such as facts learned during the investigation or Detective Lambert's training and expertise-to believe that the calendar, phonebook, contacts, SMS messages, MMS messages, emails, ringtones, audio files, all call logs, installed application data, GPS information, WIFI information, internet history and usage, or system files were connected with Winn's act of public indecency. In fact, the narrative portion of the complaint did not even mention those categories of data. Furthermore, Detective Lambert admitted at the hearing that he had no reason to believe much of that data contained evidence of the crime of public indecency [. . .] The validity of the warrant is assessed solely on the basis of the information that the police disclosed in the complaint at the time the search warrant was issued. *See Messerschmidt*, 132 S. Ct. at 1257 n.8 [. . .] The bottom line is that if Detective Lambert wanted to seize every type of data from the cell phone, then it was

> incumbent upon him to explain in the complaint how and why each type of data was connected to Winn's criminal activity, and he did not do so. Consequently, the warrant was overbroad, because it allowed the police to search for and seize broad swaths of data without probable cause to believe it constituted evidence of public indecency." *Id.* at 919-20.

Just as in *Winn*, the Search Warrant in this case was simply an un-edited template that was not narrowly tailored to the case at hand. Instead of limiting law enforcement's search of the device to fit the narrow scope originally set forth by Newell's affidavit (subscriber, photos and videos), the Warrant instead authorized a sweeping search of nearly every aspect of the Defendant's phone, including the Defendant's private conversations, emails, and call history-with no rationale or supporting probable cause as to why these areas of the phone would contain evidence of the offense under investigation. The scope of the Search Warrant is "not limited by the probable cause on which the warrant is based" *Hill*, *supra*, and is clearly overbroad, in violation of the Defendant's Constitutional rights.

B. Lack of Particularity

In addition to being overbroad, the Search Warrant also violates the Defendant's Constitutional rights because it lacks particularity.

The particularity requirement arose from "[t]he Founding Fathers' abhorrence of the English King's use of general warrants–which allowed royal officials to engage in general exploratory rummaging in a

person's belongings" *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012). "The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013, 94 L.Ed.2d 72 (1987). "In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued." *State v. Hidalgo*, 296 Neb. 912, 917, 896 N.W.2d 148, 153 (2017).

When it comes to cell phones, the particularity requirement takes on special importance due to the vast amount of personal data that can be stored and accessed. In *Riley v. California,* 573 U.S. 373, 134 S. Ct. 2473, (2014), the Supreme Court observed that "cell phones differ in both a quantitative and a qualitative sense from other objects", noting their "immense storage capacity", adding that "data on the phone can date back for years" and concluding that cell phones contain "a digital record of nearly every aspect" of a person's life. *Riley* led the Nebraska Supreme Court to declare:

> "[T]he Fourth Amendment's particularity requirement must be respected in connection with the breadth of a permissible search of

> the contents of a cell phone. Accordingly, we conclude that a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search. It has been observed that the particularity requirement of the Fourth Amendment protects against open-ended warrants that leave the scope of the search to the discretion of the officer executing the warrant, or permit seizure of items other than what is described. *U.S. v. Clark*, 754 F.3d 401 (7th Cir. 2014). A warrant satisfies the particularity requirement if it leaves nothing about its scope to the discretion of the officer serving it. *Id.* That is, a warrant whose authorization is particular has the salutary effect of preventing overseizure and oversearching."

State v. Henderson, 289 Neb. 271, 854 N.W.2d 616, (2014). Several other courts have recognized that "a heightened sensitivity to the particularity requirement in the context of digital searches is necessary." *United States v. Wey*, 256 F.Supp.3d 355, 383 (S.D.N.Y. 2017); *United States v. Galpin*, 720 F.3d 436, (2d Cir. 2013); *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009). This includes Nebraska Courts, who have stated that, due to a personal computer's ability to store a huge array of personal papers in one place, "makes the particularity and probable cause requirements all the more important." *State v. Sprunger*, 283 Neb. 531, 541, 811 N.W.2d 235, (2012).

With the heightened sensitivity to the particularity requirement in mind, and turning to the case at hand,

the Search Warrant states that the phone may be examined "for evidence relating to the offenses of Unlawful Intrusion" (Exhibit #5). The warrant then lists the numerous categories of content that can be searched (videos, photos, emails, call histories, etc.). Therefore, the only limitation on law enforcement is that the search of the listed content areas be related "to the offenses of Unlawful Intrusion."

A glaring issue with the search warrant's particularity is that is does not specify any temporal limits. Even though the incident being investigated in Kearney occurred on a single day-September 25th, 2018-the broad language of the Search Warrant simply allowed for a search for "evidence relating to the offenses of Unlawful Intrusion" without any time restraint.

Several courts have found a warrant to fail the particularity requirement due to a lack of a temporal limit on the search. A warrant's failure to include a time limitation, where such limiting information is available and the warrant is otherwise wide-ranging, may render it insufficiently particular. *See*, *e.g.*, *United States v. Abboud*, 438 F.3d 554, 576 (6th Cir. 2005) (holding that a warrant was insufficiently particular because it was not limited to documents from the time period for which the magistrate had probable cause to believe the crime had occurred); *United States v. Zemlyansky*, 945 F.Supp.2d 438 (S.D.N.Y. 2013) (finding that the absence of a temporal limit "reinforces the Court's conclusion that the [] warrant functioned as a general warrant"). When it comes to searches of digital data, which may contain "data which dates back years", *Riley*, *supra*, a temporal limitation is critical, and courts have held that the lack of a time

restriction will cause a warrant to fail the particularity requirement. *See*, *e.g.*, *State v. Keodara*, 191 Wn.App. 305, 364 P.3d 777, (2015) (finding cell phone warrant invalid when it failed to "limit the search to information generated close in time to incidents for which the police had probable cause"); *United States v. Winn,* 79 F.Supp.3d 904, (S.D. Ill. 2015) (finding "the warrant should have specified the relevant time frame. The alleged criminal activity took place on one day only [. . .] and the police were looking for photos or videos taken that same day.") *State v. McKee*, 3 Wn.App.2d 11, 413 P.3d 1049, (2018) (invalidating cell phone warrant with no temporal limitation); *United States v. Shipp*, 392 F.Supp.3d 300, (E.D.N.Y. 2019) (noting particularity concerns with warrant seeking electronic data with no temporal limitation when "it would appear to have been feasible to include such a limitation"); *Buckham v. State*, 185 A.3d 1, 19 (Del. 2018) (noting that "the warrant did not limit the search of [the] cell phone to any relevant time frame"); *United States v. Wey*, 256 F.Supp.3d 355, 387 (S.D.N.Y. 2017) (finding warrant for electronic data lacked particularity as it "undisputedly fail[ed] to limit the items subject to seizure by reference to any relevant timeframe or dates of interest. They do so despite the underlying Affidavits. . . identifying timeframes"). *United States v. Kow*, 58 F.3d 423, (Cir. 1995) ("The government did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place").

While use of a temporal restriction is not an absolute necessity in every case, such a limitation is an "indicia of particularity." *United States v. Triumph Capital Group, Inc.,* 211 F.R.D. 31, (D.Conn. 2002),

quoting *United States v. Bucuvalas*, 970 F.2d 937, 942 n. 7 (1st Cir. 1992). While courts have observed that "complexity and duration of the alleged criminal activities . . . may well make the Warrants' lack of a temporal limitation somewhat 'less significant' of a factor in determining their constitutional sufficiency", that is clearly not the case here, where the alleged offense was not complicated and occurred on only one day. *See*, *e.g*, *United States v. Hernandez,* 09 CR 625 (HB) (S.D.N.Y. 2010) ("The complexity and duration of the alleged criminal activities render a time frame less significant than in a case that required a search for a small set of discrete items related to one or only a few dates").

While using a temporal limit is one way to limit the scope of a search to the offense being investigated in order to meet the particularity requirement, courts have also found occasions where a specific description of the items to be seized acts as a proper way to limit the scope of a search. For example, in *State v. Thomas*, No. 78045-0-I, (Wash. Ct. App., 2019) which dealt with the search for images on a cell phone, the court found the warrant to be particular even though it did not include a date restriction, because the warrant contained a specific description of what the police had probable cause to look for: "The provision at issue lacked a date restriction but included a data restriction that limited the search only to images depicting D.C., K.H., K.H.'s apartment building, or "any parts of a male or female that could be" K.H. or D.C." *Id*. at 10. The search warrant in the present case is not reasonably particular because the descriptions of items to be seized were not as particular as the supporting evidence allowed.

"A search warrant may be sufficiently particular even though it describes the items to be seized in broad or generic terms if the description is as particular as the supporting evidence will allow, but the broader the scope of a warrant, the stronger the evidentiary showing must be to establish probable cause . . . The degree of specificity required depends on the circumstances of the case and on the type of items involved." *State v. Goynes*, 303 Neb. 129, 927 N.W.2d 346, (2019) (citations omitted, boldtype added). A court should consider "whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued" *United States v. Mann*, 389 F.3d 869, 878 (9th Cir. 2004) (quoting *United States v. Spilotro*, 800 F.2d at 963 (9th Cir. 1985)), or, "in other words, whether the warrant could have been more specific considering the information known to police officers at the time the warrant was issued." *State v. McKee*, 3 Wn.App.2d 11, 413 P.3d 1049, (Div. 1 2018).

The search warrant in this case was certainly bathed in broad and generic terms, allowing for a search of broad categories of content such as "emails" "call histories" and "text messages" "relating to the offenses of unlawful intrusion". *See United States v. SDI Future Health, Inc.,* 568 F.3d 684, 705 (9th Cir. 2009) (noting that use of broad terms such as "rolodexes, address books, and calendars-amounts to the laziest of gestures in the direction of specificity"). Given the circumstances of this case and the facts known to the police, the particularity in setting forth the items that law enforcement felt they had probable cause to search for could have easily been much more precise, in order to properly limit the scope of the

search. For example, the Affidavit suggested a need to search the cell phone for "photographs or video of Grube in a state of undress", and described that said photo or video would have been taken through "a void in the blinds" from outside the apartment, into the bathroom (Exhibit #5, No. 7). If that is what law enforcement truly had probable cause to search for, then the search warrant should have been limited by use of a description in order to restrain the scope of the search to comply with the Fourth Amendment. *See United States v. Morisse,* 660 F.2d 132, 136 n.1 (5th Cir. 1981) (if the "nature of the [suspected illegal] activity does not allow for [the] ready segregation" of illegal items from "legal items," then "the "magistrate should take care to assure the warrant informs the law enforcement agent as to how he should distinguish between the illegal paraphernalia and the items that are held legally").

When the circumstances of the case can support a more precise particularity in the items to be searched for, that description should be used to make the warrant particular. *Goynes*, *supra*. For example, in *United States v. Winn* where the broad terms of "videos" and "photos" were present in the warrant, the court stated, "This is not a case where the police needed to browse through hundreds of photos and videos to find what they were looking for because [law enforcement] knew the precise identity and content of the photos/videos sought." The *Winn* court instructed, "For example, the warrant could have described the location of the incident as well as the subjects of the images-children at a swimming pool, or more specifically young girls in swimsuits at the Mascoutah Public Pool." *United States v. Winn,* 79 F.Supp.3d 904, (S.D.

Ill. 2015) (citing to *United States v. Mann*, 593 F.3d 779, (7th Cir. 2010), where warrant authorized police to search for "images of women in locker rooms or other private areas" for evidence of voyeurism, thus making it particular). *See also*, *State v. Castagnola*, 145 Ohio St. 3d 1, 19 (2015) finding the search warrant defective "Under the Fourth Amendment, these details regarding the records or documents stored on the computer should have been included in the search warrant to guide and control the searcher and to sufficiently narrow the category of records or documents subject to seizure. Moreover, this degree of specificity was required, since the circumstances and the nature of the activity under investigation permitted the affiant to be this specific."

"A warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search." *Goynes*, *supra*. Here, the warrant limited the scope of the vast list of phone contents only by the nebulous phrase "relating to the offenses of Unlawful Intrusion". It is important to note the wide-open nature of that limitation-it does not limit the search to in relation to only the unlawful intrusion incident being investigated in Kearney, but, actually anything related to unlawful intrusion "offenses" at any time. Compare this limitation to the one used in *Goynes*, where the search warrant, while broad in scope, was found to be particular because the search was limited by a description of the offense, "evidence relevant to the homicide of Williams", *Id.* at 144, which particularizes the search to a specific offense and implies a general time frame. The same

search warrant in *Goynes* would lose that particularity if it allowed for a wide-ranging search of evidence "relating to the offenses of homicide"–which is exactly what was done here.

The Search Warrant in this case simply references a criminal statute as the only means of adding particularity to the scope of the search. The court in *Winn* also addressed this issue–the warrant simply referencing a broad criminal statute–as a very poor means to establish particularity:

> "The only limit implied by the search warrant is the reference to the criminal statute that Winn supposedly violated. 'An unadorned reference to a broad federal statute does not sufficiently limit the scope of a search warrant.' *United States v. Leary*, 846 F.2d 592, 602 (10th Cir. 1988). *See also* United *States v. Spilotro*, 800 F.2d 959, 965 (9th Cir. 1986) (finding that search warrant violated particularity requirement where only limitation on scope of search was items to be seized had to be evidence of violation of one of thirteen statutes, some of exceptional scope); *United States v. Roche*, 614 F.2d 6, 8 (1st Cir. 1980) (finding that search warrant violated particularity requirement where only limitation was reference to the mail fraud statute which is extremely broad in scope). And a reference to a general statute certainly will not satisfy the Fourth Amendment's particularity requirement when the police could have more precisely described the evidence that they were seeking or included other limiting features. *See Cassady*

> *v. Goering*, 567 F.3d 628, 636 (10th Cir. 2009) ('It is not enough that the warrant makes reference to a particular offense; the warrant must ensure that the search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.') (citation and alterations omitted). *But see United States v. Vitek Supply Corp.*, 144 F.3d 476, 481-82 (1998) (finding warrant did not violate particularity requirement because it was limited by reference to three narrowly focused statutes, narrowed by a date limitation, and the government could not have been more precise about the records it was seeking)."

United States v. Winn, 79 F.Supp.3d 904, (2015). In the present case, the criminal statute listed is "Unlawful Intrusion", codified at Neb. Rev. Stat. § 28-311.08, which is a very broad statute. Subsection (1) prohibits a person "to knowingly intrude upon any other person without his or her consent in a place of solitude or seclusion" which is a class I misdemeanor. Subsection (2) prohibits "any person to knowingly and intentionally photograph, film, or otherwise record an image or video of the intimate area of any other person without his or her knowledge and consent when his or her intimate area would not be generally visible to the public", which is a class IV felony. Further, subsection (3) of the statute prohibits "any person to knowingly and intentionally distribute or otherwise make public an image or video of another person recorded in violation of subsection (2) of this section without that person's consent" which is a class IIA felony. Further

yet, subsection (4) criminalizes the act of "knowingly and intentionally distribute or otherwise make public an image or video of another person's intimate area or of another person engaged in sexually explicit conduct (a) if the other person had a reasonable expectation that the image would remain private, (b) knowing the other person did not consent to distributing or making public the image or video, and (c) if distributing or making public the image or video serves no legitimate purpose" which is a class I misdemeanor. Further still, subsection (5) prohibits, "any person to threaten to distribute or otherwise make public an image or video of another person's intimate area or of another person engaged in sexually explicit conduct with the intent to intimidate, threaten, or harass any person", a class I misdemeanor. Certainly, the statute covers a broad range of criminal behavior and escalating penalties, from misdemeanors to class II felonies. Like *Winn*, and the cases it cites to, "the reference to the criminal statute did nothing to actually restrict the seizure or limit the executing officers' discretion". *Id.* Does the reference to unlawful intrusion authorize law enforcement to look for photos or videos of the incident, which would constitute a violation of subsection (2), a class IV felony? Or does is the language about unlawful intrusion support a search of the phone to determine if a video or photo was sent to another, a violation of subsection (3), a class IIA felony? Does the language about unlawful intrusion allow for the search of all communications on the phone to determine if the Defendant had ever threatened to publish a video without consent, a class I misdemeanor? Doesn't the warrant's use of the term "relating to the offenses of unlawful intrusion", by its own terms, open the search of the phone up to much

more than the actual incident being investigated? The reference to a broad criminal statute–the sole means of providing particularity to the warrant in this case–did nothing to limit the officer's discretion in their search, but instead invited a broad search encompassing anything and everything that could potentially be found in the phone's contents.

A search warrant must describe the things to be seized with sufficiently precise language so that it tells the officers how to separate the items properly subject to seizure from irrelevant items. *See Marron v. United States*, 275 U.S. 192, 296 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant"); *See also Davis v. Gracey*, 111 F.3d 1472, 1478 (10th Cir. 1997). The Search Warrant in this case is open-ended, does not limit the search to the specific offense under investigation, has no temporal limitation and utilized no limiting description of what law enforcement had permission to search for to narrow the scope of the search (for example "photos or videos of Grube in a state of undress" or "evidence relating to the unlawful intrusion of Grube", the functional equivalent of *Goynes*' "evidence relating to the homicide of Williams"). The warrant, as it stands, would allow for the authorities to review years of content–every text message, every email, every call log, all internet browser history, and every communication through all third-party applications–to determine if they can find anything related to "the offenses of Unlawful

Intrusion". This shows the warrant's true colors–it is a general warrant and allows for a "fishing expedition", clearly prohibited by the 4th Amendment. *Sprunger*, *supra* at 539. The language of the search warrant did not limit the search in any meaningful sense, but instead held the door wide open, endorsing a "general, exploratory rummaging," *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

C. Specificity-Relief Requested

If the Court finds the Search Warrant to be overbroad or not sufficiently particular given the circumstances of the case, or a combination of the two, then warrant is unconstitutional, and therefore, any evidence coming from the search of the phone should be excluded. "[A] search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Massachusetts v. Sheppard*, 468 U.S. 981, 988, 104 S. Ct. 3424, 82 L.Ed.2d 737 (1984), fn. 5; *see also State v. Castagnola*, 145 Ohio St.3d 1, 46 N.E.3d 638 (2015). "[T]he only remedy for a general warrant is to suppress all evidence obtained thereby." *United States v. Yusuf*, 461 F.3d 374, 393, 48 V.I. 980 (3d Cir. 2006) (citing *United States v. Christine*, 687 F.2d 749, 758 (3d Cir. 1982) ("It is beyond doubt that all evidence seized pursuant to a general warrant must be suppressed")).

D. Good Faith

If the court finds that the warrant was either overbroad or not sufficiently particular, or both, the next step is to determine if the good faith exception to the exclusionary rule applies. The court should find against applying the good faith exception in this case.

The Court in *Henderson* detailed the good faith exception:

> "The good faith exception provides that evidence seized under an invalid warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant. Nevertheless, evidence suppression will still be appropriate if one of four circumstances exists: (1) The magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard for the truth; (2) the issuing magistrate wholly abandoned his or her judicial role; (3) the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid." *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616, (2014).

"In assessing the good faith of an officer's conducting a search under a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit." *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

The Defendant argues that the warrant in this case was so facially deficient that the executing officers could not presume it was valid.

Kearney officers knew, or should have known, that the signed warrant authorized a wide ranging search of the phone, far reaching into areas of content where authorities had no probable cause to believe contained evidence of a crime. The fact was unmistakable-Officer Newell discussed in his affidavit the need to search for "the subscriber of the cellular account" and "photographs or video", however, the search warrant includes areas such as emails, text messages, call histories, and more. It should have been painfully obvious to Officer Newell (as well as Investigator Warrington, who was present during the discussion and development of the Affidavit) that the search warrant was much more broad in its' scope than the content identified as potentially linked to the offense.

Law enforcement would have known the search warrant's broad scope was a total mismatch to the limited content discussed in the affidavit, because the warrant was simply based on a template where the list of content to be searched was not tailored to the case. Investigator Warrington had authored the template on which the warrant was based, so it should have been immediately recognizable to him as his unedited template. The template's section that describes what content areas can be searched is vast and all-inclusive. Certainly, the warrant does include the relevant categories of "data that may identify the owner", "photographs" and "video clips", but those make up only about one-third of the total content areas listed that may be searched. Certainly law enforcement was plainly aware that the general template Warrant far exceeded the scope to search as suggested in the Affidavit.

Good faith was not extended to law enforcement in *Winn*, where an un-edited template was used to create the search warrant, and the template's list of contents to be searched included far more than the photos or videos that had been discussed in the supporting documentation. Supporting its finding that good faith did not apply, the court reasoned:

> "A review of the facts in this case shows that there is certainly an element of recklessness on the part of Detective Lambert with respect to the list of items to be seized. The complaint supporting the search warrant is geared toward searching for and seizing only photos or videos of young girls in swimsuits taken at the Mascoutah Public Pool on June 18, 2014. Detective Lambert admitted at the hearing that those photos or videos were the only evidence that he wanted to get from Winn's cell phone. Detective Lambert also admitted that he had not uncovered any information suggesting that Winn forwarded these pictures to anyone, and he had no reason to believe that the calendar, call log, or text messages contained any evidence of public indecency. Yet, when he drafted the complaint, he chose not to edit the template of items to be seized to eliminate the categories of data that had no connection to the suspected crime. He also chose not to incorporate any information that would have substantially clarified the description of the data to be seized so as to limit the invasion of Winn's privacy."

United States v. Winn, 79 F.Supp.3d 904, 923 (S.D. Ill. 2015). *Winn* noted that "[t]emplates are, of course, fine to use as a starting point. But they must be tailored to the facts of each case. This particular template authorized the seizure of virtually every piece of data that could conceivably be found on the phone."

Winn is similar to the case at hand, in that it would have been plainly obvious to law enforcement that the general template used in the warrant went far beyond the scope of the affidavit, and it was a reckless trampling of Constitutional rights to not take the time to edit the template to conform to the particular case. Newell described a need to search for limited items (owner, photos and videos), but then added a template to his affidavit (Nos. 8-11) that suggested the scope of the warrant should include nearly every type of content on the phone, completely contradicting his earlier stated probable cause for a limited search. Then, another boilerplate template was used for the warrant, which again lists several content areas on the phone that Newell did not have a belief would contain evidence of the offense (Newell testified he had no reason to believe the suspect had used the phone to communicate during or after the offense, for example, but many of the content areas in the warrant involve communication). There was no attempt made in the affidavit to suggest that many of the content areas would contain evidence of the offense, other than a general template item (No. 8) that essentially states that individuals can communicate information through with a cell phone-a common-sense statement, obviously not specific to the case at hand, and not very relevant since Newell himself did

not believe communications to be involved in the offense.

In *U.S. v. Weber*, 915 F.2d 1282, 1289 (9th Cir. 1990), the court railed against this use of general template language in the affidavit to support a broad search warrant, finding "In this case, the "expert" testimony in the affidavit was foundationless. It consisted of rambling boilerplate recitations designed to meet all law enforcement needs. It is clear that the "expert" portion of the affidavit was not drafted with the facts of this case or this particular defendant in mind." The court in *Weber* declined to extend the good faith exception, finding, "Although we do not question the subjective good faith of the government, it acted entirely unreasonably in preparing the affidavit it presented." Likewise, in this case, the copy/paste of template added to the affidavit simply provided boilerplate recitations designed to meet all law enforcement needs (No. 8-people use cell phones to communicate via calls, text, and third party applications). Nothing was remotely suggested in the affidavit that the suspect had used the phone to communicate during the event-and that notion would cut against common sense as well, given the facts of the case. As in *Weber*, law enforcement could not reasonably believe this boilerplate language truly supported the broad search into the phone content as authorized by the warrant in order to prompt the Court to utilize good faith. *See also*, *Buckham v. State*, 185 A.3d 1, 17 (Del. 2018) (the court rejecting that a broad, general statement supported the notion that the underlying affidavit was sufficient, stating "Particularly unpersuasive was the statement that

'criminals often communicate through cellular phones' (who doesn't in this day and age?)"

It would have been equally clear to law enforcement that the only limiting factor in the warrant, "offenses of Unlawful Intrusion" was not very particular, certainly not as particular of a limitation as it could be, given the information available to law enforcement at the time of the warrant application. Law enforcement knew that the offense occurred on a single day, and law enforcement knew they were wanting to look for "photographs or video of Grube in a state of undress", shot through a window, through a void in a blind. However, the warrant did not limit the search to the any particulars of the offense at hand, either by reference to a date or a general description. Law enforcement would have easily spotted that the warrant (a mostly un-edited template authored by law enforcement) allowed for a very broad search, knowing full well it could have been limited by more precise terms to avoid overreach.

The State will likely cite to *State v. Henderson* to argue that good faith should apply in this case. In *Henderson*, the search warrant failed the particularity requirement as the warrant "did not sufficiently limit the search of the contents of the cell phone." *State v. Henderson,* 289 Neb. 271, 854 N.W.2d 616, (2014). Ultimately, however, the court determined that good faith applied, finding, "there is no indication in this case that the officers would reasonably have known of the defects in the warrants as authorized. Further, there is no indication that the police used the warrant to conduct a search for evidence other than that related to the shootings investigation. The evidence that the officers obtained and that the State offered at

trial was limited to evidence that was relevant to the shootings under investigation and that would have been found pursuant to a properly limited warrant." *Id.* at 289.

This case is different. For starters, it should be noted that *Henderson* was decided in 2014, in the wake of the Supreme Court's *Riley* decision and when the requirements for warrants for cell phone searches were in their nascent stages, the Court in *Henderson* noting, "[t]he parameters of how specific the scope of a warrant to search the contents of a cell phone must be will surely develop in the wake of *Riley v. California*". *Id.* at 290. In *Henderson*, the Court announced for the first time, in relation to cell phones, that "a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search." *Id.* at 289. *Henderson* marked a time of major changes relating to the specificity required of the warrant, so of course in that light, it was more appropriate to give law enforcement a pass under the good faith doctrine.

However, *Henderson* was decided four years prior to the search in this case. *Henderson's* requirement that cell phone search warrants be directly tied in scope to the probable cause provided, and not just a list of all categories of content on a cell phone, had been in place for nearly half a decade. "Officers are assumed to have a reasonable knowledge of what the law prohibits." *Id.* at 291 (citations omitted). Unlike *Henderson*, law enforcement here would have reasonably been aware that the warrant here did not constrain the search to the items for which probable cause was suggested in the Affidavit and therefore did

not comply with *Henderson's* ruling-law enforcement would have easily known this because the warrant describing the content to be searched was an un-edited template, originally created by law enforcement, that was not in any way tailored to the case at hand. The content listed to be searched far exceeded what had been discussed by Newell in the affidavit. Further, unlike *Henderson*, where good faith was found based in part that, police did not "use[] the warrant to conduct a search for evidence other than that related to the shootings investigation", that is clearly not the case here. As discussed in part III of this brief, the police very obviously used the broad nature of the warrant to complete a full investigation of other, more serious offenses. (For example, Investigator Warrington went into the 2017 text message and call history of the phone for the sole purpose of investigating a potential sexual assault occurring in 2017 and determining the identity of the potential victim. If the warrant had been properly limited in scope, there is no possibility that searching the content of 2017 text messages for the purpose of investigating a separate (and more serious) offense, involving a separate victim, in a separate jurisdiction, occurring a year prior to the 2018 incident in Kearney, would have been permitted). And unlike *Henderson*, the State is now seeking to offer this evidence at trial. While *Henderson* adopted the "no harm, no foul" concept-finding good faith where officers appropriately constrained their search despite an overbroad warrant-this concept does not apply here. Law enforcement abused the open-ended nature of the warrant to go far outside the offense they were actually investigating.

"Courts should resist the temptation to frequently rest their Fourth Amendment decisions on the safe haven of the good-faith exception, lest the courts fail to give law enforcement and the public the guidance needed to regulate their frequent interactions." *United States v. Molina-Isidoro*, 884 F.3d 287, 293 (5th Cir., 2018) citing to *Davis v. United States*, 564 U.S. 229, 245 46, 131 S. Ct. 2419, 180 L.Ed.2d 285 (2011) (recognizing concerns that overreliance on the good-faith exception risks "stunt[ing] the development of Fourth Amendment law"). In the present case, this is very important. Investigator Warrington testified that he handles the majority of cell phone searches for the Kearney Police Department. In that capacity, Warrington testified further that the search warrant template utilized here was the same as almost every other case he comes across-that typically the only thing that changes on the search warrant is the description of the phone involved and the offense alleged; however the content areas of the phone that are to be searched does NOT change from case to case. Thus, Investigator Warrington's testimony shows that it is very likely the Kearney Police Department routinely relies on this exhaustive "template" of items to be searched in every cell phone case, and that the police are not tailoring the warrant to only include the areas of content where there is probable cause evidence of the offense will be found, in direct violation of *Henderson*. The exclusionary rule should not apply here-the police used a general template for the cell phone contents and appear to be doing that on a wide-ranging basis in every cell phone investigation. The court should deny the good faith exception to hold police accountable for their violation and regulate their frequent interactions with cell phone cases. The use of

an un-edited template, which was clearly a total mismatch to the supporting affidavit, amounts to police misconduct that rises to the level of disregard for citizens' Fourth Amendment rights.

The Defendant also argues that good faith should not be extended in this case under the second exception to the exclusionary rule, or that "the issuing magistrate wholly abandoned his or her judicial role". *Henderson*, *supra*. In this case, the magistrate issuing the warrant would have read Newell's affidavit and noted Newell's argument to search to determine the owner and for "photographs or videos of Grube in the state of undress". However, the magistrate signed off on a warrant that strikingly included much more content than that, including "emails", "messages", "call histories" and much more. There was no information in the affidavit to support the search of these content areas; even Warrington's very general statement (No. 8) that states that cell phones can be used to communicate does not mention why that would be relevant to this case, nor is it ever stated that law enforcement actually had a belief that communications were involved (and we know, through Newell's testimony, he did not hold this belief). Nothing in the affidavit suggested that the suspect's communications would hold evidence of the offense-certainly nothing rising to the level to permit a broad search of all of the phone's contents regarding communication. Additionally, the magistrate would have noted that the warrant could have been much more particular in terms of describing what the police could look for (photos or videos of Grube in a state of undress), but did not require any more specificity than the warrant's broad

language involving evidence "relating to the offenses of Unlawful Intrusion".

Instead of acting to protect the Constitutional rights and privacy rights of the individual by rejecting the warrant, or at least striking the categories on the template that were inapplicable, the magistrate simply signed the warrant, acting as a rubber-stamp for law enforcement. As the court in *Winn* found when faced with a similar situation, this behavior simply does not align with the role of the neutral and detached magistrate:

> "Courts typically exhibit a "strong preference for warrants" and provide "great deference" to a judge's conclusion that a warrant shall issue." quoting *Leon*, 468 U.S. at 914. "Deference to the [judge], however, is not boundless." *Id.* It is unwarranted when the issuing judge serves as "a rubber stamp for the police" or fails to "perform his neutral and detached function." *Id.* Judge Fiss did not notice the discrepancy between the complaint and the warrant with respect to the relevant offense. No red flags were raised and no alarm bells sounded for Judge Fiss by the fact that the police were seeking a warrant to rummage through every conceivable bit of data in Winn's phone for a misdemeanor crime. It is simply impossible to conclude that Judge Fiss adequately reviewed the complaint when he signed off on a warrant despite the facially overbroad nature of the list of items to be seized and its utter disconnect from the type of crime at issue and the facts alleged in the complaint."

United States v. Winn, 79 F.Supp.3d 904, (S.D. Ill. 2015). Similarly, in the present case, it is obvious that the issuing magistrate did not adequately review the supporting affidavit when signing the warrant. The complete mismatch of content sought should have raised "red flags" and "alarm bells"-for the magistrate was signing a warrant that allowed the authorities to rummage through almost every conceivable bit of data in the phone, instead of limiting the warrant to what was stated in the affidavit. For this reason, good faith should be denied, as the issuing magistrate was not performing his or her neutral and detached function, and it would have been very obvious to law enforcement that the scope of the signed warrant was much too broad.

II. Lack of Probable Cause to Search Phone Contents (Other than Owner Information)

Alternatively, the Defendant argues that the Warrant is invalid because the Affidavit does not establish a fair probability that the contents of the phone would contain evidence of a crime. The Defendant does concede, given the circumstances of the case, that there was probable cause to search the phone to determine who was the owner. However, the Affidavit lacked a substantial basis to find probable cause to search all other content areas on the phone.

> "In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a

> substantial basis for finding that the affidavit established probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Goynes,* 303 Neb. 129, 139, 927 N.W.2d 346, (2019).

A. Probable Cause to Search for Photos and Videos

There was not a substantial basis set forth in the affidavit to believe that there was a fair probability that photo or video evidence of the event would be found on the phone. In the Affidavit, Officer Newell set forth the circumstances of the investigation. Newell had been called at 6:04 a.m. and responded to the scene (Exhibit #5, No. 2). Shields informed him that, shortly before he had called the police, he had been talking with Grube and then she went into the bathroom. (No. 4). Shields then went outside and observed a person by the bathroom window (No. 4); a short exchange occurred and the person fled (No. 4). A phone was discovered in the path of travel by Shields and Newell a little later (No. 5).

At no point did the affidavit establish that a phone had been used by the suspect during the com-

mission of the alleged offense. When Shields discovered the suspect at the window, obviously coming upon him by surprise, there was no phone observed in use. Newell testified that neither witness saw the individual with the phone at any point, nor did Shields see the suspect drop the phone.

When it comes to photos and videos, Newell's affidavit simply offers the conclusionary statement that, "the phone may have captured photographs or video of Grube in the state of undress" (No. 7). There is no basis offered for why Newell believed that, or why there was a "fair probability" in this case that evidence of the offense would be found. Compare to *Goynes*' case-specific paragraph where the affidavit "described how, in his experience as an investigator, individuals who committed similar crimes commonly communicate, research, record, and perform other operations on their cell phones that would amount to evidence of the crime." *Goynes* at 141. No similar statement was made in this case, that in Newell's experience in these types of crimes, the event is often recorded–which may go a long way in establishing a fair probability that a recording would be found in this case. In the Affidavit, there is nothing but a general statement by Newell that he has investigated crimes in general before and found evidence of crimes on a cell phone (No. 2), but nothing to discuss why he believed, in this case and for this specific offense, photos or videos would be located.

In *Goynes* and *Henderson*, the argument that there was no probable cause to search the phone because no witness had seen the Defendant using the phone during the offense was rejected. The court, in each case, focused on the notion that, because co-

defendants were involved, there was a the court found "that it is reasonable to infer that Henderson's cell phone was used to communicate with others regarding the shootings before, during, or after they occurred. *Henderson*, *supra*. This case is different–there are no codefendants, so that logic does not apply. A video or photo could have only been taken during the offense–thus making the fact that Shields did not see the suspect with a cell phone when he came upon him by surprise carry much more weight when determining whether there was a fair probability that evidence of the offense would be found on the phone.

Essentially, the Affidavit is based on a hunch of Officer Newell, not on any evidence that had been uncovered. "[T]he Court has insisted that police officers provide magistrates with the underlying facts and circumstances that support the officers' conclusions . . . suspicion is not enough." *Illinois v. Gates*, 462 U.S. 213, 276, 103 S. Ct. 231, (1983) (quoting *Nathanson v. United States*, 290 U.S. 41, 54 S. Ct. 11 (1933), where "the Court held invalid a search warrant that was based on a customs agent's "mere affirmation of suspicion and belief without any statement of adequate supporting facts").

The only reason offered that the phone may contain video or photos is that Officer Newell said it may, without any explanation of why or if this was true of his experience dealing with these types of offenses. This kind of bare-bones conclusion leads to dangerous territory: if this is found to be adequate probable cause, then that will endorse a finding that in ANY case, a cell phone can be searched for photos and video, as long as the Affiant says it might contain

evidence. Due to the ubiquity of cell phones, most individuals have one; and in ANY case, there is always a possibility that photos or video of the offense were taken. By finding probable cause based on the sheer notion that an Officer says it might be there–without anything further in the Affidavit to base that belief or suspicion–does not meet the probable cause protection that the Constitution demands.

B. Probable Cause to Search Other Phone Content–including Call Histories and Text Messages

If the Court determines that the Affidavit presents a substantial basis to find that probable cause existed to search the phone for photos and videos, then the Defendant would ask the Court to then focus on the other content areas listed in the warrant and determine whether probable cause was set forth in the Affidavit to investigate those areas of content, particularly call histories and text messages.

In the Affidavit, there is no statement by Newell that pertains to these content areas of the phone. Newell did not attempt to set forth why call histories, emails or text messages would have a fair probability of containing evidence of the offense. As discussed prior, the only paragraph that mentions these categories of data was the copy/pasted paragraph of Investigator Warrington, which states:

> "I have a witness, Investigator Warrington, that it has become commonplace for individuals to communicate with others using cellular telephones or other electronic devices to communicate activities, develop plans, coordinate schedules and to otherwise pass

> along information in a variety of formats. This communication can be in the form of voice calls, voice messages, text message (also known as SMS), photo or video messages (also known as MMS), or other social media formats that simulate the text messaging process through other third party applications that allow communication with other parties." (Exhibit #5, No. 8).

The language in No. 8 simply sets forth the idea that people use cell phones to communicate. This paragraph essentially says nothing of value as it pertains to the case. ("Particularly unpersuasive was the statement that 'criminals often communicate through cellular phones' (who doesn't in this day and age?)" *Buckham v. State*, 185 A.3d 1, 17 (Del. 2018)). There is no statement in the affidavit to say why this would be relevant to the offense at hand, nor are there any facts in the affidavit that would lead to the finding that a substantial basis had been presented to believe that there was a fair probability that evidence would be found in the phone's text messages or call history. In fact, Newell testified that he had no reason to believe that the suspect had used the phone to communicate during or after the offense.

In *Henderson*, this sort of general language combined with the facts of the case allowed it to pass probable cause muster to search his cell phone communications. In *Henderson*, the murder suspect had been seen working with others so the court concluded "[b]ecause Henderson was working with at least one other person to commit the shootings, it is reasonable to infer that the cell phone that was in his possession was used to communicate with others regarding the

shootings before, during, or after they occurred." *State v. Henderson,* 289 Neb. 271, 854 N.W.2d 616, (2014). Similarly, in *Goynes*, "witness accounts summarized in the affidavit that described Goynes' committing the shooting with the aid of one or more other people", *Goynes* at 139, which supported a basis to believe that the cell phone communications would contain evidence of their planning or discussions.

In this case, the Affidavit did not suggest that others were involved. Why then, would there be a substantial basis to believe that the suspect had communicated with others regarding the offense before, during or after it occurred? The idea that a person would communicate with others about this particular offense is not based in common sense, such as in a homicide involving others who aided in the illegal act, as was present in *Goynes* and *Henderson*.

The Court in *Goynes* stated, "the content of the affidavit pertaining to how suspects use cell phones standing alone may not always be sufficient probable cause." *Id*. at 141. The Court also noted that "the broader the scope of a warrant, the stronger the evidentiary showing must be to establish probable cause." *Id*. at 142. The question in the present case is whether the Court will find Warrington's general statement that individuals use cell phones to communicate–with nothing more–is a substantial evidentiary showing, strong enough to allow for a broad search of the emails, text messages, call histories, and all other means of communication found on the phone. The Defendant argues that the Affidavit is lacking any rationale for why his communications with others would contain evidence of the offense, and given the facts of the case presented in the affidavit,

unlike *Henderson* or *Goynes*, the Court is without any reason to make that probable cause leap to find that these content areas would harbor evidence of the offense being investigated.

C. Good Faith and Relief Requested

For the reasons discussed previously in this brief, the good faith exception should not apply in this case because the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Law enforcement should have known that Newell's conclusory hunch that the phone may contain photos or videos of the offense did not set forth any rationale or basis for such statement. Newell was fully aware that Shields had never seen the individual holding a phone when Shields had come upon him by surprise–cutting against the idea that photos or video had actually been taken. Newell was also fully aware that he set forth no basis in his Affidavit to explain why there was a fair probability that recordings of the incident would be found; instead he was aware the affidavit presented his only his conclusion that it might, with nothing more. Certainly, Newell knew or should have known that the probable cause he set forth to search for these items was deficient.

When it comes to other content on the phone, particularly call histories and text messages, law enforcement clearly should have known that the Affidavit did not set forth a substantial basis to search these areas of the phone. The only statement even discussing communications was a very general copied template item that essentially informed that people use phones to communicate in a variety of ways, but was sorely

lacking for any basis of why communications would harbor evidence of a crime in this case. Given the facts set forth in the affidavit and the nature of the offense itself, it is hard to conjure up a connection to these content areas based on facts of the investigation–simply put, if authorities believed that the suspect had communicated in regards to the offense with others, it would be prudent and necessary to put forth some basis for that belief, as it is not obvious such as in cases like *Goynes* or *Henderson* where co-defendants were present (and the likelihood they communicated about the offense followed by a common-sense standard). Further, Newell testified that he did not have the belief that the suspect communicated with others–so when he saw the warrant granted permission to delve into this content–he knew the warrant was granting more authority to search than even he thought he truly had probable cause to do. It's clear how this happened–the use of a general template for both the affidavit and search warrant, that law enforcement did not attempt to tailor to the case at hand. The Defendant argues that the Court should not reward this behavior by employing the good faith exception.

If the Court finds the Affidavit lacked a substantial basis to find probable cause in searching the cell phone for photos or videos, the Defendant would pray that those items be excluded from use at trial. If the Court finds that the Affidavit lacked a substantial basis to support the search of other areas of the phone–namely the text messages and call history–then those items–and the fruits of the information that was found therein (the identification of the individual in the videos and the following investigation

flowing from that information) should be suppressed from use at trial.

III. Exceeding Scope of Search Warrant by Kearney Police Department

The Defendant argues that, if the warrant is found to be valid, the Kearney Police exceeded the scope of the warrant, thus violating his constitutional rights.

The issue of exceeding the scope of the warrant is difficult to address because, as argued in Part I of this brief, the warrant is woefully overbroad and not particular. In essence, the warrant is a general warrant that allows for police to look everywhere, at any time frame. If police wanted to search through the Defendant's entire text message history, call history, or emails, even from a decade prior, to determine if they could find anything in relation to the "offenses of Unlawful Intrusion" it would arguably be allowed under the language of the warrant.

However, if the Court finds the warrant's broad language of "offenses of Unlawful Intrusion" to pertain to the unlawful intrusion incident in Kearney and/or the data surrounding that time frame, then the Defendant brings his argument that law enforcement knowingly exceeded that scope by their search. Investigator Warrington exceeded the scope of the warrant in this context, because he searched files and content that he knew, or should have known, was unrelated to the offense being investigated.

a. Playing Videos Titled "20171022_3224", "20171028_055929", "20171028_055447" and "20171111_031425" Exceeded the Scope of the Search Warrant

If the warrant is read in a way to limit the search of the phone content to the offense being investigated, occurring on September 25th, 2018, Investigator Warrington violated the search warrant by playing the videos titled "20171022_3224", "20171028_055929", "20171028_055447" and "20171111_031425". (For the sake of brevity, these four videos will be referred to as the "2017 videos" in this brief.) Before clicking play on the 2017 videos, Investigator Warrington knew, or should have known, that the videos were not related to the offense he was investigating.

Investigator Warrington would have known that the 2017 videos were not videos involving the incident in Kearney for several reasons:

i. Titles identify Date Stamps

As Investigator Warrington viewed the video category on his Cellebrite Physical Analyzer software, he would have seen something the same or very similar to Exhibit #9 (Print out of Mr. Kasal's view of the data in Physical Analyzer). In this "video" category view, where the software lists any file it identifies as a video, Investigator Warrington would have seen an initial list of eleven workout videos, followed by many videos titled with an apparent date stamp, for example "20160906". These video titles begin with the year 2016 in the title and range to the current year of the search, 2018.

Investigator Warrington agreed that these titles represent the exact format the Android operating system will, by default, title a video-to match the date and time on the phone. Investigator Warrington testified that, if he sees a video titled in this fashion, there is a substantial probability that the video was recorded on the date in the title.

While Investigator Warrington testified that he does not put much stock in the title of the video, as it is subject to change by the user, he also agreed that the referred to these titles as "date stamps" in his report made on the day of the search.

The Defendant does not argue that the titles of the videos alone should have completely closed the door on the notion that they could be videos of the Kearney incident. Titles are subject to user modification (however hard it may be to imagine in the circumstances of this case). However, the Defendant does suggest that the titles of the videos put Investigator Warrington on notice that there was a strong probability that the videos were not recorded on the day in question.

ii. Meta-data

Also available to Investigator Warrington in the video category overview folder, was meta-data for many of the videos. This is represented by "Date Modified" showing the last date the video was saved or changed on Exhibit #9. Warrington testified that he looked into metadata information before playing the videos.

While meta-data information such as "Date Modified" is admittedly somewhat unreliable (for example, a video being backed up to the "cloud" may alter the date last saved or modified), the fact remains that no video gives the indication that it was "last modified" on September 25th, 2018, the date of the event in Kearney. So, in addition to the titles Investigator Warrington was seeing, nothing in the meta-data suggested the videos had been recorded on the date that was under investigation.

iii. Thumbnails

The actual videos in the video folder as seen in the Cellebrite software are typically designated by a file extension of ".mp4". Each of these files has a thumbnail attached to it, or a snapshot of a moment in the video, that can be seen in Exhibit #9. In addition, there are several files in the folder with a ".lvl" file extension that can be seen in the Cellebrite video folder. Mr. Kasal testified that this designates a file type common to Android devices where the Android operating system will create additional thumbnails or snapshots of a video. Mr. Kasal testified that it was typical on Android devices that these additional thumbnails would share the same title as the video from which they originate-for example a video titled "20171022.mp4" may have several associated thumbnails titled as "20171022.0001.lvl," "20171022.0002.lvl," etc.

These additional thumbnails (or .lvl files) are plainly seen in Exhibit #9. They are listed alongside each video they are associated with. It should have been very obvious to Investigator Warrington, with his training and experience in relation to cell phones (especially the popular Android operating system)

that each of these .lvl files were thumbnails associated with each video, thereby giving him several different screenshots of each video; an extended preview of the content in each video. For example, the video titled "20171022" has eleven additional associated thumbnails that show different portions of the content of the video.

Investigator Warrington testified that as he looked through the video folder overview, none of the thumbnails were consistent with the video of the Kearney event. Warrington testified that none of the thumbnails showed the victim (whom he had identified by photograph before beginning the search). None of the thumbnails appeared to be shot through a window or a missing blind. Further, while he did see some nudity in some of the thumbnails, nothing suggested to him, by looking at the thumbnails alone, that there was illegal activity being depicted.

At this point, as Investigator Warrington viewed the video folder, he was able to see a number of videos with titles that appeared as default date stamps spanning from 2016 to 2018. In regards to the videos that were titled beginning with 2017, Warrington knew there was a strong probability that the videos were recorded a year prior. None of the metadata showing "date modified" revealed that the videos had been modified on the date of the incident being investigated. Each video had a thumbnail, and several additional thumbnails, which gave

Warrington a preview of the content of the video- and nothing appeared to be connected to the incident in Kearney. Investigator Warrington then watched all of the videos in their entirety.

iv. Confirmatory Steps

Interestingly, after Investigator Warrington watched each and every video in the video folder, he then testified that he took further steps to verify when the 2017 videos were created, and was able to confirm they were, in fact, created in 2017. This testimony confirms that Warrington had the ability to confirm the videos were created on the date stamp as indicated to him in the video titles–and thus, completely rule them out as being videos of the Kearney incident–without watching the videos.

"[T]he ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 573 U.S. 373, 381-82 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). The Defendant argues that law enforcement violated his Constitutional rights by playing the 2017 videos when law enforcement knew, or should have known, that they had been recorded a year prior and thus, not possibly a recording of the offense they were investigating. Searching through these videos by watching them was not reasonable, as it was abundantly clear that they were not connected to the Kearney offense: The titles of the videos created a "strong probability" in Investigator Warrington's mind that they had been recorded a year prior. Meta-data did not suggest the files had been modified on the date in question. The thumbnails associated with the videos, giving multiple snapshots of each video's content, showed the videos were not involving the Kearney offense under investigation. All the information available to law enforcement prior to playing the videos suggested very strongly these videos were from a year prior. Additionally, Investigator Warrington had the ability to confirm that the

videos were created in 2017, and thus, completely rule them out as videos of the incident he was investigating. However, he chose not to do so until after he watched the videos, despite all the outward signs informing him that the videos were created in 2017.

The Defendant argues that the search of these videos were not reasonable in the circumstances, as any fair likelihood that these videos contained evidence of the crime being investigated was extinguished prior to playing the videos (and according to Warrington's technological abilities to confirm the date the videos were created, could have been completely ruled out as videos of the Kearney event in 2018 without playing the videos). In *United States v. Ross*, 456 U.S. 798, 824, 102 S. Ct. 2157 (1982), the Court held that the scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom." In the present case, there was ample evidence for law enforcement to soundly conclude that the 2017 videos were not a recording of the event they were investigating–there was no longer probable cause to believe that evidence of the offense being investigated would be found. By playing the videos, Investigator Warrington was essentially searching for a lawnmower in a bedroom–he knew (or should have known) the videos would not contain evidence of the crime he was investigating and upon which the search warrant was based, but proceeded anyway.

The State will likely argue that each and every video had to be watched in their entirety to definitively rule each of them out as being connected to the Kearney incident. In this vein, Warrington testified that video titles can be manipulated and that he needed to watch each video in its entirety since it's possible that a video could be "stitched in" to another video to conceal it. While it is true that courts have recognized, in the vein of electronic devices, that "[c]riminals don't advertise where they keep evidence" *United States v. Bishop*, 910 F.3d 335, 336 (7th Cir. 2018) and that, "criminals can–and often do–hide, mislabel, or manipulate files to conceal criminal activity". *United States v. Bass*, 785 F.3d 1043, 1049-50 (6th Cir. 2015) (citations omitted), so therefore a wide-ranging search may be necessary to fully investigate certain offenses. However, some courts have recognized the danger in this stance-essentially, that means law enforcement will be able to search each and every file on an electronic device under the guise that it may contain concealed data, thereby making the warrant a general warrant. "Indeed, the Government, once it has obtained authorization to search a hard drive, may in theory 'claim that the contents of every file it chose to open were in plain view and, therefore, admissible even if they implicate the defendant in a crime not contemplated by the warrant,' thus presenting a 'serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant.' *United States v. Galpin*, 720 F.3d 436, 447 (2nd Cir. 2013). (quoting *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1176 (9th Cir. 2010)). Therefore, some courts have flatly dismissed this idea that every file must be viewed to guard against

potential obfuscation, absent some showing that tampering or mislabeling the data is an actual concern in the case at hand. *See*, *e.g. People v. Herrera*, 2015 CO 60, 357 P.3d 1227, (2015) (denying the need to search through all text message communications on the basis that the files that the authorities had permission to search for could have been hidden, stating "the People did not present a shred of evidence to suggest, nor did they attempt to argue, that [the Defendant] had 'manipulated' the Kik files 'to hide their substance.' (citations omitted) . . . the circumstances suggested that the files had not been deceptively labeled." *See also*, *Commonwealth v. Dorelas*, 473 Mass. 496, 43 N.E.3d 306, (Mass. 2016) fn. 4, (stating, "In some circumstances, it might be natural to suspect that data deliberately has been concealed from inquiring eyes. *See*, *e.g.*, *United States v. Gray*, 78 F.Supp.2d 524, 527 n.5 (E.D. Va. 1999) (discussing investigation of hacking offenses). The facts set forth in the affidavit circumscribing our analysis, however, did not suggest that data concealment was otherwise a concern in this case. In any event, when an initial search leads a forensic investigator to believe that files have been deleted or otherwise concealed, the investigator of course may seek an additional warrant to perform a more far-reaching search for those files."

In the present case, the circumstances of the case should be heavily considered in regards to the notion that each and every video file had to be viewed by Warrington, due to the possibility that the data had been manipulated or concealed by the suspect. The evidence set forth in Newell's Affidavit clearly pointed out that the suspect had been discovered by Shields at

the window, ran away, and immediately dropped his phone nearby. The likelihood of the suspect having the time or forethought to tamper with potential video titles, meta-data, and thumbnails, or edit videos "stitching in" a video into another must be astronomically low in this case, to the point that data concealment is not reasonable to assume. Rather than accept Warrington's explanation that he needed to watch each and every video in order to rule it out, the Defendant prays the Court, given the circumstances of this case, find that there is nothing in the affidavit or otherwise to suggest that data concealment was a legitimate concern. Warrington had a bevy of information telling him the videos were created in 2017, and he had the ability to confirm this through his technical expertise, without needing to open the video. As the courts found in *Herrera* and *Dorelas*, allowing a search of all videos in this context, under the guise of possible concealment, is not reasonable.

b. Searching 2017 Call Histories and Text Messages to Identify Sexual Assault Victim

Separately, the Defendant argues that Investigator Warrington exceeded the scope of the Search Warrant by going into the Defendant's call history and text message content from 2017 for the sole purpose of investigating a potential sexual assault.

Investigator Warrington testified that he was able to identify the owner of the cell phone as the Defendant very quickly: Warrington began a search of the phone around 3:00 p.m. on September 25th and later on that same day, he testified that he had learned that Mr. McGovern was the owner of the cell

phone. Both officers Newell and Warrington discussed a phone call on September 25th where this topic was discussed between them. Investigator Warrington had also looked through the photographs on the phone on September 25th, and did so again a second time on September 26th, not finding anything connected to the investigation. It was also on September 26th that Investigator Warrington watched all the videos found on the cell phone.

After watching the videos, Investigator Warrington testified that he took steps to confirm that the 2017 videos were in fact, created in 2017. He was able to confirm that, and he testified he also learned that they appeared to been taken in Grand Island. At this point, Investigator Warrington went through the Defendant's cell phone call history and text message content from the year 2017, corresponding to the dates on the titles of each video, in an effort to identify the female in the videos.

It is important to note that Warrington had completed his investigation into the Kearney incident at this point-he had identified the owner of the phone, he had been through the photographs and videos of the phone and determined that there were no recordings of the Kearney incident. At this point, Investigator Warrington delved into the phone's 2017 call histories and text message content <u>for the sole purpose</u> of investigating a separate crime, and a much more serious offense-Warrington testified that he believed he had seen evidence of a potential sexual assault on the videos and was now focused on determining the identity of the individual in the videos.

The Defendant argues that Investigator Warrington's search into the Defendant's 2017 communications for the sole purpose of investigating a separate offense of sexual assault, known to Warrington to have occurred almost a year prior, with a separate victim, in a separate jurisdiction, exceeded the scope of the Search Warrant. The Search Warrant was premised on a need to search the cell phone for a possible recording of the event in Kearney-which appeared to be a voyeurism-type offense, codified in § 28-311.08(1) as unlawful intrusion. Warrington actually completed his investigation into the Kearney incident, locating the owner and finding no recordings of the event; he then abandoned that search to investigate what he believed to be a sexual assault occurring a year prior.

The Defendant argues that, to extend the scope of the warrant to allow Warrington to investigate a potential sexual assault occurring in 2017, the 4th Amendment demanded that he first receive a second search warrant. Seeking a second warrant has been commonly viewed by courts as a proper 4th Amendment safeguard when an investigator comes across evidence of a separate crime during their search of cell phone or computer data, and this procedure appears to be well-known to law enforcement. *See*, *e.g.*, *United States v. Williams*, 592 F.3d 511, 516 n.2 (4th Cir. 2010) (search upheld when law enforcement applied for second warrant upon discovering evidence of a separate offense); *United States v. Giberson*, 527 F.3d 882, 890 (9th Cir. 2008) (upholding search for child pornography after agents stopped search and applied for additional warrants when discovering new offense); *United States v. Walser*, 275 F.3d 981, 986 87 (10th

Cir. 2001) (upholding search where officer found evidence of a new offense during initial search, suspended search, and then returned to magistrate for second warrant to search for new offense); *Triplett v. United States*, No. 1:09cr154-MPM, 2014 (N.D. Mass. 2014) (upholding search for child pornography after second warrant was applied for when images were found during computer search for missing girl); *United States v. Carter*, Criminal No. 09-161, 2012 (W.D. Pa., 2012) (computer search for evidence of counterfeiting stopped to obtain second search warrant when evidence of separate offense found); *United States v. Gray*, 78 F.Supp.2d 524, 527-28 (E.D. Va. 1999) (upon discovering a new offense while conducting search for computer for hacking offenses, as authorized by search warrant, agent stopped search and obtained a second warrant). When the search warrant's scope is exceeded without first obtaining a second warrant, the information is subject to exclusion. *See*, *e.g.*, *United States v. Carey*, 172 F.3d 1268, 1276 (9th Cir. 1998) (suppressing evidence where police, conducting search under warrant for drug offenses, continued to search for child pornography without obtaining a second warrant). *Carey* "stands for the proposition that law enforcement may not expand the scope of a search beyond its original justification." *United States v. Grimmett*, 439 F.3d 1263, 1268 (10th Cir. 2006). *See also*, *United States v. Schlingloff*, 901 F.Supp.2d 1101, 1106 (C.D. Ill. 2012) (finding scope of search warrant was exceeded and suppressing evidence where law enforcement was searching computer for evidence of identity theft but, upon finding evidence of child pornography, failed to seek a second warrant before investigating that offense).

While the warrant allowed for a search of evidence relating "to the offenses of Unlawful Intrusion"- Investigator Warrington was well aware (as he testified), that after watching the videos, that he was now investigating a potential sexual assault. By going into the phone's 2017 communications history for the sole purpose of identifying a potential sexual assault victim, Warrington clearly expanded the scope of the search far beyond its original justification.

In a case decided by the Seventh Circuit, *United States v. Mann*, 592 F.3d 779, (7th Cir. 2010) the court was faced with the following facts: an investigator had received a search warrant to search for voyeurism content on a computer, after a camera was found hidden in a women's locker room. During the search for images taken in the locker room, police came across evidence of child pornography. The investigator did not halt the search to obtain a second warrant, but continued searching for locker room-related images. The Court ruled that, because the investigator came across the images of child pornography while conducting a search for the locker-room images, the child pornography images found during that search would not be excluded (although warning that "we emphasize that his failure to stop his search and request a separate warrant for child pornography is troubling" *Id.* at 786). However, when the investigator opened four files that had been flagged by his software as containing child pornography, those files were excluded because the investigator "knew (or should have known) that files in a database of known child pornography images would be outside the scope of the warrant to search for images of women in locker rooms". *Id.* at 784. The court in *Mann* compared law

enforcement's actions in that regard to *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), where the evidence was excluded because the officer tasked with looking for evidence of a drug offense "abandoned that search" to look for images of child pornography. *Mann* stands for the proposition that, if law enforcement simply comes across evidence of a separate crime during their search pursuant to the warrant, it is not excludable per se, but once law enforcement begins to abandon their original search to look for evidence that they know (or should know) relates solely to the separate offense, a second warrant is required or the evidence should be excluded.

Mann is instructive to this case. The State will likely argue that Investigator Warrington simply came across the 2017 videos while looking for a video related to the Kearney event. If the Court determines that to be true, then not excluding those videos is consistent with the holding in *Mann*, which did not exclude the images found by the investigator during a systematic search for content identified by the warrant. However, Investigator Warrington's next step-to delve into the call histories and text message content from 2017-cannot be said to have been done pursuant to a search into the Kearney incident that was set forth as a basis for the search in the Search Warrant Affidavit. It is clear that Investigator Warrington went to this area of content for the sole purpose of further investigating what he had seen on the 2017 videos-that is, what he testified he believed to be a potential crime of sexual assault. Like law enforcement in *Mann* when purposefully viewing content that they knew was not part of the offense they were investigating, Investigator Warrington at this point

had "abandoned" any search for content relating to the Kearney incident (he had actually completed that search by the time) and went into areas of the phone that he knew, or should have known, were outside the scope of the warrant and solely to investigate a new offense of sexual assault. It cannot be argued he simply came across this information while searching for information that related to the Kearney incident, like the investigator who initially came across images of child pornography in *Mann* while continuing to search for locker-room images. Nor can it be argued that Warrington was simply searching for evidence relating to the offenses of unlawful intrusion under the warrant-he testified he was of the belief he was now investigating a sexual assault.

If the Court determines that Investigator Warrington exceeded the scope of the Search Warrant by searching the phone's call histories and text messages from 2017 for the sole purpose of investigating a potential sexual assault that had occurred in 2017, the Defendant requests that all evidence flowing from that continued search be excluded.

All evidence derived from a Constitutionally invalid search, either directly or indirectly, should considered a fruit of the poisonous tree and should be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317, (1989). "Reference to "fruit of the poisonous tree" in Wong Sun is a condemnation of the government's subsequent exploitation of a prior violation of a defendant's constitutional right. As expressed in Wong Sun, whether evidence is the derivative product of a constitutionally invalid search turns on the question "'whether, granting

establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* at 943-44 (citations omitted). "For the exclusionary rule to apply, the defendant must show, by a preponderance of the evidence: (i) a constitutional violation, and (ii) a causal nexus between the violation and the evidence sought to be excluded." *United States v. Torres-Castro*, 470 F.3d 992, 999 (10th Cir. 2006)).

Investigator Warrington testified that this search into the 2017 communications content was instrumental to determine the identity of the individual in the video. The identification of this individual was made only by searching the phone's 2017 communication history–a clear exploitation of the illegal search without any other means being utilized to determine the identity that was not in violation the Defendant's Constitutional rights. Therefore, the identification of the individual, along with all things directly flowing from that identification (information gathered in the interview of the individual, her testimony at trial, etc.) should be suppressed from use as evidence in this case.

IV. Unlawful Search of Phone Contents by Grand Island Police Department

Testimony by GIPD Investigator Steven Sloan established that he acquired a copy of the contents of the Defendant's cell phone from the Kearney Police Department on October 1st, 2018. He was also given a copy of the Kearney Search Warrant and Affidavit. A few days later, on October 10th, without first obtaining a separate warrant, Investigator Sloan

searched the contents of the Defendant's phone. The search was expansive; Investigator Sloan testified he searched through several different types of content, including videos, photos, text messages, browser history and call histories. Investigator Sloan testified that the purpose of his search was to investigate a potential sexual assault occurring in Grand Island in 2017. Investigator Sloan wrote a report detailing his findings.

Investigator Wade Wilson testified that he conducted another search of the Defendant's cell phone content on October 29th, 2018. Wilson testified that he assisted Sloan in further searching the cell phone. Investigator Wilson agreed that his search of the phone took place on at a time when the Kearney Search Warrant had expired. The purpose of this search was clearly for evidence relating to a sexual assault occurring in Grand Island in 2017. During this search, Wilson testified that he learned that the Gmail account associated with the phone was "jakemcgovern1981@gmail.com".

Both searches by Sloan and Wilson were a violation of the Defendant's Constitutional rights, as both searches were not done pursuant to a validly issued warrant.

If Grand Island law enforcement was relying on the Kearney Search Warrant to justify their search, the Defendant argues that reliance was recklessly misplaced. For starters, Grand Island's purpose and justification for searching the phone was wildly different than the supporting affidavit; the affidavit described an event in Kearney occurring on September 25, 2018 and described the need to investigate for evidence of a photo or video of that offense; Grand Island's search of the phone was premised on a separate offense, with

a separate victim, occurring almost a year prior. As discussed in the prior section of this brief, when law enforcement seeks to expand the scope of a search to include additional offenses, seeking a second warrant to do so is necessary. While the warrant discussed permission to search for evidence of unlawful intrusion, both GIPD officers testified that they were looking for evidence concerning a sexual assault.

Another sure-fire indication that Grand Island's pursuits into the Defendant's cell phone were clearly not justified under the banner of the Kearney Search Warrant simply comes from the Search Warrant itself. In the opening line, the Search Warrant is titled "To: Officer Brad Newell, Kearney Police Department, and officers under his direction:" and goes on to state that, "The above-named officer, or officers at his discretion, may examine the cellular phones . . . " (Exhibit #5). The warrant is clearly limited to the Kearney Police Department; the Grand Island Police Officers are not "under the direction" of Officer Newell.

This exact issue-separate law enforcement agencies sharing a Defendant's cell phone contents to serve as evidence for separate offenses-was recently encountered by the U.S. District Court in South Dakota in *United States v. Hulscher,* 4:16-CR-40070-01-KES (2017). In *Hulscher*, Huron law enforcement obtained a warrant to search Hulscher's cell phone for evidence of forgery and theft. Hulscher was facing separate federal firearm charges, so the agents in that second case obtained a digital copy of Hulscher's phone content, searched it, and then attempted to use that evidence at trial. The *Hulscher* court found that the second search by law enforcement was a violation of the defendant's constitutional rights.

While not a controlling opinion, the logic behind the Court's opinion in *Hulscher* is sound. The court did not accept the government's argument that the second search was pursuant to the initial search warrant. Since the initial search warrant was issued to find evidence of forgery and theft, a second search to find firearms evidence was not within the scope of the warrant. "Although the face of the warrant allows a search seemingly as broad as the government asserts . . . [i]f the warrant were truly as broad as government counsel interprets it for purposes of [the second] search, it would in fact be a "general warrant" and would be invalid on that basis." *Id*. The *Hulscher* court denied any good faith exception as the "the exclusionary rule does not apply 'when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate *and acted within its scope*." *Id*. citing to *United States v. Houston*, 665 F.3d 991, 994 (8th Cir. 2012). The court added that it would have been clear to law enforcement completing the second search that, "[a] reasonable officer who read the search warrant would have known that" the search warrant did not authorize them to search for firearm offenses and distinguished the case from *United States v. Ganias*, 824 F.3d 199, 206 (2nd Cir. 2016) (en banc), where law enforcement conducting a second search properly obtained a separate warrant.

In the case before the court, the warrant–directed specifically to Kearney Police Department-was premised on a search for evidence of an unlawful intrusion occurring in Kearney in 2018. The scope of the warrant did not include a search of the phone for the purpose finding evidence of a sexual assault offense occurring in Grand Island in 2017–interpreting

the warrant in this broad way would mean it is a general warrant. A reasonable officer reading through the search warrant and affidavit would have known that it did not give authority to search for a sexual assault offense occurring a year prior. While the State may argue that the evidence in Grand Island investigation also included the offense of unlawful intrusion, it should be noted that both GIPD officers testified that they knew were searching for evidence of a sexual assault. Additionally, GIPD was obviously not acting pursuant to the Buffalo County warrant–which can be clearly seen by GIPD's continued searching of the phone for evidence even after the warrant expired, and additionally Investigator Wilson's testimony that he had not been asked to look into the phone by the Kearney Police Department (disregarding the warrant's language directing the authority to search to Officer Newell and officers under his direction).

If the Court finds that actions of the Grand Island Police Department were a violation of the Defendant's rights by searching the cell phone content without a valid warrant, the cell phone evidence should be excluded from use at trial due in this case due to the violation of the Defendant's Constitutional rights.

V. Search Warrant for Google, LLC is a Fruit of the Poisonous Tree

For the reasons discussed above, the Defendant argues that the search of his cell phone by Grand Island Investigators was unconstitutional. This especially applies to Wilson's search, which occurred after the warrant had expired. During Wilson's testimony, he stated that he searched the phone on October 29th and learned that the Gmail account associated with

the phone was jakemcgovern1981@gmail.com. Investigator Wilson put in his Affidavit that "On 10/29/18, while reviewing the related forensic cell phone extraction of Jake McGovern's phone, your Affiant located evidence indicating Jake's Google Gmail address was associated with the mobile device" (Exhibit #6, page 5).

For Investigator Wilson to apply for a search warrant to Google, LLC on October 30th, 2018 (Exhibit #7) he had to have the correct Google or Gmail account associated with the phone. Having this information was critical to receiving the correct materials in response to the search warrant. To get this information, Investigator Wilson accessed the phone and searched it without a warrant. (Investigator Wilson stated that he could get email address information for people from the internet as well, however he admitted that it is not uncommon for individuals to have more than one email address or phone number, so he could not know if that same email or phone number was tied to the phone in question).

If the Court finds that GIPD violated the Defendant's constitutional rights in performing their search, the second search warrant to Google LLC and any information gathered therefrom should be excluded as a fruit of the poisonous tree. Clearly, Wilson's search of the phone on October 29th was critical to reveal the information that he needed to determine what account was linked to the phone, which enabled him to get the correct information from Google. The Defendant has demonstrated a causal nexus between the violation and the evidence sought to be excluded.

VII. Collateral Estoppel/Res Judicata

The Defendant requests that the State's Motion to Quash on the basis of res judicata and collateral estoppel be denied.

> "Claim preclusion, which we have referred to in the past as "*res judicata*," bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication. Issue preclusion, which we referred to in the past as collateral estoppel, bars relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate. Claim preclusion bars litigation of any claim that has been directly addressed or necessarily included in a former adjudication, as long as (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.[12] Claim preclusion bars litigation not only of those matters actually litigated, but also of matters which could have been litigated in the former proceeding.[13] It is founded on a public policy and necessity that litigation be terminated and a belief that a person should not be vexed more than once for the same cause.[14] Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in

> privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[15] Issue preclusion applies only to issues actually litigated" *State v. Marrs*, 295 Neb. 399, 888 N.W.2d 721, (2016)

The Defendant argues that neither of these doctrines should be allowed to apply offensively against the Defendant in this case.

First, the issues in each motion to suppress are not identical. The Order from the Buffalo County Court (Exhibit #2), identified that the Defendant's motion to suppress concerned the allegations that 1) "the search was too broad in scope" and 2) "that there was not probable cause to search for and obtain the items listed above" (referring to the "owner", "recent history of web browsing" and "videos of a female that was incoherent or asleep"). This would include the issues presented by the Defendant in regards to Part II of this brief (probable cause) and Part IIIA (exceeded scope of search by searching the 2017 videos). The issue of the search warrant's scope (Part I-particularity and overbreadth) were not mentioned as being a grounds for suppression that was litigated or decided.

Additionally, there are several items in the Defendant's present motion to suppress that would not have been relevant or been able to be addressed in the Buffalo County motion to suppress. This includes the Defendant's grounds for suppression in Parts IV and V of this brief, that are concerned with the interactions of the Grand Island Police-which would not be relevant to the Kearney offense, nor be grounds for suppression of evidence in that case. Additionally, this would include Part IIIB of this brief concerning

law enforcement's continued search of the cell phone to identify the female found in the 2017 videos. The identification of this person was of no relevance to the Kearney prosecution and would not be grounds for suppression of evidence pertaining to that case. For these suppression grounds, there was no an opportunity to fully and fairly litigate these issues because they were irrelevant to the Buffalo County prosecution.

Concerning the issues that were actually decided in the Buffalo County Court-probable cause and exceeding scope of search when viewing certain videos-the Defendant argues that he should not be prevented from requesting an evidentiary ruling on these issues pending in Hall County in this separate prosecution.

It should be noted that there is no case law in Nebraska concerning the appropriateness of the State's offensive use of these doctrines to estop a Defendant bringing a motion to suppress in a separate prosecution. It should also be noted that the Buffalo County Court is an inferior court to the Hall County District Court and its decisions are non-binding on the District Court.

Next, the Defendant argues that a court's denial of a Defendant's motion to suppress is not a "final judgment on the merits". A defendant cannot seek an interlocutory appeal on the issue because it is not a final judgment. *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987). The Court can reconsider the same evidentiary issues at a trial. *State v. Pope*, 192 Neb. 755, 224 N.W.2d 521, (1974). *See*, *e.g. Commonwealth v. Ringuette*, 819 N.E.2d 941, 443 Mass. 1003, (2004) (finding that "a defendant cannot obtain interlocutory appellate review of the denial of a motion to suppress . . . [a]ccordingly, the denial of the defendant's

motion to suppress was not a final judgment for collateral estoppel purposes.") The Defendant further argues that, when he entered a plea to reduced charges in the Buffalo County case, that does not suddenly turn the motion to suppress ruling to a final judgement on the merits, as those suppression issues have not been subjected to a "final judgment on the merits" such as a trial. By entering a plea, the Defendant simply waived his right to contest those issues in that specific case.

Further-there had not been a final judgment in the Buffalo County case at the time of the Hall County suppression motion. "In a criminal case, the judgment is the sentence. The trial court must pronounce sentence before a criminal conviction is a final judgment." *State v. Wilson*, 15 Neb.App. 212, 724 N.W.2d 99, (2006). If it is the State's position that the Buffalo County motion to suppress has become a final judgment, then at the time the Defendant's Hall County motion to suppress was heard, his Buffalo County case had not reached a final judgment.

Regardless, the Court should deny the use of these doctrines offensively against the Defendant in this circumstance. "We agree that courts should more closely examine the prerequisites of the estoppel doctrine in the context of criminal cases" *U.S. v. Rosenberger*, 872 F.2d 240, 242 (8th Cir. 1989). Many courts have recognized that, in a criminal case, the paramount concern of fairness to the accused often trumps the rationale for applying estoppel. *See*, *e.g.*, *People v. Plevy*, 417 N.E.2d 518, 521-22 (N.Y. 1980) (noting that the doctrine of collateral estoppel "is less relevant in criminal cases where the pre-eminent concern is to reach a correct result and where other considerations peculiar to

criminal prosecutions may outweigh the need to avoid repetitive litigation"); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1170 (5th Cir. 1981) (noting that "considerations of fairness are of great importance" in criminal cases in regards to offense use of collateral estoppel); *Cook v. State*, 921 So.2d 631, 636 (Fla. Dist. Ct. App. 2005) ("Although the doctrine of collateral estoppel has been applied in criminal cases, application of the doctrine in the criminal context raises special concerns"). Put simply, before exposing a person to a loss of life, liberty or property, the notion of ensuring that improperly obtained evidence is not used to convict is paramount to any benefit that the doctrines provide, such as "conservation of judicial resources and the avoidance of repetitive litigation" *People v. Page*, 614 N.E.2d 1160, 1167 (Ill. 1993).

Additionally, the Defendant is facing a single misdemeanor count in Buffalo County. In Hall County, he faces multiple felony charges. Several courts have realized a Defendant's increased incentive of fully litigating a motion to suppress due to more serious charges should enter into the analysis of whether estoppel applies. *See United States v. Levasseur*, 846 F.2d 786, 795 (1st Cir. 1988); *Pleavy*, *supra*; *See also*, *Commonwealth v. DeJesus*, Nos. 104104-104118 (Mass. Super. Ct., 1998) (finding that collateral estoppel should not prevent a second motion to suppress when the charges had dramatically increased from possession of a handgun in the first case, to armed robbery in the second case, out of fairness to the accused).

It should also be considered in this case, as the Court is aware from Newell's affidavit, that the digital evidence subject to suppression was not the basis for the charge in Buffalo County-there were no recordings

or videos of the event located on the phone. Based off of Newell's affidavit, the Court is very aware that it possible the State could obtain a conviction in the Kearney case based off the eyewitness testimony alone– making the incentive of the Defendant to hold a trial in order to appeal the ruling on the Buffalo County motion to suppress a low priority in that particular case. The court should also consider a Defendant may have limited resources to fight the issue on all fronts, especially when the fight in Buffalo County may not have garnered different results overall.

Finally, as the benefits of the estoppel doctrines are mainly for "conservation of judicial resources and the avoidance of repetitive litigation" *Page*, *supra*, the Defendant would note that his motion to suppress has already been heard in Hall County. To apply the doctrines of estoppel in this scenario would not justify the purported benefits, and would only serve to severely cripple the rights of the Defendant to be free from illegal searches, if indeed an illegal search took place. The Court should decide the motion on its merits, rather than foreclosing a criminal defendant's sole avenue of relief to be free from illegal searches.

For these reasons, the Defendant prays that the State's Motion to Quash be denied.

Jake J. McGovern, Defendant

By: _____

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DEFENDANT'S BRIEF IN SUPPORT OF SECOND MOTION TO SUPPRESS (AUGUST 2020)

IN THE DISTRICT COURT OF HALL COUNTY, NEBRASKA IN AND FOR THE NINTH JUDICIAL DISTRICT

STATE OF NEBRASKA,

Plaintiff,

v.

JAKE J. McGOVERN,

Defendant.

Case No. CR19-252

The Defendant requests the Court to suppress from use at trial all evidence gathered from the Defendant's cell phone.

I. Due to the Constitutional Violations that Occurred During the Initial Searches of the Defendant's Cell Phone, the Exclusionary Rule Should Operate to Exclude from Trial All Evidence Found on the Defendant's Phone

The Defendant requests that all evidence obtained pursuant to the Second Search Warrant be suppressed from use at trial by operation of the exclusionary rule.

In its' Order dated March 9th, 2020, the Court found the Defendant's Constitutional Rights were violated by the overreaching search of the Defendant's phone and that therefore, suppression was granted "as to any evidence gathered based upon the Buffalo County search warrant" and the later search warrant for the Defendant's Google account. The State did not appeal this decision. The exclusionary rule dictates that this evidence be excluded from use at trial.

> "The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search." *Murray v. United States*, 487 U.S. 533, 536, (1988). "The exclusionary rule prohibits the admission of physical and testimonial evidence gathered illegally. One purpose of the exclusionary rule is to compel respect for the constitutional guaranty by removing the incentive to disregard it. *State v. Bray*, 297 Neb. 916, (Neb. 2017) "Its purpose is to deter police misconduct." *State v. Hatfield*, 300 Neb. 152 (2018).

During the execution of the First Search Warrant, the Defendant's Constitutional Rights were violated. These violations were clear, flagrant and repeated, involving separate violations by two law enforcement agencies on numerous occasions. All searches of the Defendant's phone with the purpose of investigating the 2017 Hall County offense were not done pursuant to a warrant, but far beyond the warrant's (already overbroad) scope.

The continuous Constitutional violations that occurred should bar the evidence from use at trial by

operation of the exclusionary rule. Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *State v. Allen,* 269 Neb. 69 (Neb. 2005) quoting *United States v. Calandra*, 414 U.S. at 338 (1974). The Second Search Warrant Affidavit and Search Warrant simply seeks the same information that was previously illegally obtained to now become admissible because law enforcement–554 days after seizing the cell phone, after repeated Constitutional violations, and after suppression–have now decided to abide by the Constitution.

To allow the evidence to now be used by the State would promote disrespect for Constitutional rights, promote disrespect for the warrant requirement, and effectively "reduce[] the Fourth Amendment to a form of words." *Silverthorne Lumber Co., Inc. v. United States*, 40 S. Ct. 182, 251 U.S. 385, 64 L.Ed. 319, (1920). Allowing the evidence to be freed from suppression would defeat the purpose of the exclusionary rule-the Constitutional violations have already occurred and law enforcement should be deterred from its misconduct: the evidence was suppressed because law enforcement did not seek the second warrant when the Constitution required it.

II. The Second Search Warrant is not an Independent Source

The State is likely to argue that the Second Search Warrant is an independent source in order to get around the prior exclusion ruling. The independent source doctrine was first developed by the Supreme Court in *Murray v. United States*, 487 U.S. 533 (1988).

In *Murray*, law enforcement had developed probable cause that marijuana was being stored in a warehouse after they had conducted a traffic stop of a vehicle leaving the warehouse. Prior to getting a warrant, law enforcement went to the warehouse, forced entry, and peered inside, finding covered bales. Officers did not disturb the bales or perform any further search; instead officers stood by and waited for a warrant. The warrant application did not mention the marijuana found in the warehouse and it was granted the same day. The Supreme Court in Murray held:

> "The ultimate question, therefore, is whether the search pursuant to warrant was, in fact, a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Murray v. United States*, 487 U.S. 533, 542 (1988).

The Court in *Murray* remanded the case, as the lower court did not "explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse." *Id.* at 543. *Murray* cautioned it was not endorsing the use of the independent source doctrine in cases where law enforcement utilizes a "search first, warrant later" mentality. *Id.*, fn 2.

The burden of proof rests on the government to prove both (1) that the decision to seek the warrant was independent of the unlawful entry (*i.e.*, that police would have sought the warrant even if the unlawful

entry had not occurred) and (2) that the information obtained through the unlawful entry did not affect the magistrate's decision to issue the warrant. *See United States v. Wright,* 739 F.3d 1160, (8th Cir. 2014); *United States v. Khabeer*, 410 F.3d 477, 483 (8th Cir. 2005).

The Defendant argues that neither of the two requirements of the independent source doctrine have been met in this case.

A. Law Enforcement's Decision to Seek the Second Warrant was Tainted by the Prior Illegal Search

The first requirement of the *Murray* test deals with the motivations of law enforcement. To that end, Murray first asks whether "the agents' decision to seek the warrant was prompted by what they had seen during the initial entry". Second, *Murray* places the need for a specific finding that "the agents would have sought a warrant if they had not earlier [illegally] entered". *Id*. at 542-3.

Was law enforcement's decision to seek the warrant prompted by the fruits of the illegal search? "What counts is whether the actual illegal search had any effect in producing the warrant". *United States v. Craig*, 630 F.3d 717, 722 (8th Cir. 2011) (underline added). In the present case, it is dubious to claim that the knowledge gathered by law enforcement during its illegal search and ensuing investigation based on that illegal search did not *somewhat* contribute to the decision to seek the Second Search Warrant over a year and a half later. Certainly, by the time the second warrant was applied for in March, 2020, Investigator Warrington was fully aware that the female in the videos (whom he identified by illegally searching the

phone) had been interviewed, shown still-frames of the videos (which were obtained by law enforcement accessing the phone again without a warrant), and had revealed to law enforcement where the events in the videos occurred and importantly, were not performed with her consent. The offense had been completely investigated-law enforcement had now identified a victim, jurisdiction, and established needed elements to charge an offense. It therefore becomes a very difficult position to say that law enforcement's knowledge-obtained by use of information gained by their illegal search-did not influence, at least in part, their motivation to apply for the second search warrant.

The Court in *Murray* noted that it would be "difficult to establish" that law enforcement's decision to seek a warrant was genuinely independent of the illegal search in cases "where the seized goods are kept in the police's possession". *Id.* at 541. This case goes a step further–the seized goods have not only been kept in police possession since seizure, but also the fruits of the illegal search have been utilized to conduct a full investigation into the matter, well prior to the second warrant application.

Would law enforcement have sought a second warrant if not for their illegal search? The record is straightforward: law enforcement never sought a second warrant to search the cell phone, nor had any intention to do so, for over a year and a half after the initial search into the phone, and not until after the evidence had been suppressed. Investigator Warrington did not seek a second warrant at the time he discovered the videos, a fact that indicates that he was not

prompted *solely* by his observation of the videos alone to seek a second search warrant.

When, exactly, law enforcement developed an intention to seek a warrant is an important consideration when trying to sort out the question of whether law enforcement would have sought a warrant in absence of their illegality. For example, in *State v. Beeken*, 7 Neb.App. 438, (1998), the court found that law enforcement's decision to seek a warrant prior to the illegal entry was key to an independent source: "Since the evidence clearly and undisputedly shows the police had determined to apply for a warrant before the entry and that the entry was made, there is no other issue to address, as recognized by Murray." *Id*. at 452 (underline added) (items seen during protective sweep of residence after announcing intention to seek warrant found admissible). In *State v. Smith*, 207 Neb. 263, 298 N.W.2d 162, (1980), the Court found an independent source applied to a search when police, armed with a search warrant, arrested and searched the Defendant prior to having probable cause to do so, focusing on the fact that, "The search warrant had already been issued based upon independent sources and information and was, therefore, unrelated to the warrantless arrest" (underline added). In most every case in Nebraska Courts and the 8th Circuit where independent source is applied, a warrant is sought relatively close in time to the illegal search.

"When the government seeks to rely on the independent source doctrine in a case involving a later-obtained warrant, it should present specific evidence that the officers were not prompted by allegedly unlawful activity to obtain the warrant, and should seek a finding on that point from the district court."

U.S. v. Leveringston, 397 F.3d 1112, 1115 (8th Cir. 2005). This inquiry goes beyond the question of what was merely presented to the magistrate in the supporting Affidavit. *See Id.* The State has not met their burden in this regard, presenting little to no specific evidence to show that officers were not prompted by their illegal searches (and the information gained as a direct product of their illegality), in their decision to seek a second warrant. The Defendant's recollection is that Investigator Warrington did not even testify that he would have sought a warrant independent of the illegal searches–perhaps because this would strain credibility, given the nature of the case. The long passage of time between the illegal search and the second warrant application, and the information developed by law enforcement derived from their illegality during that time, strongly suggests that law enforcement would not have sought a search warrant based solely on untainted information. To sort out whether law enforcement's motivations were solely independent of the illegal search is a question that is, at best, completely muddled and indecipherable at this point–an issue caused by how law enforcement proceeded with their investigation–and that inquiry should be resolved in favor of the Defendant.

This is clearly a case of "search first, warrant later" that was warned about by the Court in *Murray*. Comparing the present case to *Murray*-where law enforcement peeked in the warehouse but went no further, an action that was arguably, as noted by the Court, to prevent the destruction of evidence. *Murray* at 543. In this case there is no such exigency, and thus, no reason for law enforcement to cite to in order to search into the phone's 2017 data before seeking a

second warrant. Additionally, to liken the case to *Murray*, the officers here did the equivalent of walking into the warehouse, conducting a full search (Inv. Warrington's search of the phone), and then later re-entering the warehouse to remove items (Inv. Weller's creating still frames of the videos to use in interviews), and then using that evidence to further develop the case and chase down leads to answer critical questions (jurisdiction, witness, consent issue). Then, later, law enforcement invited another agency to the warehouse to come search (Grand Island law enforcement's searches of the phone). Even in *Murray*, where law enforcement promptly stopped what they were doing and sought a warrant immediately, the Court could not determine the question of whether law enforcement was motivated to seek a warrant due to the illegal entry, and the case was remanded. If law enforcement in *Murray* had taken all these additional steps, a claim that the illegality did not in any way motivate the decision to seek a warrant over 500 days later presents a very murky proposition.

It is significant that law enforcement sought a second warrant only after the evidence was suppressed in this case. Defendant is unaware of any Nebraska jurisprudence, Nebraska District Court decision, or 8th Circuit case that extends the independent source doctrine to evidence that has already been suppressed.

It is also significant that the government's offered "independent source" is in reality, simply law enforcement exercising a do-over of their exact constitutional violation that led to suppression. In *State v. Evans,* 223 Neb. 383, 389 N.W.2d 777, (Neb. 1986), the Court, when speaking about independent source found, "[a]n analysis of Silverthorne, Nardone, and Wong Sun discloses

that the Court was considering evidence actually discovered by two entirely independent investigative activities" (boldtype added). The procdure employed by law enforcement is not a separate investigative activity, genuinely independent of the illegality, but instead a "re-do" in reaction to the suppression, based along the same line of investigation that led to suppression, to fix the exact unconstitutional behavior that led to suppression.

The State will likely cite to *United States v. Hanhardt*, 155 F.Supp.2d 840, (N.D. Ill 2001), a decision from the Northern District of Illinois, for support in justifying the second search warrant. *Hanhardt* respresents the sole case found by the Defendant that has allowed an independent source to be applied after suppression. However, *Hanhardt* is a non-binding decision that extends the use of the independent source beyond our jurisprudence. *Hanhardt* can be distinguished from the present case for several reasons: First, the court in *Hanhardt* noted a lengthy investigation into the Defendant prior to the illegal conduct, finding that the search warrant affidavit "contained a wealth of information to support probable cause, all of it preceding the February 23, 1999 search. . . . and all of it stemming from the Government's lengthy investigation . . . " including prior-developed sources (informants) that independently established probable cause to search. This obviously supported the idea in *Hanhardt* that law enforcement was not motivated by the illegal search in their independent source analysis, and proved they had a truly independent source. However, that is not the situation in the present case, and importantly, the illegal search in the present case was used to build an investigation (unlike Hanhardt,

where the investigation was fully underway and other lines of investigation amounted to probable cause), thus making the question of law enforcement's motivations in seeking a second search warrant much more complicated, since their illegality led law enforcement to critical information. Second, the Hanhardt court distinguished cases where police acted with abandon or "assumed the role of the neutral magistrate" *Id.* at 850. The Defendant argues that is exactly the case here-law enforcement assumed the role of a neutral magistrate by determining they had probable cause to search for additional offenses and never seeking judicial approval to do so. And with multiple searches into the phone by multiple agencies in order to fully investigate a more serious offense not contemplated by the inital warrant, it can be said law enforcement acted with abandon.

In sum, due to the circumstances of this case, when determining the question of law enforcement's motivation in securing a second search warrant, there are reasonable grounds to believe that the decision was tainted by what law enforcement learned by exploiting their illegality. The State has not met its burden to show that the decision was completely independent of the prior illegal search and the fruits that flowed from it.

B. Information Obtained Pursuant to the First Illegal Search was Presented to the Magistrate in the Second Search Warrant

The second part of the *Murray* test asks to determine whether the Second Search Warrant is an independent source requires a determination of whether "information obtained during [the illegal] entry was

presented to the Magistrate and affected his decision to issue the warrant". *Murray* at 543.

1. Lack of Particularity in First Search Warrant

The Defendant renews his argument, based upon additional evidence elicited during the Defendant's Second Motion to Suppress hearing, that the initial Search Warrant from September, 2018, lacked sufficient particularity. "The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Massachusetts v. Shepard*, 468 U.S. 981, n. 5 (1984). Since the 2018 Search Warrant lacked particularity, any search and information resulting therefrom was unconstitutional. Therefore, the Second Search Warrant Affidavit, which contains information gathered pursuant to the unparticular warrant, therefore fails the requirement from *Murray* that information obtained from the illegal search not be presented to the Magistrate.

The purpose of the Fourth Amendment's warrant requirement is to ensure "searches deemed necessary should be as limited as possible." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). "[T]he specific evil" is the 'general warrant' abhorred by the colonists, and the problem is not the intrusion per se, but of a general, exploratory rummaging in a person's belongings." *Id.* at 467; *see also State v. Sprunger*, 283 Neb. 531, (2012); *Arizona v. Grant*, 556 U.S. 332, 345 (2009) ("[T]he central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects."). The Constitution limits law

enforcement to search only "the specific areas and things for which there is probable cause to search," and requires that "that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

"[T]he particularity requirement of the Fourth Amendment protects against open-ended warrants that leave the scope of the search to the discretion of the officer executing the warrant, or permit seizure of items other than what is described. A warrant satisfies the particularity requirement if it leaves nothing about its scope to the discretion of the officer serving it . . . That is, a warrant whose authorization is particular has the salutary effect of preventing overseizure and oversearching." *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616, (2014) (citations omitted).

Additionally, when it comes to search of digital data, there is a heightened sensitivity to the particularity requirement. Due to a personal computer's ability to store a huge array of personal papers in one place, this "makes the particularity and probable cause requirements all the more important." *Sprunger*, *supra* at 541. "The Fourth Amendment's particularity requirement must be respected in connection with the breadth of a permissible search of the contents of a cell phone." *Henderson, supra* at 289.

Regarding cell phones, the Nebraska Supreme Court has held, "a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search."

Henderson, *supra*. "A search warrant may be sufficiently particular even though it describes the items to be seized in broad or generic terms if the description is as particular as the supporting evidence will allow . . . The degree of specificity required depends on the circumstances of the case and on the type of items involved." *State v. Goynes*, 303 Neb. 129 (2019) (citations omitted, boldtype added).

Turning to the case at hand, the initial Search Warrant Affidavit from September, 2018 (Exhibit #4), sets forth plainly what law enforcement believed they had probable cause to search for within the phone-which was in reality a very narrow slice of the phone's contents. The Affidavit, investigating a "window peeping" incident in Kearney, mentioned a need to search for "photographs and or video of Grube in a state of undress" and "evidence of the subscriber of the cellular telephone" (Initial Search Warrant Affidavit, Exhibit #4, Paragraph #7). However, the initial Search Warrant did nothing to limit the scope of the search-other than to state that the phone could be searched for "evidence relating to the offenses of Unlawful Intrusion" (Exhibit #5).

The first problem with the first warrant's particularity is that the term "offenses" is used, when law enforcement was only investigating a single offense; thus, the warrant invited a wide-ranging search for any unlawful intrusion offenses, occurring at any point in time, despite a lack of probable cause to believe there would be evidence multiple offenses found.

Additionally, the term Unlawful Intrusion as codified at Neb. Rev. Stat. § 311.08 covers a range of five separate offenses, ranging from misdemeanors to

class II felonies. The warrant's sole limitation to search for "offenses of Unlawful Intrusion" did little to limit the scope of the search, but rather actually expanded the authority to search for evidence of other offenses that were unsupported by probable cause.

At the heart of the particularity issue is that the initial Search Warrant lacks any limitation as time frame of the offense to be investigated, nor was there any specificity or description to set forth what exactly law enforcement could search for and seize. Even though law enforcement sought the warrant under the guise of searching for a single offense occurring on September 25th, 2018, and premised the need to search for "photographs and or video of Grube in a state of undress"–the warrant did not impose any such limitations on the search. The Nebraska Supreme Court's holdings that the warrant's description as to items to be seized must be "as particular as the supporting evidence will allow" and limited to "allow a search of only that content that is related to the probable cause that justifies the search" were clearly violated. Given the circumstances of his particular case and the limited items law enforcement had set forth probable cause to search for in their Affidavit, a more narrowly tailored Search Warrant was not only easily achievable, but necessary to comply with the Constitution.

Several other courts, when faced with similar factual scenarios of search warrants involving digital data, have found a search warrant to lack particularity if it does not set forth temporal limitations or at least describe the items to be seized in an effort to narrow the parameters of the search, when it is possible to do so. *See*, *e.g.*, *State v. Keodara*, 191 Wn.App. 305, 364

P.3d 777, (2015) (finding cell phone warrant invalid when it failed to "limit the search to information generated close in time to incidents for which the police had probable cause"); *United States v. Winn,* 79 F.Supp.3d 904, (S.D.Ill. 2015) (invalidating warrant, finding "the warrant should have specified the relevant time frame. The alleged criminal activity took place on one day only [. . .] and the police were looking for photos or videos taken that same day.") *Winn* also found fault with the warrant for using the term "videos" and not specifying a description of the videos being sought: "This is not a case where the police needed to browse through hundreds of photos and videos to find what they were looking for because [law enforcement] knew the precise identity and content of the photos/videos sought [. . .] For example, the warrant could have described the location of the incident as well as the subjects of the images." *Id.* at 921; *State v. McKee*, 3 Wn.App.2d 11, 413 P.3d 1049, (2018) (invalidating cell phone warrant with no temporal limitation); *State v. Castagnola*, 145 Ohio St.3d 1, 19 (2015) (invalidating digital search warrant when it used broad terms rather than specify exactly what was being sought, "[T]his degree of specificity was required, since the circumstances and the nature of the activity under investigation permitted the affiant to be this specific."); *United States v. Mann*, 593 F. 3d 779, (7th Cir. 2010), upholding warrant as particular where warrant authorized police to search for "images of women in locker rooms or other private areas", thereby sufficiently detailing the scope of the search); *State v. Thomas*, No. 78045-0-I, 10 (Wash. Ct. App., 2019) (finding warrant particular despite having no date restriction because items sought were specifically detailed: "The provision at issue lacked a date

restriction but included a data restriction that limited the search only to images depicting D.C., K.H., K.H.'s apartment building, or "any parts of a male or female that could be" K.H. or D.C."); *United States v. Shipp*, 392 F.Supp.3d 300, (E.D.N.Y. 2019) (noting particularity concerns with warrant seeking electronic data with no temporal limitation when "it would appear to have been feasible to include such a limitation"). Even in Nebraska, it has been demonstrated for decades that law enforcement is capable of narrowly tailoring a digital search by clearly describing the evidence to be seized from a computer, *see*, *e.g.*, *State v. Spidel,* 10 Neb.App. 605, (Neb.App. 2001) warrant particularly describing the object of the search as "photographs depicting nude and partially nude young adolescent females located in the residence and/or stored on computer(s) owned by the suspect".

In the case before the Court, given the initial Search Warrant's utter lack of particularity, (coupled with the fact that the warrant set forth every single category of data to be found on a cell phone to be seared-*i.e.* calendar entries, call logs, address books, etc.-leading the Court to find the warrant overbroad after the first motion to suppress)–it becomes obvious that the Search Warrant lacks any real constraints on law enforcement and instead reads to support a search of every virtual byte of the phone.

The initial Search Warrant is a general warrant, and it was treated by law enforcement as such. The incredibly important testimony from Investigator Warrington at the Second Motion to Suppress hearing is a testament to the unparticularity of the warrant-he himself viewed the 2018 Search Warrant as a general warrant. Investigator Warrington testified that he

took the first warrant to allow for a search of the phone for offenses of unlawful intrusion occurring at any place and at any time, despite being fully aware the initial Search Warrant Affidavit described only a single offense in Kearney occurring on a single day. Investigator Warrington also testified that if he saw a video that contained nudity he would watch it, even though he could rule out that it was a video of the Kearney offense, in order to determine if it was a separate offense involving unlawful intrusion.

The Defendant would argue that the lack of particularity in the initial Search Warrant is extremely key in this case, because the unparticularized and expansive warrant was the source of the later, additional violations: As proven by Warrington's testimony, the warrant was so permissive that law enforcement felt emboldened to use it as general warrant. If the warrant had set forth search parameters in any meaningful way, law enforcement would have been required to take at least minimal steps to reign in their search; instead, law enforcement used the expansive warrant as tacit approval dig through the phone to fully investigate other offenses.

When a warrant lacks particularity, the next step is to determine whether the good faith exception nevertheless applies. The Defendant would refer the Court to the Defendant's first brief for a more detailed argument of why good faith is not applicable in this case (Defendant's Brief in Support of Motion to Suppress, page 16). Essentially, good faith should not apply in this case because "the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid." *Henderson*, *supra* at 291. It

should have been extremely obvious to law enforcement that the initial Search Warrant was a total mismatch to the Affidavit's supporting grounds to search. Investigator Warrington testified at the Second Motion to Suppress that he was aware that the initial Search Warrant Affidavit only set forth a basis to search for limited items relating to a single offense occurring on September 25th, 2018. Investigator Warrington, however, also testified that he viewed the warrant as authorizing much more expansive search of the phone contents for any offense of unlawful intrusion occurring at any place or time.

"Officers are assumed to have a reasonable knowledge of what the law prohibits." *Henderson, supra.* at 291 (citations omitted). Law enforcement should be expected to know that "a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search", (a clear guideline from our Supreme Court issued four years prior to this search)-especially a cell phone forensic investigator for law enforcement who performs hundreds of cell phones searches a year.

Cutting further against any good faith argument is the nature of how law enforcement came about having such a general warrant. Law enforcement's actions reveal unclean hands. After using a general template for the second half of the first search warrant affidavit, describing in generalities how cell phones work and requesting to search the entire phone, law enforcement then presented a unspecific, general template warrant to the magistrate (testimony established this template was routinely used by Kearney law enforcement as a "one size fits all" warrant in

almost every cell phone case)-law enforcement made no effort to narrow the scope of the warrant to the grounds set forth in the Affidavit to make the warrant particular. The Affidavit speaks for the need to search the phone for limited items, but once the warrant was signed, law enforcement then recklessly chose to interpret the warrant as authorizing an expansive search for other potential offenses not supported by probable cause. In this case, it cannot be said that law enforcement acted "in objectively reasonable good faith in reliance upon the warrant" *Henderson, supra*. Negligence by law enforcement led to the problem and law enforcement were well aware the warrant was not limited to the probable cause set forth in the accompanying Affidavit.

Finally, when considering good faith, it is important to look at how law enforcement used the warrant to search and seize. In this case, law enforcement clearly abused the broad nature of the warrant by performing a full investigation of other offenses. In *Henderson*, the Nebraska Supreme Court found the warrant to be unparticular, however, the Court extended the good faith exception. A big part of the rationale for extending good faith in *Henderson* was that there was "no indication that the police used the warrant to conduct a search for evidence other than that related to the shootings investigation. The evidence that the officers obtained and that the State offered at trial was limited to evidence that was relevant to the shootings under investigation." *Id*. at 289. The same cannot be said in the present case, as law enforcement abandoned their investigation into the Kearney offense and instead used the warrant's lack of particularity to search for and fully investigate other

offenses, and now the State intends to use that evidence at trial–quite literally the opposite of the situation on which *Henderson*'s good faith analysis was based.

While there are other reasons that good faith should not be employed in this case (as explored in the Defendant first brief), the fact that law enforcement knew the warrant was defective and unparticular on its face is extremely clear, and sets forth adequate reason why good faith should not be applied. Every step of the way, law enforcement acted with recklessly by choosing to not edit their "template warrant" to fit their case, and by their and lack of attention to this requirement, law enforcement was graced with a warrant that they knew went much farther than their stated probable cause. Armed with a general warrant, law enforcement then chose to use it as one, scouring the phone for additional offenses.

Because the warrant was clearly unparticular, and because law enforcement did not act in good faith, all evidence flowing from the initial search of the cell phone was obtained illegally. "[A] search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Massachusetts v. Sheppard*, 468 U.S. 981, 988 (1984), fn. 5; *see also State v. Castagnola*, 145 Ohio St.3d 1, 46 N.E.3d 638 (2015). "[T]he only remedy for a general warrant is to suppress all evidence obtained thereby." *United States v. Yusuf*, 461 F.3d 374, 393, 48 V.I. 980 (3d Cir. 2006) (citing *United States v. Christine*, 687 F.2d 749, 758 (3d Cir. 1982) ("It is beyond doubt that all evidence seized pursuant to a general warrant must be suppressed"). Therefore, any evidence obtained from the Second Search Warrant

should be denied from use at trial, as the Second Search Warrant Affidavit (Exhibit #13) is wholly supported by information gathered from the first search of the phone under a general warrant. *Murray*'s test requiring that information from the initial illegal search was not presented to the magistrate has not been satisfied.

2. Investigator Warrington's Continued Viewing of Videos that were Clearly Unrelated to the Kearney Investigation was Unreasonable; Therefore, the Second Search Warrant Affidavit Contains Information that was Gathered by an Illegal Search

While the Court found it was proper for Investigator Warrington to play the videos in question during the initial search, the question of how much of those videos he should have played has now become relevant, based on the information provided in the Second Search Warrant Affidavit. In the Second Search Warrant Affidavit, Investigator Warrington states that he "observed several videos containing a female in a state of undress, appearing to be unconscious, and unable to consent to these videos that were being taken" (Second Search Warrant Affidavit, Exhibit #13, Paragraph 3). However, on examination, Officer Warrington admitted that, in each video that was played in Court, after a short time he was able to determine that the video was not a video of the 2018 Kearney offense that he was investigating. This is immediately clear, as each video is shot close-up in what appears to be a bedroom-very obviously not a video taken from outside a window into a bathroom as described as the target of the search in the first Affidavit. However, Investigator Warrington continued to watch the videos past this point, despite knowing

full well that they were not a video of the Kearney offense. Investigator Warrington testified that he felt the need to watch the video, even though it was not a video of the Kearney offense, because it contained nudity and he needed to continue watching to determine whether this was a separate offense of Unlawful Intrusion.

On the portions of the videos shown in Court, there is no evidence of a female being unconscious prior to the point that Investigator Warrington testified that he was able to determine each video was not of the Kearney offense he was investigating. Investigator Warrington's continued search of the videos was unreasonable at this point and beyond the probable cause to search as set forth in the initial Search Warrant Affidavit. Therefore, Investigator Warrington's statement in the Second Search Warrant Affidavit that he viewed a female "appearing to be unconscious and unable to consent" is information gleaned from an illegal search, thus failing *Murray's* independent source test that information obtained pursuant to the illegal search not be presented to the Magistrate.

In essence, Warrington's testimony proves that he did not stumble upon evidence of the separate offense in plain view. "The plain view doctrine permits police officers to seize an object without a warrant if they are lawfully in a position from which they can view the object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object." At the point it became apparent each video was not of the offense under investigation, the investigator was no longer lawfully in a position to continue to view the video. Also, at this point in the videos, nudity could be seen but nothing

incriminating was immediately apparent. Investigator Warrington had no reason to keep watching except to stoke his curiosity of whether he might find evidence of a different offense.

"[T]he ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 573 U.S. 373, 381-82 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). The continued viewing of the videos in question was unreasonable, given the circumstances in this case. As discussed at the first motion to suppress, Investigator Warrington, a forensic expert, had substantial reason to expect that the videos in question had nothing to do with the Kearney investigation from their outward appearances alone: the videos at issue were all titled with year/month/day format, (which Warrington referred to as "date stamps" in his report) and all titles suggested the videos in question had been created in 2017; the metadata on each video (such as creation date and last modified date) did not suggest the any of the videos were created on September 25, 2018, the date of the Kearney offense; additionally, each video was accompanied by several "thumbnail" images that essentially gave an extended preview of each video, which Warrington testified at the first motion to suppress were not consistent with the Kearney offense he was investigating. While the Defendant does not intend to relitigate these points, it should be noted that prior to playing the videos, ALL the external information Investigator Warrington had available to him strongly suggested to the videos were not related to the Kearney offense and in fact, was created almost a year prior.

The Defendant recognizes that there is always an argument that video titles, metadata, and thumbnails

could be modified by the user in an attempt to conceal data (no matter how low of a possibility that was under the circumstances of this case.) If law enforcement must view the videos to rule them out, then the authority to continue viewing the videos must end when it becomes apparent the videos are not in relation to the investigation and probable cause set forth.

This notion is not new. For example, in *United States v. Heldt*, the court discussed law enforcement's search through a file cabinet, allowing a "brief perusal" of each document, and requiring that "the perusal must cease at the point of which the warrant's inapplicability to each document is clear." *United States v. Heldt*, 668 F.2d 1238, 1267 (D.C. Cir. 1982). Heldt also found that a document could be seized only if during the brief perusal the "otherwise incriminating character becomes obvious." *Id.* at 1267. *See also United States v. Rude*, 88 F.3d 1538, 1552 (9th Cir. 1996); *United States v. Giannetta*, 909 F.2d 571, 577 (1st Cir. 1990) ("the police may look through . . . file cabinets, files and similar items and briefly peruse their contents to determine whether they are among the . . . items to be seized"); *United States v. Slocum*, 708 F.2d 587, 604 (11th Cir. 1983); *United States v. Ochs*, 595 F.2d 1247, 1258 (2d. Cir. 1979) ("some perusal, generally fairly brief."). Similar reasoning has been applied to computer searches. *See United States v. Khanani*, 502 F.3d 1281, 1290 (11th Cir. 2007) (endorsing a search in which "a computer examiner eliminated files that were unlikely to contain material within the warrants' scope"); *United States v. Potts*, 559 F.Supp.2d 1162, 1175-76 (D. Kan. 2008) (warrant did not authorize an overbroad search when it allowed the investigator "to search the computer by . . . opening

or cursorily reviewing the first few 'pages' of such files in order to determine the precise content").

In the present case, Investigator Warrington's testimony clearly shows that he was able to quickly determine each video in question did not relate to the Kearney offense after a short perusal. Additionally, nothing on the videos at that point was obviously incriminating. The continued search of the videos-as testified to by Warrington-was solely to determine if the nudity he was seeing was evidence of a separate offense than had been described in the warrant.

Any argument advanced by the Government that the videos needed to be watched in their entirety to rule them out because of the chance that a video could be "stitched-in" to another video is illogical in this case. The facts of the case at hand, probably more than about any fact scenario that could be imagined, do not suggest any reason or remotely plausible possibility to reasonably believe the Defendant had engaged in editing and concealing a video during the Kearney incident, the phone clearly being dropped by the Defendant seconds after being startled by another person. More importantly, Investigator Warrington's testimony during the Second Motion to Suppress betrays and dispels the notion that he believed that a video "stitched in" to another was a reasonable possibility he considered in this case: Warrington testified that if a video was of a person doing a dance, for example, he would stop watching video. If law enforcement truly believed concealment was a possibility-why would they not watch every video in full, especially videos that appear to be innocent? Make no doubt about it (and fully revealed by Investigator Warrington's testimony) the reason Warrington

continued to view the videos was solely because he observed nudity, and wondered if it could be evidence of a separate offense.

The extensive viewing of the videos, past the point where Warrington could determine the videos were not of the Kearney incident, was unreasonable and clearly done by law enforcement only with the purpose of fishing to see if they could find evidence of other crimes. This continued search, now firmly outside the probable cause justifying the warrant, was unconstitutional. As such, the Second Search Warrant Affidavit fails the second component of the *Murray* test, as it contains information gathered during an illegal search.

III. The Second Search Warrant Affidavit Contained a Material Omission by Failing to Inform the Magistrate that the Search in 2018, and All Evidence Derived from the Defendant's cell phone, had been suppressed.

In the Second Search Warrant Affidavit, Officer Warrington informed the Court that he had completed an extraction and searched the cell phone in 2018 (Exhibit #13, Paragraph 2) which led to his discoveries. However, Warrington did not inform the magistrate that this very same prior search had been the subject of a suppression motion in the Defendant's pending Hall County Sexual Assault case, and that the Hall County District Court had ordered suppression as to "any evidence gathered based on the Buffalo County search warrant" (Order on Defendant's Motion to Suppress, entered March 9, 2020, page 5).

First, the idea that law enforcement took the warrant application to a judge other than the judge

presiding over the case, hints of possible "judge shopping" by law enforcement, potentially an endeavor to find a judge unaware of the suppression order to ensure the Second Warrant was signed without question. Second, the fact that the Hall County District Court's suppression order was never mentioned in the Affidavit is a material omission and shows bad faith on the part of law enforcement.

> "[I]n order to invalidate a warrant on the basis of material misrepresentations, a defendant must show both that the affiant made a deliberate falsehood or acted with reckless disregard for the truth and that the challenged representation is "material," that is, necessary to a finding of probable cause. The Nebraska Supreme Court has held that omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit." *State v. Shock*, 11 Neb.App. 451 (Neb.App. 2002) citing to *State v. Spidel*, 10 Neb.App. 605 (2001); *Franks v. Delaware*, 438 U.S. 154, (1978).

The Defendant argues that the omission of mention of the suppression order in this case is both material and misleading. The omission is misleading because, if included, the fact that <u>any</u> evidence from the 2018 search had been suppressed would tend to weaken or damage the inferences that can be logically drawn from the Second Affidavit. The Affidavit simply reports that a past search was completed, leading to

the inference that there had been no police misconduct in the search. In reality, all evidence had been suppressed from use by the State due to Constitutional infringements by law enforcement, certainly something the issuing judge should have been alerted to when determining the validity of the requested warrant. The omission is also material because, if the Affidavit had included the fact that the trial court had ordered all evidence resulting from the 2018 cell phone search suppressed, this would have cast serious complications for the judge to determine whether there was adequate probable cause. Coupled with the idea that "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure", *State v. Allen,* 269 Neb. 69 (Neb. 2005), it's plausible that a judge would not have issued the warrant knowing that the Affidavit consisted entirely of information that had already been suppressed due to a prior Fourth Amendment violation. In the end, the issuing magistrate was misled as to the nature of the second warrant application and deprived of the opportunity to consider how the suppression order would impact a probable cause determination. The Second Search warrant should be invalidated on these grounds.

IV. Conclusion

The evidence from the Defendant's cell phone should be suppressed from use at trial. The Defendant's phone was illegally and repeatedly searched by law enforcement in 2018, leading to its suppression. The evidence should stay suppressed as the Second Warrant fails as an independent source on all fronts-the State has not met its burden to show the motivation of law enforcement was independent of the illegal search;

additionally, information gleaned from the illegal search was presented to the magistrate in the Second Affidavit.

The exclusionary rule is "designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). Additionally, one factor in determining whether exclusion is an appropriate remedy is "the flagrancy and purpose of the police misconduct". *Brown v. Illinois*, 422 U.S. 590, 603-04, (1975). The extensive and repeated violations of Constitutional rights by law enforcement in this case must be considered. This was not simply a case of a forensic investigator briefly looking into areas of a cell phone that were outside the warrant, then quickly rushing to get a second warrant to continue further. Instead, Kearney police re-accessed the cell phone to create still frames of the videos to aid them in further investigation. Then, the Grand Island police department searched the phone on multiple occasions for an offense that they did not have a warrant to do so. Law enforcement consistently ignored the warrant requirement of the Fourth Amendment:

> "The point of the Fourth Amendment which often is not grasped by zealous officers is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. 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 Amendment to a nullity . . . " *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (underline added).

With multiple law enforcement agencies extensively disregarding the warrant requirement, taking matters into their own hands, and removing the judiciary from independently determining if probable cause existed to search, the need for deterrence is high in this case to prevent future violations.

The Government's proposal to allow the evidence, simply because law enforcement has now determined-over 500 days later-to abide by Constitutional requirements and have a "do-over" would destroy the deterrent effect of the exclusionary rule and nullify the Fourth Amendment.

"In determining whether the exclusionary rule applies, we are concerned not only with the Fourth Amendment's privacy interests, but also with deterrence and judicial integrity." *State v. Gorup*, 279 Neb. 841 (2010). In reference to judicial integrity, the Supreme Court has noted, "the criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

For these reasons, the Defendant prays his Second Motion to Suppress be granted.

Jake J. McGovern, Defendant

By: _____

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