NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

Keith Allen Shrum- Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the exigent circumstances exception saves a warrantless seizure of a defendant's phone when law enforcement could have obtained a warrant and judges were available for such a purpose prior to contacting the defendant, had no reason to believe evidence would be destroyed but for law enforcement's own action in confronting the defendant, allowed the defendant to manipulate and hold the phone unsupervised despite claiming a fear of imminent destruction of evidence, and thereafter held the property for three days without attempting to locate any evidence contained therein.

2. Whether a warrant which utilizes general language of "any and all other evidence related to a sexual abuse/exploitation investigation" is sufficiently particularized to allow seizure of electronics, or is instead an unconstitutional general warrant; whether law enforcement exceeded the scope of such a warrant when they seized electronics not described by the warrant; and whether the *Leon* exception may nevertheless apply to data upon electronic devices and save the otherwise defunct warrant when law enforcement subsequently utilized a warrant specific to the electronics and police policy and practice required a specific warrant for reviewing the contents of specific electronic devices.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

(1) *United States v. Shrum*, 3:20-cr-00110-JAJ-SBJ (S.D. Iowa) (criminal proceedings), judgment entered July 28, 2021.

(2) *United States v. Shrum*, 21-2705 (8th Cir.) (direct criminal appeal), judgment entered February 9, 2023, *available at* 59 F.4th 968 (8th Cir. 2023).

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The petitioner, Keith Allen Shrum ("Defendant"), through counsel, respectfully prays a writ of certiorari issue to review the February 9, 2023, judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 21-2705.

OPINION BELOW

On February 9, 2023, a panel of the Eighth Circuit Court of Appeals affirmed Shrum's convictions under 18 U.S.C. §§ 2251(a) and 2251(e); and 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1), concluding law enforcement had probable cause and exigent circumstances to seize defendant's phone without a warrant; the language in a search warrant for "any and all other evidence related to a sexual abuse/exploitation investigation" was sufficiently particular; and officers acted in good faith, pursuant

to *Leon*, to seize electronics not included within the warrant even if it was not sufficiently particular.

JURISDICTION

The Court of Appeals entered its judgment on February 9, 2023. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

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

STATEMENT OF THE CASE

A. Factual History

On Sunday, August 25, 2019 at 2:05 a.m., A.S.'s mother made an initial report to Davenport Police Department ("DPD"). (Suppression TR 21:1–9, 40:24–41:4).[1] The mother reported to Officer Youngerman statements received by her on Facebook from A.S.'s aunt, who was herself reporting statements from a friend. (*Id.* at 21:16–22). These messages concerned alleged inappropriate contact between Defendant and A.S. In sum, A.S. had been camping with friends and Defendant; during that time, the friends observed text messages and contacted their parents. (*Id.* at 5:14–23). During the overnight hours, the Iowa Department of Human Services also reported the matter to DPD. (*Id.* at 5:14–23, 6:3–8).

The same day, Sgt. Peiffer received a call at 10:00 a.m. from Stephanie Thurston, a DHS worker. (*Id.* at 5:2–23). Ms. Thurston advised Sgt. Peiffer she had previously contacted DPD during the overnight hours after she was contacted concerning the text messages Defendant had allegedly sent A.S. (*Id.* at 5:14–23, 6:3–8). Sgt. Peiffer and Ms. Thurston met between 11:30 a.m. and noon to review the

[1] In this brief, "R. Doc." refers to the district court docket, criminal Case No. 3:20-cr-00110-JAJ-SBJ in the United States District Court for the Southern District of Iowa. "Suppression TR" refers to the official transcript of the suppression hearing held February 23, 2021, available at R. Doc. 70. "Hr'g Ex." refers to exhibits received by the district court during the suppression hearing. *See* R. Doc. 36, 36-1, 36-2, 36-3. "PSR" refers to the presentence report prepared for sentencing in the case. R. Doc. 54.

information, determine if additional assistance was needed to locate A.S., and proceed with an investigation. (*Id.* at 6:22–7:1, 7:11–14). Sgt. Peiffer did not review Officer Youngerman's report and did not discuss the matter with Officer Youngerman. (*Id.* at 22:6–14). And, Sgt. Peiffer was unaware A.S. had denied, to her friends upon questioning before the matter came to law enforcement's notice, any inappropriate contact. (*Id.* at 22:15–18).

After meeting Ms. Thurston, Sgt. Peiffer responded to Defendant's known address, but did not locate Defendant's vehicle. (*Id.* at 8:15–21). Law enforcement then traveled to the avenue where Defendant and A.S. were known to be camping to look for a campsite and locate A.S. (*Id.*). While driving to the area, law enforcement initiated an emergency ping for Defendant's cell phone; the ping returned to Defendant's address. (*Id.* at 8:25–9:7). Law enforcement then returned back to Defendant's address at approximately 1:00 p.m., eleven hours after the initial report. (*Id.* at 9:8–12, 22:19–23:4, 40:24–41:4). Defendant was located outside, unloading items from the vehicle outside. (*Id.* at 9:13–18). Sgt. Peiffer began surveillance and requested two uniformed officers in marked cars respond; the uniformed officers responded in "a short amount of time [] [m]aybe 10 minutes." (*Id.* at 10:2–12).

Thereafter, Sgt. Peiffer, Ms. Thurston, and the uniformed officers approached the residence. (*Id.* at 10:15–18). Prior to that time, no law enforcement officer or DHS worker had any contact with Defendant. (*Id.* at 23:5–10). No other contact, by any other person, with Defendant concerning this matter is known to have occurred. (*Id.* at 23:14–17).

A.S., who had previously been inside the residence, came outside; other family members also appeared at the residence. (*Id.* at 10:18–21). Sgt. Peiffer spoke to A.S. while the uniformed officers monitored Defendant to "not let him move about." (*Id.* at 10:24–11:15). A.S. provided Sgt. Peiffer her phone, phone password, Snapchat information, and Messenger information. (*Id.* at 11:18–12:1). Sgt. Peiffer observed A.S.'s hair to be wet, as a result of taking a shower upon returning home from camping, which he deemed suspicious. (*Id.* at 12:2–15). On cross-examination, however, Sgt. Peiffer agreed A.S.'s wet hair and having showered was also simply consistent with general hygiene practices and was also consistent with showering off the smell of campfire after a weekend of camping. (*Id.* at 27:16–21). A.S. did not report trying to destroy evidence on her person. (*Id.* at 26:22–24). Sgt. Peiffer described A.S. as "very hesitant" to speak to law enforcement. (*Id.* at 12:18–21). A.S. "denied anything about improper messaging and things of that nature, and she insisted there was nothing on her phone in relation to what we were talking about." (*Id.* at 12:18–21). A.S. stated she did not want Defendant getting in trouble. (*Id.* at 12:23). Sgt. Peiffer spoke with A.S. for approximately 35 or 40 minutes, including a discussion of a safety plan, possible sexual assault collection, and follow-up medical attention. (*Id.* at 13:4–10). Law enforcement did not observe messages on A.S.'s phone consistent with the messages that had been reported to exist. (*Id.* at 23:21–23).

Sgt. Peiffer then joined the uniformed officers in their discussion with Defendant. (*Id.* at 13:11–14). Sgt. Peiffer asked if Defendant "knew roughly why we

were at his house and speaking with him;" Defendant responded "he had a rough idea and that he was contacted by some people the night before about some possible touching, and his speech just trailed off of that, and he didn't mention any further about it." (*Id.* at 13:22–14:3). "[T]he first thing [Sgt. Peiffer] told him was, I'm going to need a cell phone, and he – he agreed and said, It's inside; I'll go get it." (*Id.* at 14:5–7). On cross-examination, Sgt. Peiffer confirmed his statement to Defendant was that he "needed from [Defendant] [ ] his phone." (*Id.* at 23:24–24:3). Defendant had to go into the house to retrieve his cell phone; he did not have it in his hands or on his person. (*Id.* at 24:4–10). Sgt. Peiffer told Defendant "I'm just going to have to go in with you." (*Id.* at 14:9–10; *accord* 24:4–10 (Sgt. Peiffer told Defendant he "had to" go into the residence with Defendant)). Defendant went inside the residence, escorted by law enforcement, to retrieve his android cell phone. (*Id.* at 15:5–12, 24:11–14). At that time, DPD did have technology which allowed them to pull information from android phones, even deleted information; because Defendant had an android phone, Sgt. Peiffer admitted his concern about destruction of evidence was lessened as he believed law enforcement would still be able to retrieve any deleted items. (*Id.* at 15:21–16:2). No reports or other information was obtained Defendant had made any statement indicating he was planning to destroy his phone. (*Id.* at 31:13–16).

Defendant retrieved his cell phone, had it in his possession, and was using the phone without law enforcement stopping Defendant or observing what it was Defendant was doing on the phone. (*Id.* at 24:17–21). Law enforcement asked if there

was a password on the phone and asked Defendant to remove the password; Defendant indicated in some manner he did not know how to do so. (*Id.* at 26:1–7). Law enforcement walked around the residence with Defendant; staying close to Defendant, law enforcement was in a position to see if Defendant had tried to break the phone or take other such action and could have prevented such behavior. (*Id.* at 16:11–15, 25:4–11). After walking through the residence, law enforcement continued to allow Defendant to hold and use his phone "for several minutes." (*Id.* 26:8–10). Thereafter, Sgt. Peiffer seized the phone, provided Defendant a seized property form, and asked Defendant again if he could remove the password; in response, Defendant provided his password. (*Id.* at 16:16–24, 26:10–15, 41:5–6). Sgt. Peiffer advised Defendant "no search of the phone or his or [A.S.'s] would be done until a search warrant was approved." (*Id.* at 16:16–24). Specifically, Sgt. Peiffer told Defendant his phone would not be searched "[u]ntil a search warrant was obtained which would likely occur in the next few days since this started on a weekend, the workload would be a factor." (*Id.* at 28:3–8).

The next day, Monday the 26th, a search warrant for the phone was obtained. (*Id.* at 28:9–11, 34:18–35:3, 41:5–9; DCD 36-1 [Gov't Exh. 1]). The warrant included passwords and pictures. (Suppression TR 29:13–20). Three days later, on Wednesday the 28th, law enforcement dumped the contents of the phone. (Suppression TR at 28:12–18, 35:20–22, 41:10–12). Evidence was located on the phone, and there was no indication any evidence was destroyed or tampered, either when Defendant was in possession of the phone or remotely. (*Id.* at 26:24–27:11).

On Thursday, August 29, 2019, a search warrant was also obtained for Defendant's residence. (*Id.* at 36:12–17; DCD 36-2 [Gov't Exh. 2]). The basis for the search of the residence was upon the prior report of text messages and the results of the search of Defendant's cell phone. (DCD 36-2 [Gov't Exh. 2]). The application specifically referenced property in Scott County of indicia, photographs of the residence, clothing, bedding, an adult toy, cigarettes, a lime green Sharpie, and "any and all other evidence related to a sexual abuse/exploitation investigation." (*Id.*; Suppression TR 42:19–43:14). The application for warrant states "The intent of this search warrant is to seize multiple items of clothing, bedding, and objects observed in the background of the images and to photograph the residence." The warrant utilizes the same language. (DCD 36-2 [Gov't Exh. 2]; Suppression TR 42:19–43:14). Nowhere in the application or in the search warrant endorsed by the court is there anything related to electronics. (DCD 36-2 [Gov't Exh. 2]; Suppression TR 42:19–43:14). Law enforcement performed the search of the residence and seized "several electronic devices" including a computer tower and two external hard drives. (Suppression TR 41:13–42:2).

Also on Thursday, August 29, 2019 at 1:26 p.m., Defendant was interviewed for a second time, this time at Davenport Police Department. Defendant was provided *Miranda* rights. (Suppression TR 38:3–4). Defendant denied any wrongdoing. (*Id.* at 46:7–9). Detective Johnson, who interviewed Defendant, then confronted Defendant with information obtained from his cell phone, including showing Defendant a picture from his cell phone and describing multiple other

pictures from his cell phone. (*Id.* at 38:5–7, 46:10–47:9). After being confronted with information obtained from his phone, Defendant made incriminating statements. (*Id.* at 38:8–10, 46:18–20). Based on those statements, law enforcement seized the electronic devices from the residence, after Defendant's second interview had begun. (*Id.* at 38:18–23, 42:6–8).

On Friday, August 30, 2019, law enforcement drafted and applied for a search warrant for the electronics seized from Defendant's residence, already in DPD custody; those electronics were examined the same day. (*Id.* at 39:7–16, 40:7–9, 44:10–13; DCD 36-3 [Gov't Exh. 3]). The basis for the third search warrant of the electronics seized from Defendant's residence includes Defendant's admissions from his August 29second interview. (Suppression TR 44:14–16; DCD 36-3 [Gov't Exh. 3]).

Both the search warrant for Defendant's cell phone and the search warrant for the electronic devices seized from Defendant's residence included electronic-specific information like passwords, data, and pictures; the search warrant for Defendant's residence, in contrast, did not include such specific language. (Suppression TR 43:15–44:9; *compare* DCD 36-2 [Gov't Exh. 2] *with* DCD 36-1, 36-3 [Gov't Exhs. 1, 3]).

At the suppression hearing, Defendant called Scott County, Iowa[2] Magistrate Judge Michael Motto. (Suppression TR 48:11–20). Magistrate Judge Motto testified magistrate judges and district associate court judges in Scott County are available for warrants, including when business is closed at the courthouse. (*Id.* at 49:1–25).

[2] Davenport is located in Scott County, Iowa.

In fact, it is common and customary for law enforcement to contact a magistrate when they are in need of a warrant to be issued outside of regular business hours (*Id.* at 49:7–10). Between the magistrate judges' schedule and the district associate court judges' schedule, there is always a judge available for probable cause determinations and to issue warrants—24 hours a day, every day. (*Id.* at 49:11–25). Law enforcement has contact information for all 10 magistrate judges and 3 district associate court judges, such if a law enforcement officer cannot reach one judge, they can and do simply contact another. (*Id.* at 50:5–12).

B. Legal History

Defendant was indicted in the Southern District of Iowa with one count of production of child pornography, in violation of 18 U.S.C. §§ 2251(a) and 2251(e); one count of receiving child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1); and one count of possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). (DCD 2).

On January 25, 2021, Defendant filed a Motion to Suppress Evidence and Statements. (DCD 28). The Government resisted. (DCD 31). On February 23, 2021, Defendant appeared for hearing on his motion. (DCD 35). The Government's exhibits 1–3 were admitted under seal; the Government called Sergeant Geoffrey Peiffer and Detective Sean Johnson for testimony. (DCD 35, 36, 36-1, 36-2, 36-3). Defendant called Scott County, Iowa Magistrate Judge Michael Motto. (DCD 35). The court denied Defendant's motion, which was followed on February 25, 2021 by a written order. (DCD 35, 37).

On March 26, 2021, Defendant entered a plea of guilty to the production and receipt counts, pursuant to a plea agreement wherein Defendant reserved his right to appeal the suppression issue. (DCD 41, 43).

On July 28, 2021, Defendant appeared before District Court Judge Jarvey for sentencing. (DCD 61; Addendum p. 1). Judgment was entered and Defendant was sentenced to a term of imprisonment of 210 months with 10 years' supervised release to follow and $200 special assessment plus $15,000 restitution. (Addendum p. 2–3, 7).

Defendant requested the Eighth Circuit reverse the District Court ruling denying Defendant's motion to suppress, arguing the evidence from the phone should have been suppressed because it was unconstitutionally seized without a warrant and any resulting evidence was fruit of the poisonous tree, not saved by the exigent circumstances doctrine; the evidence from the electronic devices should have been suppressed because its seizure was outside the scope of the warrant for Defendant's residence and the warrant was not sufficiently particular to allow the seizure, not saved by the plain view or *Leon* good faith exception doctrines; and Defendant's statements should have been suppressed because they were fruit of the poisonous tree and because they were involuntary.

The Eighth Circuit rejected Defendant's arguments, finding officers had probable cause to believe the phone contained evidence of a crime and exigent circumstances were present to justify the warrantless seizure; the search warrant for Defendant's residence, providing a list of specific items to be seized plus "[a]ny and

all other evidence related to a sexual abuse/exploitation investigation" was sufficiently particular as the requirement for particularity is one of "practical accuracy"; and even if the scope of the search warrant for the residence was exceeded, it was saved by the *Leon* good faith exception. App. A.

REASONS FOR GRANTING THE WRIT

The facts of this case are so deficient as justification for a warrantless seizure of a cell phone, an item this Court has articulated as an item of particular importance and which only continues to gain import in today's world, that, respectfully, the Supreme Court should grant certiorari to consider the denial of Defendant's suppression motion. Relatedly, the seizure of Defendant's other electronic devices, similarly of particular import in today's world, outside the scope of a warrant, which itself was insufficiently particularized, warrants a grant of certiorari to consider the denial of Defendant's suppression motion.

A writ of certiorari in this case is also imperative because it involves an issue of exceptional importance: the permissible scope of the exigent circumstances exception as well as the *Leon* exception to the Fourth Amendment's warrant requirements. Indeed, the Fourth Amendment offers little meaningful protection from governmental overreach if police can create their own exigency—without other indicators of immediacy and while simultaneously, by their own action, undermining the claimed exigency—to justify seizure of an item as critical to life, privacy, and identity as a cell phone then later ignore their own knowledge and policy and claim a good faith *Leon* exception to retroactively bless their activities. *See* Supreme Ct. Rules 10(a), (c); *See, e.g.*, *Riley v. California*, 573 U.S. 373, 393 (2014) (emphasizing "[c]ell phones differ in both a quantitative and a qualitative sense from other objects").

Argument

1. ***Evidence in this matter should have been suppressed because it was unconstitutionally seized without a warrant and the resulting derivative evidence is fruit of the poisonous tree.***

The Eighth Circuit erred when it held law enforcement had probable cause and exigent circumstances to justify a warrantless seizure of Defendant's cell phone. A cell phone is well known to be an item of particular importance—both based on legal precedent and based upon common experience. The Fourth Amendment's protections must be read such as to uphold and reaffirm those protections, not undermine them. Allowing law enforcement to utilize the exigent circumstances exception—which is intended to be narrowly tailored to *except* an otherwise presumptively unreasonable seizure—when law enforcement could have easily obtained a warrant, knew they could easily obtain a warrant, had no reason not to obtain a warrant, and themselves created the claimed exigency, only to then clearly behave in a manner which undermines the notion of a claimed exigency undermines the basic premises of Fourth Amendment jurisprudence. Exceptions are intended to be that: exceptions. They should not be utilized under such brazen circumstances as that found here as a free pass to run around the Fourth Amendment. To allow the same undermines confidence and guarantees in fundamental constitutional protections. Respectfully, the Eighth Circuit's allowance for the same must be reversed.

Of course, the Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusions by the

State." *Schmerber v. Cali.*, 384 U.S. 757, 767 (1966). "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." *Wolf v. People of the State of Colo.*, 338 U.S. 25, 27 (1949). Indeed, the Fourth Amendment specifically protects the rights of individuals to be free from unreasonable seizures of their papers and effects. U.S. Const. Amend. IV. A seizure is found "when there is some meaningful interference with an individual's possessory interests in that property." *Hansen v. Black*, 872 F.3d 554, 558 (8th Cir. 2017) (quoting *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984)).

Here, Davenport police officers clearly seized Defendant's phone when they demanded Defendant provide his phone, stating they "needed" it, even requiring the Defendant to allow law enforcement to follow Defendant into and throughout his home, again stating they "needed" and "just had" to (which becomes even more offensive when one considers such demand was without a warrant and without any probable cause, or even reasonable suspicion, to believe criminal activity was afoot or evidence would be located in the home). Law enforcement thereafter demanded Defendant provide the passcode to unlock his phone (again, without *Miranda* and still without a warrant) and removed the phone to the police department.

The warrantless seizure of Defendant's cell phone in this case—an item of particular importance in today's world—was *per se* unreasonable and not subject to a well-established exception to the warrant requirement. *See, e.g.*, *Riley v. California*, 573 U.S. 373, 393 (2014) (emphasizing "[c]ell phones differ in both a quantitative and a qualitative sense from other objects").

In *Place*, a ninety-minute detention of luggage based only on reasonable suspicion was unreasonable. *U.S. v. Place*, 462 U.S. 696, 707–10 (1983). Following that authority, in *Robbins*, a recent Eighth Circuit case, the Circuit ruled a twelve-day seizure of a cell phone was unreasonable, citing with approval an Eleventh Circuit case finding a two-day seizure of a cell phone was unreasonable and "'in a different bucket than the on-the-spot inquiry hypothesized in *Place*.'" *Robbins*, 2021 WL 28091 at *5. Here, the circumstances are the same, albeit more egregious: law enforcement seized the phone without warrant, holding the phone for three days before dumping its contents and continuing to hold the property.

And, like *Robbins*, "officers did not tell Defendant with any precision when or how he would get his property back." *Id.* In *Robbins*, officers told the defendant they would get a search warrant "at some point." *Id.* (likening to *Place*, 462 U.S. at 710, finding a similar failure exacerbated the constitutional violation, and likening to *Bennett v. City of Eastpointe*, 410 F.3d 810, 826–27 (6th Cir. 2005), "highlighting lack of diligence and investigative need in finding a seizure"). Here, officers told Defendant they would apply for a search warrant "likely…in the next few days," then backtracked a possible delay even further by stating "this started on a weekend the workload would be a factor." This only "exacerbated the constitutional violation." Further, like *Robbins* and unlike the hypothetical outlined in *Place*, Defendant's cell phone was transported to the police department, rather than subjected to an on-the-spot inquiry. *Id.* (citing *Place*, 462 U.S. at 705–06). Thus, law enforcement unconstitutionally seized Defendant's cell phone and demanded Defendant's

passcode—an item of particular importance which was then unlocked using the passcode—and did so without probable cause and without a warrant.[3]

Evidence obtained in violation of the Fourth Amendment must be suppressed via the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *accord Davis v. Mississippi*, 394 U.S. 721 (1969). Evidence derived from illegality must also be suppressed as fruit of the poisonous tree:

> The exclusionary rule extends to evidence later discovered and found to be derivative of an illegality of 'fruit of the poisonous tree.' If the defendant establishes a nexus between a constitutional violation and the discovery of evidence sought to be excluded, the government must show the challenged evidence did not arise by exploitation of that illegality … [but] instead by means sufficiently distinguishable to be purged of the primary taint. The illegality must be at least a but-for cause of obtaining the evidence.

U.S. v. Tuton, 893 F.3d 562, 568 (8th Cir. 2018) (internal citations and quotation marks omitted). Put another way, "The Fourth Amendment's exclusionary rule prohibits the introduction into evidence 'tangible materials seized during an unlawful search,' 'testimony concerning knowledge acquired during an unlawful search,' and 'derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search.'" *U.S. v. Kelly*, 2020 WL 4915434 at *9 (S.D. Iowa Aug. 20, 2020) (citing *Murray v. U.S.*, 487 U.S. 533, 536–37 (1988); *U.S. v. Vega-Rico*, 417 F.3d 976, 979 (8th Cir. 2005) (citations omitted)). The fruit of the poisonous tree doctrine extends, even, to

[3] And, as it relates to any statement of what the passcode was, without the benefit of *Miranda*.

voluntary consent. *Florida v. Royer*, 460 U.S. 491, 508 (1983) (voluntary consent search was "tainted by the illegality and [the consent] was ineffective to justify the search."); *Brown v. Illinois*, 422 U.S. 590 (1975) (*Miranda* warnings, by themselves, may not purge taint of an illegal arrest); *U.S. v. Alvarez-Manzo*, 570 F.3d 1070, 1077 (8th Cir. 2009) (describing application of the fruit of the poisonous tree doctrine to subsequent consent).

Here, the phone seizure (and subsequent search of its contents) provides the only line of support to all other evidence. Premised upon the phone seizure, law enforcement applied for and obtained warrants for social media and email/stored communications providers, as well as for Defendant's residence and other electronics. Additionally, it is only after being confronted with information obtained from his phone Defendant makes incriminating statements. (Supp. TR 38:8–10, 46:18–20). All of that evidence is fruit of the poisonous tree, directly and indirectly derived from the unconstitutional seizure, and should have been suppressed.

2. The narrow exigent circumstances doctrine should not be permitted to apply to save the unconstitutionally obtained evidence.

The Government argued, and the District Court and Circuit Court adopted, the doctrine of exigent circumstances to permit the police to seize Defendant's phone to prevent destruction of evidence. (DCD 37 pp. 4–5; App. A.). This was error. Allowing law enforcement to apply what is intended to be an exception to the exclusion of evidence seized without a warrant to circumstances like the case at bar—where law enforcement clearly did not actually believe there would be imminent destruction of

evidence, knew they could recover it in any event, and had no specific reasons to believe evidence would be destroyed—completely undermines Fourth Amendment protections and allows the exception to swallow the rule. Such cannot be permitted. This Court's precedent clearly establishes the police have a "heavy burden" when relying upon this exception. *Welsh v. Wisconsin*, 466 U.S. 740, 749–50 (1984). Such "heavy burden" was not applied here: rather, police and the Government were able to simply assert the doctrine, ignore their lack of basis upon which to believe evidence would be destroyed, then ignore their actions which contradict any claimed belief of such exigency.

"One well-recognized exception [to the warrant requirement] applies when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). The need "to prevent the imminent destruction of evidence" constitutes an exigent circumstance justifying warrantless searches and seizures. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (citing *Ker v. California*, 374 U.S. 23, 40 (1963)). However, "[t]he exigent circumstances exception to the warrant requirement is narrowly drawn," *U.S. v. Ball*, 90 F.3d 260, 263 (8th Cir. 1996), and the "police-created exigency" doctrine limits the exception. *King*, 563 U.S. at 461 "Under this doctrine, police may not rely on the need to prevent destruction of evidence when that exigency was 'created' or 'manufactured' by the conduct of the police." *Id.* (citing *U.S. v. Chambers*, 395 F.3d 563, 566 (6th Cir. 2005); *U.S. v. Gould*, 364 F.3d 578, 590 (5th

Cir. 2004)).

To determine whether exigent circumstances exist to justify a warrantless search or seizure, courts utilize an objective standard "'focusing on what a reasonable, experienced police officer would believe." *Ramirez*, 676 F.3d at 759–60 (quoting *U.S. v. Kuenstler*, 325 F.3d 1015, 1021 (8th Cir. 2003)). "[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh*, 466 U.S. at 749–50. When the claimed exigency is destruction of evidence, "police officers must demonstrate a sufficient basis for an officer to believe that somebody…will imminently destroy evidence." *Ramirez*, 676 F.3d at 760 (citing *U.S. v. Clement*, 854 F.2d 1116, 1119 (8th Cir. 1988)); *see also U.S. v. Castro*, 959 F.Supp.2d 1205, 1211 (W.D. Mo. 2013) ("In assessing the presence of such exigent circumstances, '[t]he question…is not whether there was actual probable cause and exigent circumstances, but whether the officers could reasonably have thought so.'" (quoting *Greiner v. City of Champlin*, 27 F.3d 1346, 1353 (8th Cir. 1994)).

The District Court found "an exigent circumstance existed because of the risk that defendant would destroy the evidence on his phone." (DCD 37 p. 5). The Eighth Circuit adopted the same, stating:

> an experienced officer would have reason to be concerned that Shrum might try to destroy other evidence. Of course, the fact that evidence is stored on an electronic device does not itself constitute exigent circumstances. But here, based on the facts found by the district court, exigent circumstances justified Peiffer's seizure of the phone pending issuance of a warrant.

App'x A. However, at the time law enforcement approached Defendant, no other law

enforcement officer or DHS employee had yet made any contact with Defendant. (Supp. TR 23:5–10). In fact, there is no evidence any person had contacted Defendant concerning the allegations. (Supp. TR 23:5–10). In other words, Defendant was none-the-wiser. Any concern Defendant may, as a result of being confronted, destroy evidence was created solely because law enforcement confronted Defendant. Law enforcement could have just as easily obtained a warrant first; there is no reason they did not do so. As testified by Magistrate Judge Motto, a magistrate judge in addition to a district associate court judge was at all times available. (Supp. TR 49:1–25). Indeed, reaching out to any one of the many available judges, at any hour and at any time, is customary and regularly done. (*Id.*). If one judge cannot be reached, law enforcement can and regularly does contact any of the other available judges—they have all judges' contact information. (*Id.*). There was simply nothing to prevent law enforcement from securing a warrant first—and no reason not to. Indeed, law enforcement knew they could, (*id.*), they just chose not to.

The district court reasoned evidence on electronic devices could be tampered with or destroyed before a warrant could be obtained. (DCD 37 p. 5). The Circuit walked this back, noting "[o]f course, the fact that evidence is stored on an electronic device does not itself constitute exigent circumstances." But, in any event, again this hypothetical could have been easily avoided by law enforcement very simply securing a warrant before approaching Defendant. Further, there is no evidence this defendant, and not merely a hypothetical defendant, had taken (or would have taken) any steps to amend, tamper with, or destroy evidence. Such conclusion is based upon

supposition and speculation of possibilities present in every case and not the facts of this case. *See Ramirez*, 676 F.3d at 760 ("Exigency, however, does not exist by mere supposition. Stating a belief that these men were about to destroy evidence after safely arriving at the [motel] and checking into their room, seemingly without knowledge that they were being tracked by law enforcement, is quite speculative."). Defendant did not even have his phone in his hands or on his person; he had to go into the house to retrieve his cell phone. (Supp. TR 24:4–10). When he did so, he was always escorted by law enforcement. (Supp. TR 15:5–12, 24:11–14). No reports or other information was obtained Defendant had made any statement indicating he was planning to destroy his phone or any evidence on the phone. (*Id.* at 31:13–16). And, when officers approached Defendant, they knew their department had technology which allowed them to pull information from android phones, even deleted information; because Defendant had an android phone, Sgt. Peiffer admitted his concern about destruction of evidence was lessened as he believed law enforcement would still be able to retrieve any deleted items.[4] (*Id.* at 15:21–16:2). A reasonable, experienced police officer, under these circumstances, would not have believed evidence would have been imminently destroyed but for the seizure of Defendant's phone.

[4] In fact, evidence was located on the phone, and there was no indication any evidence was destroyed or tampered with, either when Defendant was in possession of the phone or remotely. (*Id.* at 26:24–27:11).

The claim officers reasonably believed Defendant would destroy evidence (let alone imminently do so), if the phone was not then seized, is further belied by officers' actions while escorting Defendant to retrieve the phone and in officers' failure to then seize the other electronic evidence. In fact, while still under escort with said law enforcement escort close enough to see and prevent Defendant if he had tried to break the phone or take other such action, Defendant was allowed to continue to hold the phone in his possession and use the phone without law enforcement stopping Defendant or observing what it was Defendant was doing on the phone. (*Id.* at 16:11–15, 24:17–21, 25:4–11, 26:8–10). If law enforcement believed immediate seizure of the phone was necessary to prevent the imminent destruction of evidence, why allow Defendant to continue to possess and manipulate the phone freely?

In fact, although law enforcement was close enough to stop Defendant from trying to break the phone or take any other such action, law enforcement was *not* close enough to see what it was Defendant was doing on the phone. (*Id.*). Thus, if Defendant had simply wanted to delete the messages, i.e., destroy evidence, Defendant was still free to do so and allowed *by law enforcement* to be in such position. It is difficult to understand, then, how law enforcement could have reasonably believed there was an imminent threat of destruction of evidence to warrant ignoring the Fourth Amendment's requirements, when law enforcement allowed Defendant to do so if he had been so inclined. Additionally, if destruction of electronic evidence was imminently at risk, law enforcement would have seized the hard drives, which could also be destroyed now that Defendant was on notice and had been confronted

by law enforcement. But, the hard drives were not seized until four days later, after a residential search warrant, which law enforcement used to justify seizure of the electronics, was obtained. (Supp. TR 36:12–17; DCD 36-2 [Gov't Exh. 2]).

Looking simply to law enforcement's actions in this case, this not an emergency situation. *See Castro*, 959 F.Supp.2d at 1212 ("The Court understands 'exigent' to mean just that—an emergency situation. The testimony of the officers in this case indicates that this was not an emergency situation, but rather a situation that *might* become an emergency."). There was no reason to believe evidence was to be destroyed, let alone imminently destroyed. A reasonable officer in that situation could have—and would have—obtained a warrant. There was no reason not to,[5] and police had ample time to do so. As noted, eleven hours had passed[6] between the time of the initial report and the time when law enforcement confronted Defendant. (*Id.* at 9:8–12, 22:19–23:4, 40:24–41:4). Any claimed exigency of a supposed hypothetical destruction of evidence was created by law enforcement themselves when they approached Defendant at a time during which Defendant had no prior knowledge of the investigation or law enforcement's involvement.

3. The search warrant for Defendant's residence was not sufficiently specific to allow law enforcement to seize the additional electronics

The Fourth Amendment requires warrants "particularly describe the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The

[5] Certainly, obtaining the warrant first would have been best practices.
[6] If there is an emergency justifying immediate action, without taking the few minutes necessary to safeguard constitutional rights, why wait eleven hours?

Fourth Amendment's particularity requirement "makes general searches under [warrants] impossible and prevents the seizure of one thing under a warrant describing another." *Marron v. U.S.*, 275 U.S. 192, 196 (1927); *see also Maryland v. Garrison*, 480 U.S. 78, 84 (1987) (the purpose of the particularity requirement is to prevent general searches). A search violates the Fourth Amendment if performed under a warrant lacking adequate particularity. *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (citations omitted). This particularity requirement requires a particular description of the place to be searched and the persons or things to be seized. *U.S. v. Grubbs*, 547 U.S. 90, 97 (2006); *see also U.S. v. Summage*, 481 F.3d 1075, 1079 (8th Cir. 2007) ("To satisfy the particularity requirement of the fourth amendment, the warrant must be sufficiently definite to enable the searching officers to identify the property authorized to be seized."). "The degree of specificity required will depend on the circumstances of the case and on the type of items involved." *Summage*, 481 F.3d at 1079. "Particularity prohibits the government from conducting 'general, exploratory rummaging of a person's belongings.'" *U.S. v. Sigillito*, 759 F.3d 913, 923 (8th Cir. 2014) (quoting *U.S. v. Saunders*, 957 F.2d 1488, 1491 (8th Cir.1992)). Particularity is required in the warrant, not the supporting documents like the application or affidavit. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). Allowing law enforcement to use the kind of catch-all language it did here—as is seen in many cases—offends the principles which undermine the Fourth Amendment.

Here, the application for warrant relating to Defendant's residence specifically referenced property in Scott County, namely indicia, photographs of the residence,

clothing, bedding, an adult toy, cigarettes, a lime green Sharpie, and "any and all other evidence related to a sexual abuse/exploitation investigation." The application for warrant states "The intent of this search warrant is to seize multiple items of clothing, bedding, and objects observed in the background of the images and to photograph the residence." The warrant, then, uses this same language: specifically referencing Defendant's property in Scott County, namely indicia, photographs of the residence, certain articulated clothing, certain articulated bedding, an adult toy, cigarettes, a lime green Sharpie, and "any and all other evidence related to a sexual abuse/exploitation investigation." This catch-all language of "any and all other evidence related to a sexual abuse/exploitation investigation" is not sufficiently particular to identify the things to be searched and the items to be seized. *Contrast with Summage*, 481 F.3d at 1079 (warrant authorized search and seizure of all video tapes and DVDs, pornographic pictures, video and digital recording devices and equipment, all equipment used to develop/upload/download photographs and movies, computers, and any indicia of occupancy). "Any and all other evidence" is a catch-all for anything,[7] and therefore it is a general warrant. This is in violation of the Fourth Amendment.

Even if a warrant facially satisfies the particularity requirement, the police

[7] The limitation of "related to a sexual abuse/exploitation investigation" does nothing to limit the general nature of the warrant. In order for law enforcement to discern whether some item is "related" to the investigation, law enforcement would first have to seize and search that item. The cat is, as they say, out of the bag, at that point and the constitutional infraction already had. This is a run around the Fourth Amendment.

violate the Fourth Amendment when the scope of the search exceeds what the warrant permits. *Horton v. California*, 496 U.S. 128, 140 (1990). The question is one of reasonableness, assessed on a case-by-case basis. *Riis v. Shaver*, 458 F.Supp.3d 1130, 1177 (D. S.D. April 28, 2020) (citing *U.S. v. Loera*, 923 F.3d 907, 916 (10th Cir. 2019)). Courts look to the fair meaning of the warrant's terms in determining whether a search exceeded the scope of its warrant. *U.S. v. Sturgis*, 652 F.3d 842, 844 (8th Cir. 2011).

Here, law enforcement's seizure of Defendant's electronics from the residence is outside the scope of the search warrant for his residence. The warrant for the residence specifically, and particularly, outlined certain objects to be seized: indicia, photographs of the residence, particular clothing, particular bedding, cigarettes, an adult toy, and a lime green Sharpie. The warrant was predicated upon an application with the same language, specifically stating "The intent of this search warrant is to seize multiple items of clothing, bedding, and objects observed in the background of the images and to photograph the residence." The warrant did not include electronics, nor the specific electronics seized, and the stated "intent" of the warrant did not include electronic devices or the data contained thereon. The catch-all provision notwithstanding, seizure of electronics as part of the search of Defendant's residence was unconstitutionally outside the scope of the warrant.

The District Court concluded seizure of the hard drive was permitted under the plain view doctrine, reasoning the "incriminating nature was immediately apparent. Detective Johnson had called them and told them that defendant admitted

he had a hard drive with child pornography on it." (DCD 37 pp. 6–7); *see U.S. v. Rodriguez*, 711 F.3d 928, 936 (8th Cir. 2013) (quotation omitted) (officers may seize item if they have lawful right of access and object's incriminating nature is immediately apparent). However, unlike other objects, for example methamphetamine, one cannot look at a hard drive and immediately know the hard drive contains incriminating evidence or is otherwise unlawful. There is nothing visually telling about the contents of a hard drive merely by looking at it. Police could not tell whether the hard drives had music, vacation photographs, legal briefs, or child pornography, or whether they had any data whatsoever. Additionally, it is worth noting the officers performing the seizure took "several electronic devices" including a computer tower and two external hard drives. (Suppression TR 41:13–42:2). Defendant's statement, however, was "he had *a hard drive* with child pornography on it." (*Id.* at 44:20–21 (emphasis added)). *Because* law enforcement could not tell which electronic device was the singular hard drive described, they seized "several" hard drives. Stated differently, because it was not immediately apparent which electronic device was incriminating, law enforcement had to take them all. Further, officers did not know the hard drive(s) contained anything incriminating until Detective Johnson advised them as much. Police seized the electronics only after Detective Johnson advised them of Defendant's statement, demonstrating the plain view doctrine does not apply.

The plain view doctrine, however, was not adopted by the Eighth Circuit, instead relying upon the *Leon* good faith exception. That is, even if the warrant was

insufficiently particular or officers exceeded its scope, pursuant to *Leon*, the constitutional deformity is excused.

Under *Leon*, evidence otherwise inadmissible by function of the exclusionary rule may only be admitted if "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope," even though a court later found the warrant invalid. *U.S. v. Leon*, 468 U.S. 897, 920 (1984); *see also U.S. v. Cannon*, 703 F.3d 407, 413 (8th Cir. 2013) (in order for the *Leon* good faith exception to apply to a warrant based on evidence obtained through a violation of the Fourth Amendment, "the detectives' prewarrant conduct must have been close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable.").

Here, as articulated above, officers did not act within the scope of the warrant and it was not objectively reasonable to believe the residential warrant included electronics. Detective Johnson agreed the residential warrant, unlike the electronic devices warrant obtained after seizure of the electronic devices and unlike the warrant for Defendant's cell phone, did not include electronic-specific information and, at the time the warrant was drafted, Detective Johnson was aware of police policy or practice to obtain specific search warrants for reviewing the contents of specific electronic devices. (Suppression TR 43:15–44:9, 45:14–18; *compare* DCD 36-2 [Gov't Exh. 2] *with* DCD 36-1, 36-3 [Gov't Exhs. 1, 3]). As such, the *Leon* exception, which has become in practice a seeming "free pass" for any scenario, should not apply to save police conduct here. Rather, Fourth Amendment principles should be given

primary import and jealously protected.

CONCLUSION

For the foregoing reasons, Keith Shrum respectfully requests the Petition for Writ of Certiorari be granted and the Eighth Circuit's opinion and judgment be vacated.

RESPECTFULLY SUBMITTED,

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APPENDIX