No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SALVADOR SALAS, JR. - PETITIONER

VS

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED

In light of this Court's recently-discussed privacy concerns articulated in *Riley v. California* and *Carpenter v. United States*, whether the Fourth Amendment prohibits application of the "container search" doctrine to digital storage devices, such as cellular phones, smart phones, computers, and external hard drives.

PARTIES TO THE PROCEEDINGS

Petitioner Salvador Salas, Jr., appellant below, is an inmate incarcerated at the United States Penitentiary in Tucson, Arizona.

Respondent is the United States of America, appellee below.

There are no other parties, corporate or individual, involved in this case.

RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the District of Wyoming and the United States Court of Appeals for the Tenth Circuit:

United States v. Salvador Salas, Jr.,
No. 23-8027 (July 3, 2024)

United States v. Salvador Salas, Jr.,
No. 21-CR-77-SWS (April 13, 2023)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case.

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IN THE

SUPREME COURT FOR THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 106 F.4th 1050 (10th Cir. 2024), and appears at Appendix A to the petition.

The opinion of the United States District Court for the District of Wyoming is reported at 2022 U.S. Dist. LEXIS 251733, 2022 WL 22840740 (D. Wyo. 2022), and appears at Appendix D to this petition.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit decided the case below on July 3, 2024.

No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Solicitor General of the United States has been served with notice of this petition in accordance with Supreme Court Rule 29.4(a).

CONSTITUTIONAL PROVISION INVOLVED

"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."

Fourth Amendment, U.S. Constitution.

STATEMENT OF THE CASE[1]

I. Legal Background.

A. The Fourth Amendment's two independent particularity prongs.

In *Groh v. Ramirez*, this Court treated the Fourth Amendment's particularity requirement as having two prongs: "the place of the search," 540 U.S. 551, 557 (2004)(identified as one of "the first three" warrant requirements"), and the "description of the type of evidence sought, *id.* ("the fourth requirement"). The *Groh* Court held the warrant in that case was unconstitutional because it complied with only *one* of those two prongs, thereby treating them independently. *Id.*

B. This Court's container doctrine.

In *Coolidge v. New Hampshire*, this Court established the Fourth Amendment "plain view" doctrine which permits Government agents to lawfully seize items if they are in plain view from a vantage point to which the agents have lawful access or entry. 403 U.S. 443, 465-471 (1971); *see Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *United States v. Silkwood*, 893 F.2d 245, 247 (10th Cir. 1989)(internal citations omitted). The container search doctrine, or simply "container doctrine," derives from the plain view doctrine. *Texas v. Brown*, 460 U.S. 730, 739 (1983). In *United States v. Ross*, this Court enunciated the container doctrine itself, holding that

[1] Appendices are cited using the format: "[Appx. # at PP]," wherein "Appx. #" refers to the particular appendix, and "PP" refers to the green page number at the top right of each page therein. The Tenth Circuit's Record on Appeal is cited using the format: "[RV.PPP]," wherein "V" refers to the record volume number, and "PPP" refers to the page number within that volume at the bottom-right of each page therein, prefixed by "WYD."

> [a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. . . . When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home . . . must give way to the interest in the prompt and efficient completion of the task at hand.

456 U.S. 798, 821 (1982); *See Horton v. California*, 496 U.S. 128, 138-142 (1990)(applied to warranted search of fixed premises); *United States v. Gray*, 814 F.2d 49, 51 (1st Cir. 1987)("any container . . . may be searched if it is reasonable to believe that the container could conceal items of the kind portrayed in the warrant").

In *Brown*, this Court described the container doctrine "not as an independent 'exception' to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." 460 U.S. at 738-739. Thus, in the context of a premises search authorized by a warrant, the container doctrine necessarily implicates *Groh*'s third particularity requirement: the "place to be searched." 540 U.S. at 557; *see Ross*, 456 U.S. at 821 (treating "closets, drawers, and containers" as an extension of the premises to be searched).

C. In *Riley v. California* and *Carpenter v. United States*, this Court found 21st Century digital technology raises significant privacy concerns.

In 2014, in *Riley v. California*, this Court considered whether applying the Fourth Amendment's "search incident to arrest" doctrine to smart phones "would 'untether the rule from the justifications underlying the'" doctrine. 573 U.S. 373, 378-379, 382, 386 (2014). The *Riley* Court engaged in a thorough discussion of

cellular telephones, ultimately finding they "differ in both a quantitative and a qualitative sense from other objects" because "these devices are in fact minicomputers" with "immense storage capacity," which implicated never-before-seen "interrelated consequences for privacy." *Id.* at 393-398. Thus, this Court ruled the "search incident to arrest" doctrine inapplicable to smart phone data searches, even when the devices themselves are lawfully seized. *Id.* at 401.

In 2017, in *Carpenter v. United States*, the petitioner challenged the reasonableness of a warrantless search of his mobile service provider's records pursuant to this Court's prior-established "third-party" doctrine. 585 U.S. 296, 300-301, 313, 317 (2018). Relying primarily on the privacy concerns described in *Riley*, *id.* at 311, 313-316, this Court held that "[g]iven the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome [petitioner]'s claim to Fourth Amendment protection" and "the Government must generally obtain a warrant . . . before acquiring such records," *id.* at 315-316.

II. Substantive Factual Background.

To preface, Justice Frankfurter once observed that "the safeguards of liberty have often been forged in controversies involving not very nice people." *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950)(dissent.). Unequivocally, this case involves a petitioner of "distasteful and repugnant nature." *See Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009)(internal citations omitted). Nonetheless, Petitioner invokes the wisdom of both Justice Frankfurter and the Fourth Circuit,

cautioning this Court to concern itself only with "what are really the great themes of the Fourth Amendment," *Rabinowitz*, 339 U.S. at 69, because "judges defending the Constitution 'must sometimes share their foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply.'" *Snyder*, 580 F.3d at 226 (internal citations omitted).

On February 27, 2021, Petitioner gave methamphetamine to S.V., a minor child, at his residence. [Appx. A at 2]. Early the next morning, S.V. returned home, whereupon her mother, Chelsea Gonzalez, noticed strange behavior and blistering around her mouth. Gonzalez took S.V. to the hospital where she tested positive for methamphetamine. On February 29, Gonzalez and S.V. reported this information to officers at the Casper Police Department ("CPD"). [Appx. A at 2]. On March 1, CPD officers prepared an application and affidavit for a search warrant based on Gonzalez and S.V.'s report. [R3.89-90]. Judge Steven Brown of the Wyoming state court of appeals issued a warrant ("Warrant #1"). [Appx. E; R3.87]. On the face of the warrant, Judge Brown authorized CPD to search for "[e]vidence to show use and delivery of a controlled substance; to include . . . records, and/or receipts, written or electronically stored." [Appx. A at 2; Appx. E at 87; R3.87].

Judge Brown used a check-the-box system on the face of Warrant #1 whereby he indicated probable cause findings, and authorized CPD to search only the following places: "on the person," "on the premises," and "in the vehicle" of Petitioner. [Appx. B at 13-14; Appx. E at 87; R3.87]. Though Warrant #1 facially included a box and space to describe additional places to search for such records and

receipts as "the property described," Judge Brown neither checked that box, nor described additional places to be searched. [Appx. B at 13; Appx. E at 87; R3.87]. Thereby, the face of Warrant #1 failed to explicitly identify any digital storage devices either as "effects" to be seized, or as "places" to be searched. Nor did the face of Warrant #1 describe how CPD was authorized to access or conduct a search of the data on any digital storage devices.

On March 2, CPD executed Warrant #1. During their search of Petitioner's home ("Search #1"), officers found and seized two digital-storage devices: an encrypted iPhone and an encrypted hard drive. [Appx. A at 3; R4.147]. Despite Warrant #1's plain language, CPD officers believed a second warrant was necessary to access those devices' data. [R4.58]. During Search #1, CPD officers noticed that Petitioner owned video and photography equipment. [Appx. A at 3]. This, combined with statements by Petitioner's girlfriend, led CPD officers to speculate that Petitioner produced or possessed child pornography. [Appx. A at 3; R4.63].

That same day, CPD officers prepared an application and affidavit for a "piggy-back" search warrant. [Appx. A at 3; R4.106]. Judge Brown – utilizing the same check-the-box system – issued a second search warrant ("Warrant #2"). [Appx. A at 3; Appx. B at 17-18; Appx. F; R3.95]. Unlike Warrant #1, Warrant #2 facially authorized CPD to seize "[c]omputers[,] . . . cellular telephones . . . mobile digital storage devices . . . hard drives . . . flash storage, [and] USB storage drives" found at Petitioner's residence. [Appx. F at 95; R3.95]. Also unlike Warrant #1, Warrant #2 facially authorized CPD to "acquire evidence from the devices" and computers if

"found in a running state." [Appx. F at 95-96; R3.95-96]. CPD officers promptly executed Warrant #2 ("Search #2"). [Appx. A at 3]. During Search #2, they seized three more digital-storage devices: a Sony laptop computer, an encrypted MacBook laptop computer, and an encrypted Seagate hard drive. [Appx. A at 3].

On March 8, pursuant to Warrant #2, a CPD analyst conducted a forensic data search of the devices seized during Search #1 and Search #2 ("Search #3"). [Appx. A at 3; R4.147-148]. During Search #3, the analyst discovered images and videos of child pornography on the smart phone, the Sony laptop, and the Seagate hard drive. [Appx. A at 3]. On March 31, Petitioner was re-arrested on state charges. [Appx. A at 3]. During custodial interrogation, CPD confronted him with the fruits of Search #3, *i.e.* "the specifics regarding the child pornography," whereupon he admitted to producing and possessing the evidence found during Search #3. [Appx. A at 3; R3.129].

III. Procedural Factual Background.

A. District Court proceedings, and the particularity of Warrant #1.

A grand jury returned a six-count indictment charging Petitioner with one count of possession of child pornography and five counts of producing child pornography. [R2.325]. Petitioner moved to suppress the fruits of Search #2 and Search #3 due to Warrant #2's constitutional deficiencies. [Appx. A at 3; R3.64-77]. Petitioner also moved to suppress his March 31 statements as the fruits of Search #2 and Search #3. [Appx. A at 4; R3.116-121]. The Government contended that even if Warrant #2 was constitutionally defective, the fruits of Search #2 and Search #3

would have been inevitably discovered. [R2.63-65]. The Government offered three alternative theories of inevitable discovery:

1. Warrant #1 was sufficiently particular to authorize Search #3 ("Theory #1"), [R2.65];

2. CPD would have gotten a constitutional warrant authorizing Search #3, or other forensic data search ("Theory #2"), [R4.139]; and/or

3. Petitioner would have consented to CPD's search of his phone, even in the absence of Search #2 and Search #3 ("Theory #3"), [R4.139-141].

As to Theory #1, Petitioner asserted that Warrant #1 authorized the seizure of his devices during Search #1, but not forensic data searches, as occurred during Search #3. [Appx. A at 3-4].

The District Court held a suppression hearing. [R4]. CPD officers testified to their understanding that a warrant authorizing a forensic data search was necessary. [R4.39-40, 58]. The U.S. Attorney expressly argued that a warrant explicitly authorizing a forensic data search was "necessary" specifically "because of the vast amount of data that [the devices] contain," even if an argument existed that merely "listing the electronic data" as evidence sought made Warrant #1 sufficiently particular. [R4.136-137]. And unequivocally, Search #3 was conducted pursuant to Warrant #2 – not Warrant #1. [R4.94, 129-130].

Ultimately, the District Court held that Warrant #2 was constitutionally defective under *Franks v. Delaware* due to CPD malfeasance. [Appx. B at 139-146; Appx. D at 139-146; R2.139-146]. This left only the question of inevitable discovery.

The District Court found that Theory #1 and, in the alternative, Theory #3 formed factual bases to conclude the fruits of Search #3 inevitably would have been discovered. [Appx. B at 146, 149; Appx. D at 146, 149; R2.146, 149]. The District Court never ruled on Theory #2. The District Court also found that "the confession is tied to the motion to suppress" the fruits of Search #3. [R4.148]. Thus, "under the fruit-of-the-poisonous tree doctrine, the statement would have to be suppressed" if the fruits of Search #3 were suppressed because the statements "derived from [CPD] having viewed the cell phone" contents. [R4.148]. Accordingly, because it declined to suppress the fruits of Search #3, the District Court declined to suppress Petitioner's statements. [Appx. A at 4]. At trial, the core evidence admitted against Petitioner in the Government's case was (i) the fruits of Search #3, *i.e.* the photos and videos from the phone recovered during Search #1, and (ii) his incriminating statements, and he was convicted. [Appx. A at 4; R5.77-80; 506-508, 526].

B. Tenth Circuit proceedings, and its evasion of *Riley* and *Carpenter*.

On appeal, the Tenth Circuit limited its analysis to Theory #1, expressly declining to rule on Theory #2 *or* Theory #3. [Appx. A at 7]. Petitioner explicitly argued that Warrant #1 was not sufficiently particular because it failed to describe the digital storage devices as "places to be searched." [Appx. B at 30-33; Appx. C at 15-20]. Petitioner challenged the container doctrine by name. [Appx. C at 15]. Petitioner expressly challenged application of the container doctrine considering this Court's decisions in *Riley* and *Carpenter*. [Appx. C at 16-19]. Furthermore, Petitioner cautioned the Tenth Circuit against application of its 2019 precedent in

United States v. Loera, 923 F.3d 907 (10th Cir. 2019), because it relied exclusively on pre-*Riley* and pre-*Carpenter* Circuit precedent. [Appx. C at 15-19].

Despite taking *de novo* review, [Appx. A at 5], the Circuit did not address the *Riley* Court's privacy concerns. Instead, the Circuit reflexively ruled *Riley* was not "particularly persuasive," and distinguishable because it implicated the "search incident to arrest" doctrine, and not a warranted search or the container doctrine. [Appx. A at 12]. Relying on no precedent of this Court, but instead only "per [Tenth Circuit] caselaw" reliant on pre-*Riley* and pre-*Carpenter* precedent, [Appx. A at 14-16], the Circuit ruled Warrant #1 was constitutionally particular because it contained "some 'limiting principles'" describing the "records, and/or receipts" sought as "evidence of specific crimes." [Appx. A at 9-11]. Under this analysis, the Circuit "decline[d] Mr. Salas' invitation to establish a new legal rule that every search of a cellphone requires a discrete authorization via a warrant." [Appx. A at 14]. It affirmed the District Court's holding regarding Theory #1 and, by extension, the District Court's ultimate ruling on inevitable discovery. [Appx. A at 20].

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In *Robbins v. California*, this Court rejected the Government's theory that the nature of a container makes it "unworthy" of Fourth Amendment protection. 453 U.S. 420, 425-426 (1981). In *Ross*, this Court later held that "a constitutional distinction between 'worthy' and 'unworthy' containers would be improper;" that "the central purpose of the Fourth Amendment forecloses such a distinction." 456 U.S. at 822.

Conversely, this Court's recent precedent in *Riley* and *Carpenter* suggests a distinction between "worthy" and "*more* worthy" containers, *i.e.* those entitled to *the full scope* of Fourth Amendment protection based on their nature. *Riley* and *Carpenter* address privacy concerns implicated by digital storage "containers" such as smart phones, computers and hard drives. Those decisions acknowledge the capabilities, ubiquity and prevalent use of such devices as unique, and so significant, that the Fourth Amendment demands their treatment independent from the places in which they are found; as castles-within-castles.

I. The ubiquity and prevalence of digital-storage devices in daily life greatly affects personal privacy, and simultaneously makes digitally-stored evidence indispensable in thousands of criminal investigations, and nine of ten criminal prosecutions.

A. In *Riley* and *Carpenter*, this Court explicitly held the ubiquity of digital-storage devices and their pervasive use in modern society raise historically unique Fourth Amendment privacy concerns.

When *Ross* was decided in 1982, less than six million personal computers had been sold globally.[2] No cellular phone would be commercially available for another two years.[3] The Internet would not become publicly accessible for more than a

[2] Jeremy Reimer, *Total Share: Personal Computer Market Share 1975-2010*. Blog Post, Dec. 7, 2012, <https://jeremyreimer.com/rockets-item.lsp?p=137> (last accessed: Aug. 9, 2024)(derived from figures in downloadable Excel data sheet); Jeremy Reimer, *Total share: 30 years of personal computer market share figures*. Ars Technica Online, Dec. 14, 2005, <https://arstechnica.com/features/2005/12/total-share/> (last accessed: Aug. 9, 2005).

[3] Jennifer Korn, *50 years ago, he made the first cell phone call*. CNN Online, Apr. 3, 2023, <https://www.cnn.com/2023/04/03/tech/cell-phone-turns-50/index.html> (last accessed: Aug. 8, 2024)("cell phones would not be available to the average consumer for another decade"); Mobile Phone Museum, *Motorola Dynatac 8000X*. Webpage, <https://www.mobilephonemuseum.com/phone-detail/dynatac-8000x> (last accessed: Aug. 8, 2024)("In 1984, it came onto the market"); Smithsonian, *Dynatac Cellular Telephone*, National Museum of American History, Behring Center Webpage, <https://americanhistory.si.edu/collections/nmah_1191361> (last accessed: Aug. 8, 2024)("The Motorola DynaTAC . . . was the first commercially available portable handheld cell phone").

decade.[4] Google's search engine would not be invented until 1996.[5] The idea for Web 2.0, characterized by user-generated content, would not be conceived until 1999.[6] Nobody would record a photo or video with their smart phone camera until 2000.[7] Web-based smart phones were not introduced to the marketplace until 2001.[8] People would not social network on Facebook until 2004.[9] Nobody would share videos on YouTube until 2005,[10] or photographs on Instagram until 2010.[11] And it

[4] David Grossman, *When the Internet Was Invented, It Was First Just for Scientists*. Popular Mechanics Online, May 16, 2023, <https://www.popularmechanics.com/culture/web/a43903714/when-was-internet-invented/> (last accessed: Aug. 8, 2024); Julian Ring, *30 years ago, one decision altered the course of our connected world*. NPR Online, April 30, 2023, <https://www.npr.org/2023/04/30/1172276538/world-wide-web-internet-anniversary> (last accessed: Aug. 8, 2024)("On April 30, 1993, something called the World Wide Web launched into the public domain").

[5] John Battelle, *The Birth of Google*. Wired Magazine Online, Aug. 1, 2005, <https://www.wired.com/2005/08/battelle/> (last accessed: Aug. 8, 2024).

[6] Kinza Yasar, *What is Web 3.0 (Web3)? Definition, guide and history; Web 2.0*. TechTarget Webpage, <https://www.techtarget.com/whatis/definition/Web-20-or-Web-2#:~:text=The%20term%20Web%202.0%20was,Web%202.0%20Conference%20in%202004> (last accessed: Aug. 8, 2024); National Science and Media Museum, *What Is Web 2.0?*. Webpage, Apr. 14, 2011, <https://blog.scienceandmediamuseum.org.uk/what-is-web-2-0/> (last accessed: Aug. 8, 2024).

[7] Ahmed Nassar, *Understand the Evolution of the Camera Phone*. Medium Online, May 11, 2020, <https://medium.com/digitalshroud/you-should-understand-the-evolution-of-the-camera-phone-7db64b433c12> (last accessed: Aug. 8, 2024).

[8] Jeremy Reimer, *From Altair to iPad: 35 years of personal computer market share*. Ars Technica Online, Aug. 14, 2012, <https://arstechnica.com/information-technology/2012/08/from-altair-to-ipad-35-years-of-personal-computer-market-share/> (last accessed: Aug. 9, 2024).

[9] Mythili Devarakonda, *'The Social Network': When was Facebook created? How long did it take to create Facebook?*. USA Today Online, July 25, 2022, <, https://www.usatoday.com/story/tech/2022/07/25/when-was-facebook-created/10040883002/> (last accessed: Aug. 8, 2024).

[10] Paige Leskin & Ana Altchek, *YouTube is 19 years old. Here's a timeline of how it was founded and grew to become the king of video, with some controversies along the way*. Business Insider Online, May 28, 2024, <https://www.businessinsider.com/history-of-youtube> (last accessed: Aug. 8, 2024).

[11] Dan Blystone, *Instagram: What It Is, It's History, and How the Popular App Works*. Investopedia Webpage, July 9, 2024, < https://www.investopedia.com/articles/investing/102615/story-instagram-rise-1-photo0sharing-app.asp#:~:text=The%20Instagram%20app%20was%20launched,25%2C000%20users%20in%20one%20day.> (last accessed: Aug. 8, 2024).

was not until 2008 that Apple first launched its "app store,"[12] with Google delaying launch of its Play Store for Android devices until 2012.[13] The *Ross* Court simply could not have predicted 21st Century technology or how associated norms would evolve, let alone opined on application of the container doctrine to such technologies and norms. *See Riley*, 573 U.S. at 385 (internal references omitted)("based on technology nearly inconceivable just a few decades ago").

In *Carpenter*, this Court acknowledged that cellular phones are ubiquitous across the nation, finding "396 million cell phone service accounts in the United States – for a Nation of 326 million people." 585 U.S. at 300. Today, the Pew Research Center reports that 97% of Americans own a cellphone of some kind.[14] Of those users, "[n]ine-in-ten own a smartphone, up from just 35% in Pew Research Center's first survey of smartphone ownership conducted in 2011."[15]

Furthermore, digital storage device usage is prevalent in daily life. A decade ago, Chief Justice Roberts, writing for the majority in *Riley*, opined that modern cell phones by then were "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of

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[12] Capitol Technology University, *A Brief History of Mobile Apps*. Webpage, Dec. 15, 2021, <https://www.captechu.edu/blog/brief-history-of-mobile-apps> (last accessed: Aug. 9, 2024); Apple Computers, Inc., *The App Store turns 10*. Apple Corp. Press Release, July 5, 2018, <https://www.apple.com/newsroom/2018/07/app-store-turns-10/> (last accessed: Aug. 9, 2024).

[13] John Callaham, *From Android Market to Google Play: a brief history of the Play Store*. Android Authority Online, March 6, 2017, <https://www.androidauthority.com/android-market-google-play-history-754989/> (last accessed: Aug. 9, 2024).

[14] Pew Research Center, *Mobile Fact Sheet*. Pew Research Center Webpage (Jan. 31, 2024), <https://www.pewresearch.org/internet/fact-sheet/mobile/> (last accessed: Aug. 8, 2024).

[15] *Id*., *supra* at fn. 14.

human anatomy." 573 U.S. at 385. As he further wrote, "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be" searched by law enforcement. *See id.* at 393. "The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as telephones. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Id.*

"One of the most notable distinguishing features of modern cell phones" and other digital-storage devices "is their immense storage capacity. . . . [T]he possible intrusion on privacy is not physically limited in the same way when it comes to cell phones" and other such devices. *Id.* at 394. Instead, "[t]he storage capacity of cell phones" and other devices "has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information . . . that reveal much more in combination than any isolated record. Second, a [device]'s capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs." *Id.* This is probably why information technology experts regularly refer to a person's digitally-stored information, in aggregate, as that person's "digital twin," "data double," and "digital doppelganger."[16]

[16] Interfacing Technologies Corp., *Your Digital Doppelganger*. Webpage, <https://www.interfacing.com/digital-doppelganger> (last accessed: Aug. 7, 2024); Data & Society, *Announcement: Digital Doppelgangers – A Workshop on Our Digital Others*. Webpage, <https://datasociety.net/announcements/2023/02/08/digital-doppelgangers/> (last accessed: Aug. 7, 2024).

Four years later, in *Carpenter*, this Court reiterated and relied heavily on *Riley*, holding that privacy interests are implicated even in information divulged to third-parties and kept as business records. 585 U.S. at 305-316. Thus, any contention that "a search of all data stored" on a device is "'materially indistinguishable' from searches of . . . physical items," like traditional containers, is intellectually dishonest and disingenuous; "like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Riley*, 573 U.S. at 393.

B. Federal and state governments use evidence found during digital searches in 90% of all criminal prosecutions because of – not in spite of – the ubiquity and pervasive use of digital-storage devices.

The Government has used digitally-stored evidence in prosecutions since 1989.[17] As the use of digital storage devices, and the cultural norms associated with them have evolved, digital forensics has evolved into an important investigative discipline.[18] Both pre-*Riley* and post-*Riley*, the U.S. Department of Justice commissioned research from the National Research Council in 2009, and the RAND Corporation in 2015. Both institutions reported that the proliferation of computers and digital storage devices, and major shifts in their usage, had led to expansion of the types of criminal activities that digitally generate and store evidence.[19] Today,

[17] Digital Evidence Innocence Initiative, Website Homepage (2019), <https://www.digitalinnocence.com/> (last accessed: Aug. 8, 2024).

[18] Sean E. Goodison, et al., *Digital Evidence and the U.S. Criminal Justice System*. RAND Corporation, Priority Criminal Justice Needs Initiative at 31, n. 5 (2015), <https://www.ojp.gov/pdffiles1/nij/grants/248770.pdf> (last accessed: Aug. 8, 2024).

[19] *Id.*, *supra* at fn. 18 (Goodison 2015); Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*. The National Academies Press, p. 179-180 (2009), <https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf> (last accessed: Aug. 8, 2024).

digital storage devices are no longer valuable to investigators and prosecutors merely as the instrumentalities or objects of criminal offenses. They are now "storage containers for evidence,"[20] and "huge repositories of personal information."[21] As reported by RAND, the ubiquity and pervasiveness of such devices offers to prosecutors "clear benefit . . . to obtain convictions," and that "law enforcement relies extensively on digital evidence for important information" in investigations.[22] Today, the Government targets digitally-stored information in connection with even the most mundane offenses. *E.g. United States v. Crawford*, 220 F. Supp. 3d 932, 934 (W.D. Ark. 2016)(criminal threat); *United States v. Demasi*, 2024 U.S. Dist. LEXIS 21553 at *2 (E.D. Mich. 2024)(bank fraud); *In re Search Warrant for the Prop. Located at Irvine, Cal.*, 2024 U.S. Dist. LEXIS 91322 at *2 (C.D. Cal. 2024)(misdemeanors). As of 2021, digitally-stored evidence appears in 90% of all criminal prosecutions.[23]

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[20] National Research Council, *Strengthening Forensic Science*, *supra* at fn. 19.

[21] Goodison, *Digital Evidence and the U.S. Criminal Justice System*, *supra* at fn. 18.

[22] *Id.*, *supra* at fn.18. (Goodison 2015)

[23] Linda Geddes, *Digital forensics experts prone to bias, study shows*. The Guardian Online, May 31, 2021, <https://www.theguardian.com/science/2021/may/31/digital-forensics-experts-prone-to-bias-study-shows> (last accessed Aug. 8, 2024); Christa M. Miller, *A survey of prosecutors and investigators using digital evidence: A starting point*. Forensic Science International: Synergy, vol. 6 at p. 1 (2023), <https://www.sciencedirect.com/science/article/pii/S2589871X2200081X> (last accessed: Aug. 8, 2024); Digital Evidence Initiative, Website Homepage, *supra* at fn. 4.

C. Law enforcement relies daily on the "container search" doctrine in gathering digitally stored evidence.

In 2022, the federal Judiciary issued its most recent Delayed-Notice Search Warrant Report. Therein, it reported that the federal judiciary issued more than 18,000 delayed-notice search warrants in 2022.[24] That is *just* federal warrants; not state warrants. And that is *just* delayed notice "sneak and peek" search warrants which authorize surreptitious entry into geographic premises to observe and examine what may be inside, including containers.[25] It does not include ordinary search warrants or no-knock warrants. For a six-month period in the same year, Syracuse University's Transactional Records Access Clearinghouse reported that 883 applications to federal courts for ordinary search warrants, subpoenas and summons were made.[26] Applications are moving toward pre-pandemic levels exceeding 2,500 per year.[27]

Between delayed-notice search warrants, ordinary warrants and other Fourth Amendment search authorizations, the federal judiciary alone is granting, on average, more than 19,900 search warrants per year; or, 55 per day. The container doctrine is implicated in most, if not all, investigations and cases involving searches conducted pursuant to these warrants where a phone, computer,

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[24] United States Courts, *Delayed-Notice Search Warrant Report 2022*. U.S. Courts Webpage, Sep. 30, 2022, <

[25] Charles Doyle, *The USA Patriot Act at 20: Sneak and Peek Searches*. Congressional Research Service, Legal Sidebar, Oct. 27, 2021, <https://crsreports.congress.gov/product/pdf/LSB/LSB10652> (last accessed: Aug. 11, 2024).

[26] TRAC, *How Often Do the FBI and the Department of Justice Seek Search Warrants and Subpoenas?*. Syracuse University, Transactional Records Access Clearinghouse Report, Aug. 22, 2022, <https://trac.syr.edu/reports/693/> (last accessed: Aug. 11, 2024).

[27] *Id*., *supra*, TRAC at fn. 4.

or other device may reside at the premises searched. As well-settled as the doctrine is in a brick-and-mortar context, these numbers suggest Government agents also rely on it daily to conduct digital forensic searches, despite this Court's admonitions in *Riley* and *Carpenter*, *supra*.

II. The Tenth Circuit's decision conflicts with this Court's prior decisions in *Riley* and *Carpenter*.

A. This Court has a long history of reviewing application of well-established Fourth Amendment doctrines in light of privacy concerns that inevitably accompany technological advancement.

Justice Kennedy decried the *Carpenter* majority's determination that "the privacy interests at stake must be weighed against" application of the third-party doctrine. 585 U.S. at 335 (dissent.). He cautioned that judicial prudence prohibits "elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *Id.* at 338 (internal citations omitted). However, Justice Kennedy failed to provide a rubric by which this Court can measure whether emerging technology's "role in society" has become sufficiently apparent to grant review of those Constitutional questions, instead of abandoning the answers to the legislative branch. *Id.* ("it is wise to defer to legislative judgments"). Notwithstanding that our system of checks-and-balances has reserved to the judiciary alone the application of the Fourth Amendment to modern societal norms, Justice Kennedy ignored this Court's long-established and well-worn history of doing exactly that.

Prior to *Katz v. United States*, it was well established that the test for whether a Fourth Amendment search occurred was tethered to whether a common law physical trespass occurred. 389 U.S. 347 (1967)(citing *Olmstead v. United States*, 277 U.S. 438 (1928); and *Goldman v. United States*, 316 U.S. 129 (1942)). This Court took up the question in *Katz* because new technology – wiretaps – raised the issue whether "the Fourth Amendment protects people -- and not simply 'areas.'" *Id.* at 353.

Prior to *Kyllo v. United States*, the "plain view" and "open fields" doctrines were well established, permitting "warrantless visual surveillance of a home" by never "'requir[ing] law enforcement officers to shield their eyes when passing by a home on public thoroughfares.'" 533 U.S. 27, 32, 33 (2001)(quoting *California v. Ciraolo*, 476 U.S. 207 (1986); citing *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986)). Nonetheless, this Court took review because new technology – thermal imaging capable of "detect[ing] 'only heat radiating from the external surface of [a] house'" – raised the question "how much technological enhancement of ordinary perception from such a vantage point, if any, is too much." *Id.* at 33, 36.

Prior to *Riley*, the "search incident to arrest" doctrine was well established and "ha[d] been recognized for a century." 573 U.S. at 382-385 (citing *Weeks v. United States*, 232 U.S. 383 (1914); *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Robinson*, 414 U.S. 218 (1973); and *Arizona v. Gant*, 556 U.S. 332 (2009)). Nevertheless, this Court granted review of whether that doctrine applied

when the property searched took the form of new technology – a cellular "smart" phone. *Id.* at 378.

And prior to *Carpenter*, the "third-party" doctrine was well established, holding "that 'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" 585 U.S. at 307-308; *Smith v. Maryland*, 442 U.S. 735, 743-744 (1979); *United States v. Miller*, 425 U.S. 435, 440 (1976). Nonetheless, the *Carpenter* Court granted review because new technology – mobile device networks – and *Riley* raised the question whether the logic of *Smith* and *Miller* "extends to the qualitatively different category of cell-site records." 585 U.S. at 309.

Irrefutably, *Ross*' "container search" doctrine is well-established in the analog context. Nonetheless, the time has come for this Court to follow tradition and consider whether the Fourth Amendment demands different application when the containers in question, digital storage devices, have already been found twice by this Court in the last decade to be quantitatively, qualitatively and – ultimately – constitutionally different from other containers, *see Riley*, 575 U.S. at 393; *see Carpenter*, 585 U.S. at 311, 313-316. Six years since *Carpenter*. Ten years since *Riley*. 23 years since the first smart phone. Nearly 50 years since the first personal computer. More than enough time has passed for the role digital storage devices play in modern society to become clear, and for this Court's review to ripen.

B. The Tenth Circuit relied exclusively on its own prior precedent because the question remains unsettled by this Court; but Justice Blackmun's concurrence in *Texas v. Brown* suggests this Court's review has ripened in light of *Riley* and *Carpenter*.

The Circuit explicitly stated it limited itself to application of its own case law, relying on no precedent of this Court. [Appx. A at 14]. The Circuit's failure to cite *any* authority of this Court suggests this Court has failed to address the question. However, less than a year after *Ross* was decided, Justice Blackmun opined in *Brown* that

> [i]f a movable container is in plain view, seizure does not implicate any privacy interests. Therefore, . . . the owner's possessory interest in the container must yield to society's interest. . . . It does not follow, however, that the container may be opened on the spot. . . . Some inconvenience to the officer is entailed by requiring him to obtain a warrant before opening the container, but that alone does not excuse the duty to go before a neutral magistrate. As Justice Powell emphasizes, the Warrant Clause embodies our government's historical commitment to bear the burden of inconvenience.

460 U.S. at 749-450 (concur.)(internal citations omitted). He concluded, "the constitutionality of a container search is not automatically determined by the constitutionality of [the container's] prior seizure. Separate inquiries are necessary, taking into account the separate interests at stake." *Id.* at 749. Echoing Justice Blackmun's concurrence, the *Riley* Court cautioned against mechanical application of rules deemed "categorical . . . in the context of physical objects . . . to digital content on" digital storage devices. *See* 585 U.S. at 386; *see Carpenter*, 585 U.S. at 305 (discussing *Kyllo*, 533 U.S. 27). Petitioner avers that the question is now worth settling whether *Riley*'s privacy concerns merit different application of the "container search" doctrine to digital storage devices, as they did to application of

the "third party" doctrine to CSLI in *Carpenter*. *Riley* and *Carpenter* trigger the need for the "separate inquiry" described by Justice Blackmun.

C. The Tenth Circuit's mechanical rejection of Petitioner's argument that the container doctrine demands re-examination when applied to digital storage devices conflicts with this Court's prior precedent in *Riley* and *Carpenter*.

First, the Circuit focused its inquiry on the fact that Warrant #1 contained "several affirmative 'limiting principles'" relating to type of evidence to be sought. [Appx. A at 10-11]. But this inquiry focused exclusively on *Groh*'s fourth particularity prong, and never addressed the second. Nonetheless, the Circuit held this was sufficient to satisfy "the Fourth Amendment's particularity requirement" in whole. [Appx. A at 11]. Second, the Circuit held *Riley* was limited to "search incident to arrest" cases. It treated *Riley*'s privacy concerns as wholly irrelevant on that basis (*i.e.* "not 'particularly persuasive'"), lecturing that "[t]o apply *Riley* to [Petitioner]'s case would be to cherry-pick and graft a holding from an independent area of Fourth Amendment law," and that the circuit court "do[es] not conflate legal doctrines so casually." [Appx. A at 13].

The Circuit implicitly held either (i) because *Groh*'s "items to be sought" prong was sufficiently particular that its "places to be searched" prong was necessarily fulfilled, or (ii) the container doctrine applies to digital storage devices. Assuming the Circuit did not intentionally contradict *Groh*'s treatment of those prongs as independent from each other, it merely applied the container doctrine "by any other name" in this case, holding Warrant #1 envisioned Search #3 because

"'drug and drug trafficking information [were] likely to be found' on [Petitioner's cellphone]" which was found in his residence during Search #1.[28]

Thus, the Tenth Circuit summarily rejected Petitioner's contention that *Riley* and *Carpenter* raised privacy concerns sufficient "to establish a new legal rule that every search of a [digital storage device] requires a" warrant particularly describing it as a "place" to be searched. But the Tenth Circuit never actually addressed the substance of *Riley*'s privacy concerns, or its admonition to "get a warrant," as applied to an initial "entry" into digital storage devices. The Circuit could have addressed *Riley*'s privacy concerns and opined *why* the container doctrine does *not* merit different application. It did not. The Circuit could have acknowledged *Riley*'s privacy concerns while relying on *stare decisis* to express hesitance to announce a new application of well-established Fourth Amendment doctrine without guidance from this Court, as it did in *United States v. Thompson*, one of *Carpenter*'s sister cases. 866 F.3d 1149, 1159 (10th Cir. 2017), *judgment vacated*, 138 S. Ct. 2706 (2018). It did not. Instead, it addressed in *ex post facto* analysis only whether the

[28] The Tenth Circuit suggested that because the Government agents' search was "limited to electronic records and receipts and, in addition, they were 'limited to . . . drug and drug trafficking information,'" that no Fourth Amendment violation occurred. [Appx. A at 11]. However, this is of no import. The question whether a search warrant is sufficiently particular is an inquiry distinct from whether the *execution* of that warrant is lawful in scope. *Cf. United States v. Lengen*, 245 Fed. Appx. 426, 433-434 (2007)(6th Cir. 2007)(treating "Particularity of Warrant" as issue independent of "Scope of Authority to Search); *also cf. United States v. Mione*, 1987 U.S. Dist. LEXIS 1366 at *15-17 (S.D.N.Y. 1987)(treating question whether items were seized "beyond the scope of the warrant" independent of the facial particularity of the same warrant). The way Government agents went about searching Petitioner's devices *after* they gained *de facto* unrestricted access to the contents is independent of the question whether they had *de jure* access to the devices' digital contents in the first place. Petitioner acknowledges this Court's discretion to raise the issue *sua sponte* pursuant to Rule 14.1(a) of this Court's rules. However, he avers it is only collaterally related and not a question reasonably subsumed under Petitioner's question presented because the scope of the search occurring after Government agents accessed the devices is irrelevant and immaterial when Government agents are not permitted to access particular *loci*, such as the devices themselves, in the first place.

scope of the forensic data search was reasonable as it occurred *after* "initial entry into" the devices. [Appx. A at 15-16].

It is disingenuous to disregard as distinguishable, "cherry-picking," and "graft" the explicit *findings* of the *Riley* Court on the pretext that *Riley*'s privacy concerns arise *only* in cases implicating the "search incident to arrest" doctrine. By the Circuit's logic, *Carpenter* should have been fatally distinguishable because it involved only the third-party doctrine. *See* 585 U.S. at 302, 316. The Tenth Circuit's shortsightedness is evident given Justice Blackmun's concurrence 40 years ago and this Court's consideration of the exact same privacy concerns in rendering its *Carpenter* holding. Petitioner, therefore, avers that even if the Tenth Circuit's decision does not directly contradict *Riley* and *Carpenter*, it nevertheless conflicts with those precedents because the Circuit summarily and unreasonably disregarded the privacy concerns raised in those cases, and failed to address how they affect application of the container doctrine.

D. For the reasons stated above, the issue will recur in district courts until this Court resolves the dissonance between *Riley*'s breadth of privacy concerns with the so-far mechanical application of *Ross* to digital-storage devices.

Are digital storage devices deserving of the unique treatment *Riley* and *Carpenter* suggest? Or are they simply one more category of container that may be searched pursuant to *Ross*? This is not the only case implicating post-*Riley* questions about application of *Groh*'s particularity prongs and the container doctrine to digital storage devices and forensic data searches. *E.g. Colorado v.*

Herrera, 357 P.3d 1227, 1228-1229 (Colo. 2015)(*en banc*); *Maine v. Jandreau*, 288 A.3d 371, 379-381(Me. 2022); *Massachusetts v. Dorelas*, 43 N.E.3d 306, 310-313 (Mass. 2016); *Richardson v. Maryland*, 282 A.3d 98, 113-124 (Md. 2022); *United States v. Bass*, 785 F.3d 1043, 1049 (6th Cir. 2015); *United States v. Corleto*, 56 F.4th 169, 175 at fn. 3 (1st Cir. 2022); *United States v. Deschambault*, 2022 U.S. Dist. LEXIS 131106 at *16-18 (D. Me. 2022); *United States v. Lindsey*, 3 F.4th 32, 37, 39 (1st Cir. 2021); *United States v. Mubarak*, 2022 U.S. Dist. LEXIS 133244 at *9-10, 29 (D. Mass. 2022); *United States v. Robinson*, 2024 U.S. Dist. LEXIS 77296 at *1-4 (E.D. Wyo. 2024); *United States v. Salaman*, 2024 U.S. Dist. LEXIS 133184 at *7, 18 (D. Conn. 2024).

Assuming this Court rules the container doctrine applies to permit initial access to data on a device, what are its limits given *Riley* and *Carpenter*? At least one lower court permits law enforcement to search *every* file and folder for particularly described evidence once a warrant authorizes *any* access to a device. *See United States v. Morton*, 46 F.4th 331, 339 (5th Cir. 2022)(applying *United States v. Leon*, 468 U.S. 897 (1984)). Or does it require warrants to facially incorporate *ex ante facto* descriptions of the files, folders and applications they are permitted to open? *See Connecticut v. Smith*, 278 A.3d 481, 251 (Conn. 2022). Does it require warrants to facially describe time frames during which files, folders and applications were created, edited or used? *See United States v. Wey*, 256 F. Supp. 3d 355, 387-388 (S.D.N.Y. 2017). Does it require warrants to facially incorporate *ex ante* orders describing the procedure law enforcement is permitted to use to search

once they have accessed a device's contents? *See United States v. Barnett*, 2022 U.S. Dist. LEXIS 206863 at *12-15 (E.D. Ky. 2022). If so, what is the standard? Must it be tailored to reasonably find the particularly-described evidence? Or must it be tailored to prevent intrusion into protected files, folders, programs and applications? Or does the Fourth Amendment require only *ex post* review to determine whether a forensic data search was *factually* limited in scope? *See Carter v. Indiana*, 105 N.E.3d 1121, 1130 (Ind. App. 2018)("we discern no indication that law enforcement had the ability to determine, *ex ante*, that certain pages could not have contained any of the information sought"). Commentators have noted the confusion.[29] Given the recency of *Riley* and *Carpenter*'s extraordinary concerns, and the sheer number of prosecutions involving digitally-stored evidence (90%), it is reasonable to expect these questions will continue to be raised in district courts, circuit courts and state courts absent this Court's review.

III. Petitioner's case presents an ideal vehicle to resolve the question presented.

A. This is a substantively clean case because the relevant and material facts are undisputed.

The face of Warrant #1 is incontestable. It says what it says. Warrant #1 *only* identified "records, and/or receipts, written or electronically stored" as evidence to be searched for. Warrant #1 *never* identified any digital storage devices as "places"

[29] Orin S. Kerr, *Yes, Warrants Allow a Search Through the Whole Phone*. Reason Online, Mar. 2, 2024, available at: <https://reason.com/volokh/2024/03/02/yes-warrants-allow-a-search-through-the-whole-phone/> (last accessed: Aug. 26, 2024); Jennifer Lynch, *New Federal and State Court Rulings Show Courts are Divided on the Scope of Cell Phone Searches Post-Riley*. Electronic Frontier Foundation, Oct. 4, 2022, <https://www.eff.org/deeplinks/2022/10/new-federal-and-state-court-rulings-show-courts-are-divided-scope-cell-phone> (last accessed: Aug. 26, 2024).

to search for such "records, and/or receipts," despite the clear call of the check-the-box system Judge Brown used to do exactly that, in addition to Petitioner's "person," "premises," and "vehicle." Nor did Warrant #1 describe the manner in which Government agents were authorized to search for "records, and/or receipts, written or electronically stored."

B. This is a procedurally clean case because the question presented was raised and ruled on by the Tenth Circuit.

Petitioner expressly raised the question presented with the Tenth Circuit. While never specifically invoking *Brown* or *Ross*, Petitioner nevertheless clearly asked whether, in light of *Riley* and *Carpenter*, "a warrant must issue which particularly describes the [digital storage device] as a place to be searched prior to accessing its contents even when the [device] itself is lawfully seized" pursuant to a warrant. [Appx. B at 30-33; Appx. C at 18]. And the Tenth Circuit clearly applied this Court's container doctrine, citing to its own precedent in *Loera* for the general rule established in *Ross* and *Robbins*. [Appx. A at 14 (quoting 923 F.3d at 916)].

C. This is a meritorious case because resolution of the question presented is outcome-determinative for Petitioner.

The Government rested its inevitable discovery argument on three theories. The District Court, however, only ruled that Theory #1 and Theory #3 provided alternative grounds on which to make its inevitable discovery finding. Following suit, the Tenth Circuit declined to rule on Theory #2 *and* Theory #3, despite their full briefing. The Circuit intentionally abandoned those theories as alternative

grounds on which to deny Petitioner's motion to suppress. Thus, this Court can satisfy itself that resolution of the question presented is necessary to a finding of inevitable discovery in this case. It is therefore dispositive of Petitioner's motion regarding suppression of the majority and core of the Government's evidence admitted against him at trial.

Furthermore, because the answer to the question presented is dispositive as to the digitally-stored evidence, it is dispositive of Petitioner's motion to suppress his later statements. Both the District Court and the Tenth Circuit ruled that the outcome of Petitioner's motion to suppress the statements relied on the outcome of his motion to suppress the digitally stored evidence. [Appx. A at 20]. Assuming this Court grants review and ultimately rules in favor of Petitioner, his statements would necessarily be suppressed as the "fruit of the poisonous tree." *See Colorado v. Spring*, 479 U.S. 564, 571-572 (1987)(contra-negative). Therefore, this Court's review of the question presented would necessarily dispose of *all* suppression matters in the case; and a ruling in Petitioner's favor would undermine confidence in the outcome, *i.e.* materially change the outcome of the case. *United States v. Davila*, 569 U.S. 597, 606-607 (2013).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Rule 33 of the Rules of the Supreme Court of the United States, I certify that this petition is proportionally spaced and contains 8,839 words, which includes footnotes. I relied on my word processor to obtain the count, and it is Microsoft Word 10. My petition was prepared in Century, a proportional typeface, and contains 33 pages of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Kari S. Schmidt
Kari S. Schmidt
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that paper copies of this original Petition for Writ of Certiorari were forwarded by third-party commercial carrier this 19th day of September, 2024, in accordance with Rule 29 of the Rules of the Supreme Court of the United States. I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope with the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days:

Original with 10 copies to:

Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

And 3 copies to:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

And 1 copy to:

Salvador Salas, Jr.

/s/ Kari S. Schmidt
Kari S. Schmidt
Counsel of Record for Petitioner

Salvador Salas, Jr. v. United States

Case No. _____

Petition for Writ of Certiorari
from U.S. Court of Appeals for the Tenth Circuit
10th Cir. Case No. 23-8027

APPENDIX A

Decision of U.S. Court of Appeals for the Tenth Circuit*

*Also reported at 106 F.4th 1050 (10th Cir. 2024)

FILED
United States Court of Appeals
Tenth Circuit

July 3, 2024

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SALVADOR SALAS, JR.,

Defendant - Appellant.

No. 23-8027

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 1:21-CR-00077-SWS-1)

Kari S. Schmidt, Conlee, Schmidt & Emerson LLP, Wichita, Kansas, for Defendant-Appellant.

Christyne M. Martens, Assistant United States Attorney (Nicholas Vassallo, United States Attorney, with him on the brief), Office of the United States Attorney, Casper, Wyoming, for Plaintiff-Appellee.

Before **PHILLIPS**, **SEYMOUR**, and **MURPHY**, Circuit Judges.

SEYMOUR, Circuit Judge.

In July 2021, based on evidence seized pursuant to two warrants, one for illicit drugs and one for child pornography, Mr. Salvador Salas, Jr. was charged with, and eventually convicted of, one count of possession and five counts of production of child

pornography. Prior to trial, Mr. Salas argued that all evidence found pursuant to the child pornography warrant should be suppressed because the warrant violated the Fourth Amendment. The district court agreed a Fourth Amendment violation had occurred but declined to suppress the child pornography evidence. It found that suppression was inappropriate because Mr. Salas's child pornography would have been inevitably discovered. On appeal, Mr. Salas contends that his child pornography would not have been inevitably discovered and, as such, should have been suppressed. We disagree and affirm.

I.

The factual events constituting Mr. Salas's case began February 27, 2021. That evening, while she visited his home, Mr. Salas gave methamphetamine to S.V.,[1] a 13-year-old girl, after which he sexually abused, filmed, and photographed her. S.V. was the daughter of Chelsea Gonzalez who had been a friend to Mr. Salas for approximately six years and whose children, including S.V., had often visited, stayed with, and babysat for Mr. Salas without incident. However, when S.V. returned home that night, Gonzalez noticed she was acting "really weird and not correct" and had a swollen white blister in her mouth. Rec., vol. V at 744. Concerned, Gonzalez took S.V. to the hospital, where a urinary analysis tested positive for methamphetamines. That next day, Gonzalez filed a police report with the Casper Police Department.

On March 1, based on Gonzalez's report, police officers obtained a warrant (the "First Warrant") to search Mr. Salas's home and vehicle for drugs and related evidence. On

[1] As referred to in the briefs, we also refer to the child victim as "S.V."

March 2, they executed it. During their search of Mr. Salas's home, the officers arrested him and his girlfriend, seized "a significant amount of narcotics," and seized Mr. Salas's iPhone and one hard drive. Aplt. Br. at 9. After interviewing Mr. Salas's girlfriend and noticing that he owned a significant amount of video and photography equipment, the officers further suspected him of producing or possessing child pornography. That same day they applied for, obtained, and executed a second search warrant (the "Second Warrant") to search for such evidence. Executing the Second Warrant, officers seized a Sony laptop, MacBook laptop, and Seagate hard drive from Mr. Salas's residence. In a subsequent search of the devices, a digital forensic analyst found child pornography in Mr. Salas's iPhone's Photo app (seized under the First Warrant) and on the Sony laptop and Seagate hard drive (seized under the Second Warrant).

On March 31, Mr. Salas was re-arrested on state charges of sexual assault, sexual exploitation of children, and drug use. While in custody, he made several incriminating statements confirming his production and possession of the child pornography on his devices.

The government indicted Mr. Salas in July 2021 on six federal counts of possessing and producing child pornography. In response, Mr. Salas moved to suppress the child pornography found on the Sony laptop and Seagate hard drive on the grounds that the Second Warrant lacked probable cause and, as such, violated his Fourth Amendment rights. He also argued that the child pornography on his iPhone, seized under the First Warrant, would not have been inevitably discovered because the First Warrant only authorized the

seizure, not the *search*, of his iPhone. Separately, Mr. Salas moved to suppress his incriminating March 31 statements, asserting that the police officers had ignored his invocation of his right to legal counsel.

Following a combined evidentiary hearing on Mr. Salas's motions, the district court declined to suppress the child pornography found on Mr. Salas's iPhone. It agreed with Mr. Salas that the Second Warrant, under which the other devices containing child pornography were seized, had "wholly lack[ed] probable cause." Rec., vol. II at 145. But it held that the First Warrant allowed for both the seizure and search of Mr. Salas's iPhone and therefore child pornography would have been inevitably discovered by the officers as part of their investigation into Mr. Salas's drug activities. The court separately declined to suppress Mr. Salas's statements, finding that he did not clearly invoke his right to counsel. The government presented the child pornography evidence at trial, and Mr. Salas was convicted on all counts. He timely appealed.

II.

Mr. Salas argues that the district court improperly denied his motions to suppress. "When reviewing a district court's denial of a motion to suppress, we view the evidence in the light most favorable to the government and accept the district court's factual findings unless they are clearly erroneous." *United States v. Palms*, 21 F.4th 689, 697 (10th Cir.

2021). We review de novo the ultimate question of reasonableness under the Fourth Amendment.[2] *Id.*

The Fourth Amendment establishes a right to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. To be constitutionally "reasonable," a warrant must be supported by probable cause and describe with particularity the places to be searched and evidence to be seized. *See id.*; *United States v. Russian*, 848 F.3d 1239, 1244 (10th Cir. 2017); *Palms*, 21 F.4th at 697. Moreover, "[a]fter obtaining a warrant, the Fourth Amendment also requires officers to conduct the search and seizure reasonably." *Palms*, 21 F.4th at 697. When a search violates the Fourth Amendment's mandates, any evidence obtained "will [generally] be suppressed under the exclusionary rule." *United States v. Christy*, 739 F.3d 534, 540 (10th Cir. 2014). *See also Nix v. Williams*, 467 U.S. 431, 442–44 (1984) (discussing the exclusionary rule's applicability and rationale); *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005) ("When a search violates the Fourth Amendment, the exclusionary rule normally dictates that evidence obtained as a result of that search be suppressed."). If applicable, the reach of the exclusionary rule is broad: Its "sanction applies to any 'fruits' of a constitutional violation," including "evidence [that is] tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." *United States v. Crews*, 445 U.S.

[2] The government contends that Mr. Salas waived his particularity argument and that we should only review it under plain error if we review it at all. Given that Mr. Salas's appeal is unsuccessful under de novo review, we need not address this argument.

463, 470 (1980). That said, the exclusionary rule has never been an absolutist doctrine and has long been subject to exceptions, albeit "jealously and carefully drawn" ones. *Jones v. United States*, 357 U.S. 493, 499 (1958) (citations omitted). One such exception is the inevitable discovery doctrine, under which "illegally obtained evidence may be admitted if it 'ultimately or inevitably would have been discovered by lawful means.'" *See Christy*, 739 F.3d at 540 (quoting *Nix*, 467 U.S. at 444). As we have noted:

> The[se] "lawful means" need not be a second, independent investigation. Rather, the inevitable discovery doctrine will apply if there was "one line of investigation that would have led inevitably to the obtaining of a search warrant by independent lawful means but was halted prematurely by a search subsequently contended to be illegal."

United States v. Loera, 923 F.3d 907, 928 (10th Cir. 2019) (quoting *Christy*, 739 F.3d at 540) (citations omitted). The crux of the inevitable discovery doctrine "is to place the government officers in the same positions they would have been in had the impermissible conduct not taken place" and then to ask "whether the government would have inevitably discovered the evidence lawfully." *Id.* at 928 (quoting *Nix*, 467 U.S. at 447). The government must prove by a preponderance of the evidence that the child pornography would have been discovered without the Fourth Amendment violation. *Christy*, 739 at 540.

Mr. Salas argues the district court improperly denied his first motion to suppress by erroneously applying the inevitable discovery doctrine. He contends the doctrine is inapplicable for three reasons: (1) the First Warrant was not sufficiently particular to allow the police to search his iPhone; (2) the government did not prove by a preponderance of the evidence that it would have obtained a subsequent warrant to search his iPhone for child

pornography; and (3) the government did not prove by a preponderance of the evidence that, absent its unlawful conduct, Mr. Salas would have given consent to the police to search his iPhone. Because we "have discretion to affirm on any ground adequately supported by the record," Mr. Salas's climb to reversal is steep. *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004). To obtain a reversal, he must succeed on all of his three legal challenges, while the government need only succeed on one to affirm.

We ultimately need not rule on Mr. Salas's second or third arguments because his appeal fails on his first one. We hold that evidence of Mr. Salas's child pornography would have been inevitably discovered because the First Warrant was sufficiently particular to justify a search of his iPhone and the police would have conducted the search reasonably. Because Mr. Salas's March 31 confession was the fruit of the government's search of his iPhone and because the search of his iPhone was proper under the inevitable discovery doctrine, Mr. Salas's confession was not "poisoned." The district court was correct to deny both of Mr. Salas's motions to suppress.

A.

We start with Mr. Salas's first challenge and note that it raises two distinct inquiries. First, was the First Warrant sufficiently "particular" to justify the seizure and search of Mr. Salas's iPhone?[3] And, second, assuming it was, was the search conducted "strictly within

[3] Of course, all warrants must also be supported by probable cause. *United States v. Otero*, 563 F.3d 1127, 1131 (10th Cir. 2009); *Palms*, 21 F.4th at 697. While Mr. Salas successfully challenged the probable cause of the Second Warrant, he did not similarly challenge the First Warrant and does not attempt to raise that issue on appeal.

the bounds set by the warrant," i.e., "reasonably?" *See United States v. Loera*, 923 F.3d 907, 916 (10th Cir. 2019). *See also Palms*, 21 F.4th at 697; *United States v. Wagner*, 951 F.3d 1232, 1243 (10th Cir. 2020).

1.

"The Fourth Amendment requires . . . that warrants . . . 'particularly describ[e] the place to be searched, and the places or things to be seized.'" *Otero*, 563 F.3d at 1131 (quoting U.S. Const. amend. IV) (alteration in original). This constitutional 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." *Id.* at 1131–32 (quoting *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)). Given "[t]he modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place," our circuit has observed that "the particularity requirement [has become] that much more important" in the context of electronic searches. *Id.* at 1132. To satisfy the "particularity" prong of the Fourth Amendment, then, we have held that "'warrants for computer searches must *affirmatively limit* the search to evidence of specific federal crimes or specific types of material.'" *Palms*, 21 F.4th at 698 (quoting *Otero*, 563 F.3d at 1132) (emphasis added).[4] We apply this same standard to cellphones "because they are essentially 'minicomputers that also happen

[4] "Warrants do not have to identify specific statutes for the crimes to which they are limited" to satisfy particularity. *Palms*, 21 F.4th at 698–99. Rather, we consider "whether the warrant adequately limited the scope of the search despite the absence of a statutory reference." *Id.* at 699. *See also Russian*, 848 F.3d at 1245.

to have the capacity to be used as a telephone.'" *Id.* (quoting *Russian*, 848 F.3d at 1245). The limitations in the search warrant are key. We have held electronic searches invalid "where we could discern *no limiting principle*: where, for example, the warrant permitted a search of 'any and all' information, data, devices, programs, and other materials." *Russian*, 848 F.3d at 1245 (quoting *United States v. Christie*, 717 F.3d 1156, 1164–65 (10th Cir. 2013)) (emphasis added). *See also Otero*, 563 F.3d at 1132–33. That said, so long as we can discern some "limiting principles" to the warrant, "broad authorization[s]" are permissible. *Palms*, 21 F.4th at 698.

To guide us, we look to a case that is factually similar, *United States v. Burgess*, 576 F.3d 1078 (10th Cir. 2009). There, following a traffic stop in which they discovered drugs in his motor home, officers came to suspect Mr. Burgess of drug trafficking. *Burgess*, 576 F.3d at 1082. They obtained a warrant that authorized a search of Burgess's motor home for, among other things, "certain property and evidence to show the transportation and delivery of controlled substances, which may include . . . pipes, bongs, syringes, packaging material, *computer records*, scales . . . ." *Id.* at 1083 (emphasis added). Pursuant to this warrant, officers seized two hard drives from Burgess's motor home, on which they eventually found child pornography. *Id.* at 1083–84. The district court denied Burgess's motion to suppress the evidence. *Id.* On appeal, we noted that although the inclusion of "computer records" might appear to be an "anomaly," the warrant provided the necessary context for determining its scope. *Id.* at 1091. Had the warrant been "read to allow a search of all computer records without description or limitation," we cautioned, it would have

failed particularity. *Id.* But the warrant did not do so. Its authorized "search . . . was limited to evidence of drugs and drug trafficking and, as it relates to the computer, was limited to the kind of drug and drug trafficking information likely to be found on a computer." *Id.* That was sufficiently particular.

Here, then, our first step is to analyze the First Warrant to determine if it contained appropriate limiting principles. The First Warrant, issued by a Wyoming appellate court judge, authorized officers to search and seize evidence in three places: (1) "on the person of Salvador Salas"; (2) "on the premises" of his home; and (3) in his vehicle. Rec., vol. III at 87. Specifically, it authorized officers to search for and seize:

> Controlled substances including, methamphetamine, heroin and marijuana; Evidence to show the use and delivery of a controlled substance; to include, paraphernalia designed for use in the weighing, cutting, ingesting, and packaging of controlled substances, *records, and/or receipts, written or electronically stored*, records that show ownership of other property. . . .

Id. (emphasis added).[5]

We discern several limiting principles in the First Warrant. Like the warrant in *Burgess*, the First Warrant authorized police to search only for specific kinds of digital evidence, specifically, "records and/or receipts, written or electronically stored." *Id.* Further, the warrant "provided the necessary context for determining its scope," *Burgess*, 576 F.3d at 1091. The officers could only search for records and/or receipts "show[ing] use and delivery of a controlled substance." Rec., vol. III at 87. They were not empowered to

[5] Both parties agree that Mr. Salas's iPhone, which was found on his bed next to him when he was arrested on March 2, 2021, was properly seized pursuant to the First Warrant.

go on a fishing expedition for everything on Mr. Salas's iPhone. The warrant and the officers' search were limited to electronic records and receipts and, in addition, they were "limited to the kind of drug and drug trafficking information likely to be found" on Mr. Salas's cellphone. *Burgess*, 576 F.3d at 1091. Admittedly the First Warrant did not identify a specific criminal statute for which the government was investigating Mr. Salas, but we have never held that to doom particularity. *See Palms*, 21 F.4th at 698–99. "[W]arrants may pass the particularity test if they limit their scope either to evidence of specific [] crimes or to specific types of material." *Russian*, 848 F.3d at 1245 (quoting *Christie*, 717 F.3d at 1165) (cleaned up). The First Warrant explicitly delimited the kind of illicit conduct, "use and delivery of [] controlled substance[s]", that the government was investigating Mr. Salas for. Rec., vol. III at 87. This is sufficient. Finally, we observe another limiting principle in the First Warrant: geography. The warrant limited the geographic reach of the government's electronic search to devices found in only three places: in Mr. Salas's residence, on his person, and in his vehicle. Any phones, computers, or other electronic devices found outside and beyond these areas would have been *per se* off-limits to the police unless and until they had obtained a separate warrant to search them. *See, e.g.*, *Russian*, 848 F.3d at 1245. In this context, we are convinced the First Warrant contained several affirmative "limiting principles" and so satisfied the Fourth Amendment's particularity requirement.[6]

[6] To be sure, this warrant is not an ideal specimen. As even the government admitted during oral argument, the First Warrant was "sparse." The more particular a warrant, the

But Mr. Salas advances a new argument. He contends that the First Warrant was only sufficiently particular to authorize the *seizure* of his iPhone, but not so particular as to authorize the *search* of it. Essentially, Mr. Salas argues that cellphones must be understood as not only "effects" (things) under the Fourth Amendment, but also as "places," and that to lawfully search a cellphone's data, a warrant must independently identify and authorize that cellphone as a "place" to be searched. Simply listing "electronically stored records" in a warrant, as was done in the First Warrant here, does not, Mr. Salas contends, authorize officers to search a cellphone even if they properly seized it. In that case, i.e., if a warrant does not list the seized cellphone as a discrete "place," then the police must get another warrant before searching it.

To support his claim, Mr. Salas points us to two cases: the Supreme Court's decision in *Riley v. California*, 573 U.S. 373 (2014), and our decision in *United States v. Russian*. We find neither particularly persuasive. *Riley* concerned "the reasonableness of a *warrantless* search [of an individual's cellphone] incident" to the lawful arrest of that individual and the Court ultimately held that "officers must generally secure a warrant before conducting such a search." *Riley*, 573 U.S. at 382, 386 (emphasis added).[7] This is

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better. However, that a better warrant could have been issued does not make this one legally insufficient. The First Warrant's particularity meets the bar set under our caselaw. That is enough.

[7] To illustrate the dissimilarities, both the combined cases in *Riley* concerned individuals arrested by officers while in their automobiles; officers then conducted warrantless searches of the phones seized when those individuals were arrested. *Riley*, 573 U.S. at 378–81. Here, Mr. Salas was arrested in, and his phone was seized from, his home by officers who then searched his phone pursuant to a valid warrant.

not analogous to Mr. Salas's case, which deals with the particularity of a *warranted* search in which his cellphone was properly seized. To apply *Riley* to Mr. Salas's case would be to cherry-pick and graft a holding from an independent area of Fourth Amendment law. We do not conflate legal doctrines so casually.

In *Russian*, two phones were seized incident to Russian's arrest, and a warrant was sought and issued to search his residence and seize any additional phones. *Russian*, 848 F.3d at 1242–43. Police used this warrant to then search the two already-seized phones. *Id.* We found the warrant failed particularity because it "did not identify either of the phones that were already in [the police's] custody, nor did it specify what material . . . law enforcement was authorized to seize." *Id.* at 1245. Mr. Salas argues that *Russian* thus stands for the proposition "that mobile digital storage devices, like cellphones . . . constitute not only evidence to be seized, but co-extensively are places to be searched." Aplt. Br. at 26. This reads *Russian* too broadly. We found *Russian*'s warrant insufficiently particular to justify the search of the already-seized cellphones because the warrant *only* authorized the search of Russian's apartment and any cellphones inside; it said nothing about the already-seized phones. *Russian*, 848 F.3d at 1243. We never held that the two already-seized phones were separate "places"; we simply held that they were not explicitly included in the warrant and, as such, the warrant did not authorize their search. *Id.* at 1245 ("Although the [affidavit] requested authorization to search the two Samsung cell phones law enforcement had seized at the time of Russian's arrest . . . the warrant itself merely authorized a search of Russian's residence and seizure of any cell phones found inside. The

warrant did not identify either of the phones that were already in law enforcement's custody . . . .").

We decline Mr. Salas's invitation to establish a new legal rule that every search of a cellphone requires a discrete authorization via warrant. Rather, per our caselaw, we hold that the First Warrant contained sufficient limiting principles to satisfy the Fourth Amendment's particularity requirement.

2.

"[O]btaining a sufficiently particular warrant is just the first step to conducting a reasonable search. The officers tasked with executing a sufficiently particular warrant must conduct their search 'strictly within the bounds set by the warrant.'" *Loera*, 923 F.3d at 916 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 n.7 (1971)). "If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . the subsequent seizure [of evidence] is unconstitutional without more." *Horton v. California*, 496 U.S. 128, 140 (1990). This is "an exercise in reasonableness assessed on a case-by-case basis." *Loera*, 923 F.3d at 916.

We recognize the general rule that "investigators executing a [sufficiently particular] warrant can look anywhere where evidence described in the warrant might conceivably be located." *Id.* Even so, we have cautioned that this traditional analysis of a warrant's physical scope is "less effective in the electronic-search context." *Id.* This is so "[g]iven the enormous amount of data that computers can store and the infinite places within a computer that electronic evidence might conceivably be located." *Id.* As such, our

circuit's reasonableness analysis for electronic searches has trended away from focusing on the "what" permitted under a search warrant; instead, "we have focused on 'how' the agents carried out the search, that is, the reasonableness of the *search method* the government employed." *Id.* at 916–17 (emphasis added). The key question is "whether the forensic steps of the search process were reasonably directed at uncovering the evidence specified in the search warrant." *Id.* at 917.

Here, because the actual procedure used to search Mr. Salas's iPhone was done pursuant to the ultimately invalid Second Warrant, we are forced to wade into hypothetical waters. The appropriate inquiry is, if the Second Warrant was never issued, would the search process officers conducted been "reasonable"? We conclude that it would have been.

During the suppression hearing, the analyst who conducted the electronic search of Mr. Salas's devices, Computer Forensic Analyst Caleb Forness, described the procedure he would have used for searching a phone only suspected of containing electronic drug records.[8] Forness testified he would have first opened the iPhone's "Settings" application to identify the user, and he then would have "more than likely" opened the "Photos" application. Rec., vol. IV at 157. This described process appears "reasonably directed" at

[8] We note that before any electronic search, the data on Mr. Salas's devices was first forensically extracted. We upheld similar "extraction and search" methods (by which agents "make a byte-for-byte copy" of all of a cellphone's files) in *Burgess* and *Palms*. *See Burgess*, 576 F.3d at 1084; *Palms*, 21 F.4th at 701. Such methods preserve, without alteration, data from electronic devices to both make that data easier to forensically search and to protect against remote wipes.

finding the "evidence specified in the search warrant." *Loera*, 923 F.3d at 917. The First Warrant authorized the police to search for "records and/or receipts, written or electronically stored" related to "use and delivery" of drugs. Rec., vol. III at 87. This might have included receipts of sales, records of pay-owe sheets, or drug "trophy photos." Such evidence is often found on cellphones generally, as Officer Andrea Husted testified, *see* Rec., vol. IV at 60 ("In 2022, most people are keeping [receipts] on their cellphones instead of notebooks and sheets of paper."), and in photos specifically, as the district court observed, *see id.* at 177 ("I guess what I would say is I'm . . . thinking electronic receipts could include photographs of pay/owe sheets, photographs of—I mean, in my experience, I've seen photographs of drugs. I've seen photographs of pay/owe sheets."). Of course, a phone has many "areas" to search, but Forness's instinct to search Mr. Salas's Photo app conforms with our "conceivably located" standard. *Loera*, 923 F.3d at 916. It is certainly conceivable that records of drug transactions, perhaps photos of physical receipts, screenshots of electronic deposits, or drug "trophy photos," as examples, might have been saved in an iPhone and in its Photo application. *See Burgess*, 576 F.3d at 1078. Given that Forness's hypothetical search would have been limited, at least initially, to only the photos on Mr. Salas's iPhone, we hold that the process described would have been reasonable.

3.

Our final inquiry is whether, acting pursuant to a properly particular warrant and a reasonable search, officers would have inevitably discovered evidence of child pornography. The district court so held and we agree.

The record demonstrates by a preponderance of the evidence that the police would have inevitably discovered the child pornography on Mr. Salas's iPhone through lawful means independent from the invalid Second Warrant. As we held above, the police lawfully seized and were authorized to search Mr. Salas's iPhone pursuant to the valid First Warrant. On March 8, 2021, Caleb Forness digitally searched Mr. Salas's devices, including his iPhone, for evidence of drug transactions (under the First Warrant) and child pornography (under the Second Warrant). Had the constitutionally "impermissible conduct not taken place" here, i.e., had the Second Warrant never been issued, Forness would have still discovered the child pornography on Mr. Salas's iPhone. *Nix*, 467 U.S. at 447. Forness testified he would have used the same methodology when searching Mr. Salas's iPhone for evidence of drug transactions as he would when searching for child pornography: "Settings" first, "Photos" second. Rec., vol. IV at 157. There would have been no difference between the process Forness used in the search he *did* perform acting under the Second Warrant and the search he *would have* performed had he only been acting under the First Warrant. Rec., vol. IV at 157. This is further buttressed by Forness's testimony that whether he had forensically or manually reviewed the iPhone's photos, he would have inevitably stumbled upon Mr. Salas's child pornography. *Id.* at 150–51. Mr. Salas's child pornography was near the top of his iPhone's camera roll and, as Forness testified, he "almost immediately" found it as he began scrolling downward. *Id.*

Moreover, although the iPhone was initially locked, Forness testified that it would have been "just a matter of time" before he could "brute-force" his way in. *Id.* at 151. He

ultimately did not have to do so because, by happenstance, the iPhone's passcode was found on another of Mr. Salas's devices, his Sony laptop. However, because it is unclear whether that laptop was seized pursuant to the (valid) First or (invalid) Second Warrant, our analysis is whether, absent that laptop, Forness could have accessed the iPhone. Ostensibly that answer is yes, Forness would have eventually broken through the iPhone's lock and accessed its contents. Thus, Mr. Salas's child pornography would not have indefinitely stayed hidden behind his iPhone's locked passcode. It would have inevitably been discovered.

Finally, although the district court did not make a factual finding on the issue, the record indicates the regular practice of the police was to apply for and obtain so-called "piggyback warrants" when officers discovered evidence of a second crime while investigating. Detective Shannon Daley's testimony suggested this was a commonplace practice in the department. Moreover, Daley was able to provide a relatively detailed description of piggyback warrants, articulate their application process, and even describe established, informal practices the police used when applying for them. This all suggests that the police would have applied for another warrant upon Forness's discovery of Mr. Salas's child pornography.

Thus, all the necessary prerequisites of the inevitable discovery doctrine were satisfied here. The First Warrant was particular enough to authorize the police to seize and search Mr. Salas's iPhone. The hypothetical search procedure the police would have used to search Mr. Salas's iPhone for evidence of drugs and drug transactions was reasonable.

And the search methodology would have rendered discovery of Mr. Salas's child pornography inevitable. The district court was right to so hold.

B.

One last issue remains for us to resolve: whether Mr. Salas's incriminating March 31 statements should be suppressed. Mr. Salas argues that, assuming his first motion to suppress is reversed, his statements given during his March 31 interrogation should be similarly suppressed under the fruit-of-the-poisonous-tree doctrine. He relies on a statement given by the district court during the suppression hearing:

> To me, the confession is tied to the motion to suppress. If the affidavit or the search of the phone is valid, the motion to suppress Mr. Salas' statements would be denied . . . . Conversely, however, if the Court were to find that the motion to suppress the items seized from the second search warrant, then I think under the fruit-of-the-poisonous-tree doctrine, the statement would have to be suppressed because the statement that he made and the questions he was asked were derived from the officer having viewed the cellphone.

Rec., vol. IV at 173. The court's statement tracks well-worn law. As we noted above, if the exclusionary rule applies because of a Fourth Amendment violation, then the rule's ambit is "broad[,] and witnesses and evidence (including confessions), no matter how probative, discovered only as a result of a Fourth Amendment violation, must be excluded." *United States v. Pettigrew*, 468 F.3d 626, 634 (10th Cir. 2006). The defendant bears the burden of establishing the "causal connection between an illegal seizure and the evidence he seeks to suppress" or, said otherwise, that "the incriminating evidence 'would not have come to light *but for* the illegal [seizure].'" *United States v. Shrum*, 908 F.3d 1219, 1233 (10th Cir. 2018) (quoting *Wong Sun v. United States*, 371 U.S. 471 (1963)). The government can then

rebut this 'but for' causation by proving inevitable discovery. *Id.* at 1235. Both the government and Mr. Salas agree that "[a] confession cannot be 'fruit of the poisonous tree' if the tree itself is not poisonous." *Colorado v. Spring*, 479 U.S. 564, 571–72 (1987). *See* Aple. Br. at 41; Reply at 21–22. As such, Mr. Salas concedes that the "inevitable discovery issues [] are determinative of this issue." Reply at 22. We agree.

The district court found that Mr. Salas's confession on March 31 to the production and possession of the child pornography was the fruit of the search of his iPhone on March 8. This is a factual finding that we may only reverse if we find it is clearly erroneous. *Palms*, 21 F.4th at 697. We do not find any such error based on our own review of the record. If the child pornography found on Mr. Salas's iPhone would have been inevitably discovered absent the Second Warrant, then Mr. Salas's statement could not be suppressed. As we have determined, the child pornography on Mr. Salas's iPhone would have been inevitably discovered pursuant to the First Warrant. As was the case with Mr. Salas's motion to suppress the child pornography, the district court was correct in denying Mr. Salas's motion to suppress his March 31 statements.

We affirm.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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July 03, 2024

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RE: 23-8027, United States v. Salas
Dist/Ag docket: 1:21-CR-00077-SWS-1

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Christyne Marie Martens
Stephanie Irene Sprecher

CMW/lg

Salvador Salas, Jr. v. United States

Case No. _____

Petition for Writ of Certiorari
from U.S. Court of Appeals for the Tenth Circuit
10th Cir. Case No. 23-8027

APPENDIX B

Petitioner's Brief to U.S. Court of Appeals for the Tenth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 23-8027

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVADOR SALAS, JR.,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Wyoming

The Hon. Scott W. Skavdahl, United States District Judge

D.C. No. 21-CR-77-SWS

BRIEF OF DEFENDANT-APPELLANT

ORAL ARGUMENT IS REQUESTED

Respectfully submitted,

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JURISDICTION AND RELATED APPEALS

This appeal is made pursuant to 28 U.S.C. § 1291, arising from a final judgment disposing of all parties' claims. Appellant was indicted in the District of Wyoming on July 22, 2021. [R1.26-28]. A jury convicted him at trial on one count of violating 18 U.S.C. § 2252A(a)(5)(B), (b)(2), and five counts of violating 18 U.S.C. § 2251(a), (e). [R2.325]. He was sentenced to 240 months imprisonment as to Count 1 and 360 months imprisonment as to each of Counts 2, 3, 4, 5 and 6, all counts to be served consecutively to each other, for a total term of imprisonment of 2,040 months, and ten years supervised release. [R2.326]. He timely filed his Notice of Appeal on April 18, 2023. [R1.98]. This appeal follows. There are no other related appeals in this case.

STATEMENT OF THE ISSUES

I. Whether the District Court erroneously denied Appellant's motion to suppress evidence found on his cellular phone and other digital storage devices?

II. Whether the District Court erroneously denied Appellant's motion to suppress Appellant's post-*Miranda* statements?

STATEMENT OF THE CASE

In February 2021, Appellant was the subject of two criminal complaints. The first was a domestic violence complaint alleged against him by his girlfriend, Marti Parmenter. The second, and at the center of this case, concerned his alleged distribution of narcotics, including to a minor child. On March 1, law enforcement obtained a warrant to search for evidence of narcotics distribution in Appellant's residence, vehicle and on

his person. On March 2, law enforcement executed that search, ultimately seizing a sizeable amount of drugs, as well as Appellant's iPhone and an undescribed computer hard drive. Also on March 2, based on a certain officer's hunch that Appellant was engaged in production, possession and distribution of child pornography, law enforcement obtained a second search warrant. On the heels of the first search, before law enforcement even left Appellant's apartment, they executed a second search, seizing electronic equipment, including laptop computers and additional hard drives. Appellant was arrested on March 2, but quickly was released on pre-trial bond. But law enforcement retained possession of the iPhone, computers and hard drives.

By March 8, law enforcement had failed to obtain a third search warrant expressly authorizing it to conduct a search of the digital contents and files on the iPhone. However, on that date, law enforcement conducted a search of the iPhone, accessing and viewing its digitally-stored contents. At the same time, law enforcement conducted a search of the laptop computers and hard drives seized during the second search of his residence a week earlier. Ultimately, law enforcement discovered files and digital contents of evidentiary value across these devices, including images and videos depicting Appellant engaged in production of child pornography. Law enforcement did not act on this newly-discovered information.

It was not until March 31 that law enforcement would act again. By that date, an arrest warrant had been issued for Appellant in connection with the February domestic violence complaint. On that date, during a warrant service operation, law enforcement arrested Appellant. Despite requesting an attorney, none was ever provided. Once

transported to the police department, law enforcement interrogated Appellant. However, law enforcement's questions were not limited to the domestic assault which led to his arrest. Instead, law enforcement confronted Appellant with the pictures and videos found on his phone, questioning him about the contents. During this interview, Appellant confessed that he owned the devices on which the pornographic images and videos were found. He identified himself as the man in the images and videos. And he confirmed that the person he was depicted engaged with in sexual acts was a person known to law enforcement to be a teenager and minor child. Appellant was arrested and booked on the charges in the instant case, in addition to the charges in the domestic violence case, and was detained pending trial.

On April 13, after learning that law enforcement had already viewed the contents of his phone and other devices, Appellant requested through his attorney that law enforcement make copies of certain files from his phone. He believed they would aid him in his defense against the domestic violence charges.

Appellant later moved the District Court to suppress the contents of the digital devices, including and especially his iPhone. The District Court ultimately found that the second search warrant was invalid. However, the District Court held that the inevitable discovery doctrine precluded exclusion of the evidence. At trial, the District Court permitted the Government to admit the digital content evidence against Appellant, including the images and videos. Appellant also moved the District Court to suppress the statements he made on March 31. The District Court ultimately held that if the iPhone evidence was excluded, then the statements must be excluded, as well, as "fruit of the

poisonous tree;" but if the iPhone evidence was not excluded, then the statements were otherwise admissible. Having found the digital content evidence admissible against Appellant due to inevitable discovery, the District Court found the statements admissible. At trial, the District Court permitted the Government to admit Appellant's statements against him. Appellant was convicted on all counts, and now challenges the District Court's denials of his motion to suppress the digital evidence seized by law enforcement on March 8, and his motion to suppress his statements made on March 31.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY[1]

I. FACTS RELATED TO THE MARCH 8, 2021 DIGITAL STORAGE DEVICE SEARCHES.

Domestic Violence Incident

On February 14, 2021, Marti Parmenter, Appellant's girlfriend, filed a complaint against him for domestic violence. [R3.91; R4.120-121, 125]. At some point after the incident, a felony warrant issued for Appellant's arrest on domestic violence and sexual assault charges. [R4.72, 122]. But no further action was taken until March 31, 2021, *infra*. [R4.71-72].

[1] The record on appeal is cited to using the following format: [R1.203], wherein "R1" refers to the record volume number (such that "R1" refers to record volume 1), and wherein "203" refers to the page number within that record volume (such that "R1.203" refers to page 203 of record volume 1.

Initial Incident

On February 27, 2021, S.V., a minor, went to Appellant's home to babysit for him. [R3.78]. While at Appellant's home, Appellant supplied S.V. with methamphetamine which she smoked. [R3.79]. Appellant also took pictures of S.V. with children at his residence. [R3.78].

On February 28, 2021, during the early morning hours, S.V. returned home. Around 3:15 in the morning, S.V.'s mother, Chelsea Gonzales witnessed S.V. behaving out of character; acting without motor function control and speaking unintelligibly. [R3.78]. She also observed burn marks on the corners of S.V.'s mouth and lower lips. [R3.78]. Around 4:30 in the morning, Gonzales took S.V. to Wyoming Medical Center (WMC). [R3.78]. While at WMC, medical professionals conducted a blood draw and determined that S.V. was under the influence of methamphetamine. [R3.79]. Later that day, Gonzales reported these events to Officer Meyers of the Casper Police Department (CPD) in Casper, Wyoming. [R3.78].

CPD's Initial Investigation

On March 1, 2021, Officer Meyers and Special Agent Reinhart, of the Wyoming Division of Criminal Investigation (DCI), conducted a follow-up interview with Gonzales and S.V. [R3.79]. S.V. recalled to them the events of February 27 and February 28. [R3.79]. She also reported that Appellant distributed narcotics to children and adults. [R3.79]. S.V. identified for CPD Appellant's residence at 8300 Tubbs Road #A as the

location where the events of the initial incident occurred. [R3.80]. She also provided to CPD a description of Appellant's vehicle, a red Cadillac. [R3.80].

Search Warrant #1: Application and Context

Later that same day (March 1), Officer Meyers memorialized Gonzales' and S.V.'s reports in an affidavit. [R3.89-90]. Based on these reports, the blood draw results, and S.V.'s identification of Appellant's residence and vehicle, Officer Meyers applied for a warrant to search Appellant, his residence at 8300 Tubbs Road, and his red Cadillac vehicle. [R3.80]. Later that day (March 1), Judge Steven Brown, of the Wyoming state court of appeals, granted the application and issued the search warrant ("Search Warrant #1"). [R3.80].

Search Warrant #1: Scope - Evidence To Be Searched For

The face of Search Warrant #1 sets out the scope of what was to be searched for:

> "[e]vidence to show use and delivery of a controlled substance; to include . . . records, and/or receipts, written or electronically stored, records that show ownership of other property."

[R3.87]. Nothing in the warrant granted to CPD a right to search for or seize evidence relating to the possession, production or distribution of child pornography. [R3.87].

Search Warrant #1: Scope - Places To Be Searched

The face of Search Warrant #1 used a checkbox system for identifying the particular places to be searched. [R3.87]. Using that checkbox system, Judge Brown memorialized his finding that probable cause existed to believe evidence of "use and

delivery of a controlled substance" would be found in exactly three places: (i) "the person of" Appellant, (ii) "on the premises" of Appellant's residence, and (iii) "in the vehicle" of Appellant. [R3.87]. However, Judge Brown did not check the box indicating a finding that probable cause existed to believe evidence of a drug use or distribution offense would be found in any "other property" despite fair opportunity to do so:

> Affidavit having been made before me by Officer M. Meyers A328 that he has reason to believe that;
>
> ☒ on the person of Salvador Salas a white male standing 5'10" tall and weighing 220 pounds with brown eyes and short black hair.
> ☒ on the premises of 8300 Tubbs Road #A, Casper, WY 82604, a tan 4 apartment complex where all front doors are located on the south side of the building. Apartment #A is located on the top left of the apartment complex as described by two independent witnesses, one of which being the victim. Apartment #A has a black/grey front door, with no indication, numbering, or lettering on the outside of the apartment. As you are looking at the complex from Tubbs Road, Apartment #A is located in the top left of the complex.
> ☒ in the vehicle of a red Cadillac CTS Wagon passenger car bearing Wyoming registration 1-P-68281, VIN #: 1G6DM8EG8A0131742.
> ☐ on the property described as ,

[R3.87].

Below that, the face of the warrant set forth a second series of checkmark boxes indicating the places CPD was authorized to search for evidence of a drug distribution crime: (i) "on the person . . . above described," (ii) "on the premises . . . above described," (iii) "in the vehicle . . . above described," and (iv) "on the property . . . above described." [R3.87]. Again, however, Judge Brown checked only the first three of these boxes indicating his ruling regarding places CPD was authorized to search for evidence of a drug crime:

> and as I am satisfied that good cause is shown by the Affidavit, which is incorporated by reference hereto, that this Warrant should be executed and as I am satisfied that there is probable cause to believe that the said property is being concealed:
>
> ☒ on the person ☒ on the premises ☒ in the vehicle ☐ on the property
>
> above described, because of the information contained from the affidavit, attached hereto and made a part hereof; you are hereby commanded to search the person named for; the property specified; serve this Warrant and make the search:

[R3.87]. Judge Brown did not authorize CPD to search anywhere else.

The face of the warrant fails to evidence any of the following: (i) a finding that probable cause existed to believe evidence of a drug crime was "being concealed" in or on any digital storage devices, such as cell phones, laptops or hard drives; (ii) authorization to "hack," "crack," or otherwise bypass any digital security protocols on any such devices, (iii) authorization to conduct a device "dump," *i.e.* to transfer, copy, download or otherwise create a local copy of any records or files digitally stored or accessed through any devices, or (iv) authorization to review or look at the contents of any records or files digitally stored or accessed through any devices, whether directly on those devices or on other devices to which those contents were "dumped." [R3.87].

Search #1: Execution of Narcotics Warrant (Search Warrant #1).

On March 2, 2021, the next day, CPD conducted a pre-raid conference with the officers who would execute Search Warrant #1. [R4.59]. At that meeting, CPD was informed of the scope of the warrant, including the places to be searched and evidence to be seized. [R4.34-35]. After the conference, CPD executed a search pursuant to Search Warrant #1 ("Search #1"). [R3.81; R4.60]. CPD searched both the residence at 8300 Tubbs Road, and the vehicle. [R3.81]. Upon entering the residence, CPD discovered Appellant inside. [R3.81]. His person, too, was searched in the residence upon his arrest. [R3.81]. Upon entering the residence, CPD also discovered that Parmenter (the girlfriend) was inside the residence. [R4.61]. CPD arrested her. [R4.61]. CPD transported Appellant and Parmenter to the jail and police department, respectively. [R4.62, 111].

During Search #1, CPD discovered in the residence and seized a significant amount of narcotics, including 29 grams of heroin, 2 grams of MDMA, 29 grams of methamphetamine, a firearm and ammunition. [R3.82, 85-86; R4.91]. During Search #1 at the residence, CPD also seized two digital storage devices: an iPhone with a clear, green case, [R3.86; R4.61, 63, 65, 68; R5.376], and a hard drive from under Appellant's bed. [R3.86; R4.63]. CPD "believe[d] that it was justifiable or that there should be a search warrant sought for the search of the phone based on the drug quantities," but CPD never pursued any steps to obtain such a warrant. [R4.83-84].

Search Warrant #2: Application and Context

On March 2, during Search #1, CPD noticed that Appellant had a significant amount of video and photography equipment at his residence. [R3.99]. After transporting Parmenter to the police department building, CPD officers and detectives conducted an interview with her. [R3.91-94; R4.112-113]. During that interview, Parmenter represented to CPD that Appellant took drugs with her, that he took pictures of her after she had passed out, and that he had pictures of other women in a state of undress saved to his cellular phone. [R3.99; R4.112].

Later that same day, on the basis of Parmenter's representations about Appellant taking pictures of her after taking drugs with her, her representations about Appellant having pictures of other adult women on his phone, the age of S.V., and the fact that S.V. had done drugs with Appellant, Officer Meyers applied for a second warrant ("Search Warrant #2"). [R3.97-100; R4.21, 64-65, 70]. Officer Meyers returned to Judge Brown

with his application for Search Warrant #2. [R4.98]. He "piggybacked" his application and affidavit for Search Warrant #2 onto his application and affidavit for Search Warrant #1. [R4.99, 116-118]. Judge Brown issued Search Warrant #2. [R3.100; R4.114].

During Parmenter's interview, and Officer Meyers' application to Judge Brown for Search Warrant #2, CPD officers at the residence concluded Search #1, secured the residence and waited there for Search Warrant #2 to issue. [R4.66, 79].

Search Warrant #2: Scope - Evidence To Be Searched For

The face of Search Warrant #2 authorized CPD to search for, and included video, photography and computer equipment, including digital storage devices which may contain images, pictures, photographs, or videos "which may show or tend to show criminal acts . . . related to the sexual exploitation of children." [R3.95]. Specifically, it permitted seizure of "[c]omputers and [d]igital communications devices allowing access to the Internet to include . . . cellular telephones." [R3.95]. It also permitted the seizure of digital photo and video files themselves. [R3.95].

Search Warrant #2: Scope - Places To Be Searched

Search Warrant #2 utilizes the same checkbox system as Search Warrant #1. [R3.87, 95]. On the face of Search Warrant #2, Judge Brown evidences his finding that probable cause existed to believe evidence of child pornography and sexual exploitation would be found in the following places: "on the premises" at Appellant's apartment, and "in the vehicle" owned by Appellant. [R3.95]. Conspicuously, Judge Brown elects to *not* express a finding that Officer Meyers asserts probable cause exists to believe evidence of

child pornography and sexual exploitation would be found on or in "[other] property described as" the iPhone seized during Search #1, or any other digital storage devices that might be seized during the search to be made pursuant to Search Warrant #2 ("Search #2"). He leaves that box unchecked:

Affidavit having been made before me by Officer M. Meyers A328 that he has reason to believe that;

☐ on the person of
☒ on the premises of 8300 Tubbs Road #A, Casper, WY 82604, a tan 4 apartment complex where all front doors are located on the south side of the building. Apartment #A is located on the top left of the apartment complex as described by two independent witnesses, one of which being the victim. Apartment #A has a black/grey front door, with no indication, numbering, or lettering on the outside of the apartment. As you are looking at the complex from Tubbs Road, Apartment #A is located in the top left of the complex.
☒ in the vehicle of a red Cadillac CTS Wagon passenger car bearing Wyoming registration 1-P-68281, VIN #: 1G6DM8EG8A0131742.
☐ on the property described as

[R3.95]. Similarly, Judge Brown elects to *not* express a finding that probable cause actually exists to believe evidence of child pornography and sexual exploitation would be found in or "on [other] property" that might be described as the iPhone, or any other digital storage device. He leaves that box unchecked:

and as I am satisfied that good cause is shown by the Affidavit, which is incorporated by reference hereto, that this Warrant should be executed and as I am satisfied that there is probable cause to believe that the said property is being concealed:

☐ on the person ☒ on the premises ☒ in the vehicle ☐ on the property

above described, because of the information contained from the affidavit, attached hereto and made a part hereof; you are hereby commanded to search the person named for; the property specified; serve this Warrant and make the search:

[R3.96].

Judge Brown only conditionally authorized CPD to conduct forensic digital searches on certain digital storage devices. First, given that the scope of Search Warrant #2 pertains only to devices seized pursuant to its auspices, CPD was authorized to conduct forensic digital searches only on devices seized during Search #2. [R3.96].

Second, CPD was authorized to conduct such searches only on devices "found in a running state" during Search #2:

> 5) Computer software, hardware or digital contents related to the sharing of Internet access over wired or wireless networks allowing multiple persons to appear on the Internet from the same IP address. If computers or other digital devices are found in a running state the investigator may acquire evidence from the devices prior to shutting the devices off. This acquisition may take several hours depending on the volume of data.
>
> 6) If computers are found in a running state the investigator may acquire evidence from the computers prior to shutting the computers off. This acquisition may take several hours depending on the volume of data.

[R3.95-96].

Search #2: Execution of Child Pornography Warrant (Search Warrant #2)

Later that same day (March 2), after CPD received Search Warrant #2, officers on the scene at Appellant's residence immediately began Search #2. [R4.66]. CPD searched the residence and vehicle, and seized "all electronics, power sources, anything that could hold electronic data." [R4.66-67]. Specifically, during Search #2, CPD seized (i) a Sony laptop, [R1.26; R3.102; R5.182], (ii) a Seagate hard drive, [R1.26; R3.102; R5.440-445], and (iii) a Macbook laptop. [R3.102]. None of these devices were contemplated by CPD to have been seized during Search #1 pursuant to Search Warrant #1 as part of an investigation "for controlled substances or evidence of controlled substances." [R4.71; R5.378]. In other words, they were seized as the fruits only of the execution of Search Warrant #2 – "the piggyback" warrant. [R4.114, 119]. After Search #2, all of the electronic devices seized from Appellant's residence were transferred to Caleb Forness, a computer forensics analyst with DCI. [R4.119].

Post-Arrest Release

Later that same day (March 2), while Search #1 and Search #2 were transpiring, and after Appellant had been transported to jail, he was booked on Wyoming state charges for child endangerment, possession of controlled substances and delivering paraphernalia to a minor. [R2.84]. The next day, on March 3, he was released on pre-trial bond. [R2.84; R4.92]. Appellant's devices were not returned to him. [R4.123].

Search #3: The Cellphone Search

On March 8, 2021, Caleb Forness, a CPD digital forensic analyst, began his investigation of the devices recovered from Appellant's residence. [R4.147, 154]. That day, Officer Meyers personally appeared at Forness' office at DCI. [R4.146; R5.502, 684]. He brought with him a "brief synopsis of the case and then the digital evidence items." [R4.146]. Officer Meyers represented to Forness that a search warrant had been issued authorizing a forensic digital search, *i.e.* Search Warrant #2. [R4.147]. Officer Meyers provided to Forness a copy of Search Warrant #2, but Forness did not read it or review it. [R4.154-155].

Forness then commenced a search of the devices including searches of the Apple iPhone seized during Search #1, and of the Sony laptop and Seagate hard drive seized during Search #2, and accessed their stored contents. [R4.147]. During this process, he discovered the iPhone had run out of battery charge. [R4.148]. He charged the phone. [R4.148]. He determined that the Apple iPhone and Seagate hard drive "were encrypted and locked behind a pass code." [R4.147]. However, the Sony laptop was unencrypted.

[R4.151]. While conducting a search of the Sony laptop and the MacBook laptop, he discovered a six-digit sequence of numbers. [R4.147, 151]. Forness deduced this numerical sequence was an account passcode and once the iPhone was charged, Forness used that six-digit sequence to unlock it. [R4.147, 148]. Once unlocked, he "went into the photos and then manually discovered child pornography." [R1.26-28; R4.148]. He discovered evidence of child pornography on the Sony laptop and the Seagate hard drive as well. [R1.26; R5.192-194, 199-200, 239, 245-251].

Search #4: The Second Cellphone Search Request

On March 31, 2021, CPD arrested Appellant in connection with a separate and independent offense: domestic violence. [R4.120-121]. On April 13, 2021, CPD received a request from Appellant's attorney in the domestic violence case, Noelle Bradshaw, to "search the phone and look for [certain] recordings." [R4.121, 122]. Bradshaw represented to CPD in that request "that there was evidence on his phone, a recording . . . that he believed would exonerate him in the domestic-violence crime." [R4.121].

The Suppression Proceedings

On July 22, 2021, the federal Government indicted Appellant. [R1.26]. On September 16, 2022, Appellant filed his written motion to suppress the fruits of Search #2 and Search #3. [R3.64-77]. On September 30, 2022, the Government filed its written response. [R4.48-66]. Therein, the Government alleged that Search Warrant #2 was supported by probable cause, [R4.53], that the good faith exception of *United States v. Leon* applied even if Search Warrant #2 was not supported by probable cause, [R4.60],

and that the photographic evidence obtained from the Apple iPhone would have been inevitably discovered in connection with Search #1 or Search #4. [R4.63]. On October 12, 2022, Appellant filed a written reply. [R2.70-82]. On December 2, 2022, the District Court held an evidentiary hearing on Appellant's motion to suppress. [R4.26].

On December 8, 2022, the District Court issued its memorandum order. [R2.128-151]. First, the District Court found that Officer Meyers' affidavit for Search Warrant #2 "included material misstatements and omissions." [R2.141-145]. Second, the District Court found that "[a]fter excising the misrepresentations" in accord with *Franks v. Delaware*, "the corrected affidavit would wholly lack probable cause to support a search of [Appellant's] electronic devices for evidence of child pornography." [R2.145, 150]. Thus, the District Court held that "*Leon*'s good-faith exception cannot prevent suppression because this error was [CPD]'s error and not a judicial error." [R2.150].

However, the District Court found that the evidence on Appellant's iPhone and other devices would have been inevitably discovered either (i) "while searching [them] pursuant to [Search Warrant #1] for evidence of drug possession and distribution," or, alternatively, (ii) "while searching [Appellant]'s iPhone pursuant to his request and consent for police to search his phones" on April 13. Photographs and videos recovered from Appellant's iPhone were admitted against him at trial. [R5.196, 240, 245]. Photographs and videos recovered from the Sony laptop and the Seagate hard drive were admitted against him at trial, too. [R5.77-80, 185, 197, 217-218, 239-245].

II. FACTS RELATED TO THE MARCH 31, 2021 CUSTODIAL INTERROGATION.

March 2 Arrest

When CPD executed Search #1, officers found Appellant in his residence, *supra*. [R4.61]. CPD Officer Romero handcuffed Appellant while CPD Officer Husted handcuffed Parmenter. [R4.61]. CPD Officer Husted then advised them of their *Miranda* rights. [R4.61]. Appellant was then placed in Officer Husted's vehicle, and she commenced transporting him to the police department. [R4.62]. Implied in Officer Husted's testimony is that the purpose of taking a suspect to the police department was to engage them in questioning and interrogation. [R4.62]. Otherwise, CPD would transport suspects directly to the jail for booking. [R4.62, 75] ("Q: And since he requested an attorney, you decided to cut it off and go to the jail? A: That's correct"). While Appellant was in the CPD vehicle being transported to the police department, he requested to speak with an attorney. [R4.62].

According to Officer Husted's testimony, his exact words on March 2 were "'Can I talk' -- or 'Can I have a lawyer?'" [R4.78]. Based on Appellant's mere query, Officer Husted determined that he had unambiguously exercised his right to counsel, and so she diverted from the police department to the jail. [R4.62]. On March 3, Appellant was released with a pre-trial bond. [R4.165].

March 31 Arrest and Questioning

On March 31, CPD Officer Husted was involved in another arrest of Appellant on an open felony warrant. [R4.71, 72]. After arresting Appellant, CPD placed him in

Officer Husted's patrol vehicle. [R4.72]. CPD did not apprise him of his *Miranda* rights at this time. Once placed in the vehicle, but still on the scene of the arrest, Appellant "was rambling on mostly about drugs." [R4.73]. He then made the following statement to Officer Husted: "Can you call my attorney, Jay Cole, to explain what's going on?" [R2.154; R4.73].

Officer Husted determined at that time that Appellant's statement was too ambiguous for her to form a belief whether Appellant was exercising his right to counsel. [R4.75, 86]. She allegedly was only able to discern "that he wanted to know what was going on." [R4.75]. However, she unequivocally told her fellow officers (as caught on her body-cam footage) that "[Appellant] wants to talk to his lawyer" upon transporting him to the Casper police department for questioning. [R4.86]. Later, Officer Husted would testify that the March 2 statement "Can I have a lawyer?" was different from the March 31 statement "Can you call my attorney?," implicitly suggesting it was reasonable to permit her a completely different interpretation of such similar queries. [R4.93].

While detained in the vehicle on the scene, he "whistl[ed] and holler[ed] for [officers] to come back" to the vehicle. [R4.92-93]. Officer Husted testified to her belief that "he was reinitiating" with CPD based on his whistling and hollering. [R4.92]. She testified to her belief that "he was on the fence in that he did want to talk to detectives, but he also wanted to know what was going on." [R4.86, 92]. But she also testified to her state-of-mind that she "didn't know what he wanted to do, so [she was] going to bring him to the police department" for questioning. [R4.75]. Despite Officer Husted's belief that he had either not exercised his right to counsel, or had attempted to reinitiate, she

said nothing to him during transport, and Appellant continued "to ramble" all the way to the police department. [R4.75-76].

At the Casper police department facility, Appellant was brought into an interview room. [R4.102]. CPD and DCI personnel interrogated Appellant. [R3.117]. It was not until the custodial interrogation began that he was given the *Miranda* warnings, after he had requested counsel. [R3.116-117]. During this custodial questioning, CPD did not question him about pending drug charges or pending domestic violence charges. Instead, a CPD detective "informed [Appellant] that he did not want to address any of [his] controlled substance charges he was currently on bond for." [R3.129]. Instead, he was "confronted with the specifics regarding the child pornography" found on his phone on March 8. [R3.129].

In response to this questioning, Appellant made incriminating statements including the following: (i) confirmation the devices containing child pornography were his, (ii) details about the process by which he encrypted the devices containing child pornography, and (iii) admitting to photographing and taking videos of S.V. [R3.117].

The District Court later made the following finding regarding the relationship between Search #3 and the March 31 questioning:

> [T]he confession [on March 31] is tied to the motion to suppress [the fruits of Search #3]. If the . . . search of the phone is valid, the motion to suppress [Appellant]'s statements would be denied. . . . Conversely, however, if the [District] Court were to [grant] the motion to suppress the items seized from the second search warrant [*i.e.* Search Warrant #2], then I think under the fruit-of-the-poisonous-tree doctrine, the statement would have to be suppressed because the statement [Appellant] made and the questions he was asked [by CPD] were derived from the officer having viewed the cell phone [contents].

[R4.173]. In other words, the District Court found that Appellant's March 31 statements were the fruits of Search #3, *i.e.* that but for CPD's March 8 search, Appellant would not have made inculpating statements on March 31. The only outstanding issue was whether the fruits of Search #3 were subject to suppression. Ultimately, the District Court did not suppress the fruits of Search #3, and so it did not suppress Appellant's March 31 statements as fruits deriving from Search #3. Video of the interview in which Appellant gave the statements was admitted against him at trial. [R5.506-508]. Implied testimony was elicited at trial that he made statements "acknowledging that he had sex with S.V. and recorded that sex." [R5.526].

ARGUMENTS AND AUTHORITIES

I. THE RECORD ON APPEAL PRESENTS INSUFFICIENT EVIDENCE TO FIND BY A PREPONDERANCE THAT THE INCULPATORY EVIDENCE ON THE iPHONE AND OTHER DEVICES WOULD HAVE BEEN INEVITABLY DISCOVERED, REGARDLESS OF CPD'S CONSTITUTIONAL VIOLATION.

A. Standard of Review.

This Court "review[s] the ultimate decision to deny a motion to suppress based on the Fourth Amendment de novo, but will not disturb the district court's findings of fact unless they are clearly erroneous." *United States v. Pacheco*, 884 F.3d 1031, 1039 (10th Cir. 2018).

B. Argument & Analysis.

In this case, the Government ultimately put forth three theories on which the District Court determined the evidence from the iPhone, the Seagate hard drive and the Sony laptop would have been discovered.

First, that Search Warrant #1 was sufficiently broad in scope to permit CPD to conduct digital content Search #3, and thus the data on the iPhone would have been discovered during the narcotics investigation; which, in turn, would have provided sufficient probable cause to obtain a warrant to search for and seize the other digital storage devices at Appellant's residence and conduct similar forensic digital searches for additional evidence related to minor child sexual exploitation.

Second, that CPD had sufficient probable cause to obtain a warrant authorizing a content search of the iPhone in the course of the narcotics investigation, during which the child pornography evidence would have been found; a search pursuant to which would have provided sufficient probable cause to obtain a warrant to search for and seize the other digital storage devices at Appellant's residence and conduct similar forensic digital searches for additional evidence related to minor child sexual exploitation.

Third, that even absent CPD's unlawful March 8 search of Appellant's iPhone and other storage devices, he would have consented on April 13 to a search of his iPhone without regard to any intervening events; a search pursuant to which would have provided sufficient probable cause to obtain a warrant to search for and seize the other digital storage devices at Appellant's residence and conduct similar forensic digital searches for additional evidence related to minor child sexual exploitation.

For the following reasons, the record fails to reflect evidence proving by a preponderance that the digitally-stored evidence on Appellant's devices would have been inevitably discovered in accord with any of these theories.

1. The Fourth Amendment, the Exclusionary Rule, and the Inevitable Discovery Exception.

The Fourth Amendment provides,

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

U.S. Const., amt. iv. The Fourth Amendment does not merely require a generalized probable cause that a person has committed a crime to justify a search. *See United States v. Palms*, 21 F.4th 689, 697 (10th Cir. 2021). Instead, the amendment embodies a two-prong particularity requirement requiring (i) that probable cause exists to search *for* evidence of a particular crime, and (ii) that probable cause exists to search for such evidence *in* a particular place. *Id.* A search which exceeds the scope of a warrant's particulars is presumptively unreasonable, and thus, unlawful. *See id.* (quoting *United States v. Loera*, 923 F.3d 907, 916 (10th Cir. 2019)); *also see Birchfield v. North Dakota*, 579 U.S. 438, 455 (2016).

Courts have long applied the so-called "exclusionary rule" pursuant to their supervisory powers over the administration of criminal justice "to deter unlawful searches by police." *Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984); *Elkins v. United States*, 364 U.S. 206, 216 (1960). Courts exclude (suppress) from trial evidence

which was seized or obtained by the Government unlawfully, in violation of the Constitution. *Boyd v. United States*, 116 U.S. 616, 638 (1886); *Nardone v. United States*, 308 U.S. 338, 340-341 (1939); *McNabb v. United States*, 318 U.S. 332, 341 (1943); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). "The exclusionary prohibition extends as well to the indirect as the direct products of such invasions." *Wong Sun v. United States*, 371 U.S. 471, 484 (1980). Otherwise stated, the exclusionary rule prohibits the use of all "fruits of the poisonous tree," including all "tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." *United States v. Crews*, 445 U.S. 463, 470 (1980).

The exclusionary rule exists to sanction Government misconduct. It is not an independent right of the criminally accused. Thus, courts must determine whether exclusion under the circumstances fulfills deterrence policy objectives. *Arizona v. Evans*, 514 U.S. 1, 11 (1995); *United States v. Janis*, 428 U.S. 433, 454 (1976). "The 'deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue.' Those benefits are sufficient to justify exclusion where 'police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights.'" *Davis v. United States*, 564 U.S. 229, 256-257 (2011). Thus, when "the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality" of the constitutional violation, it is inappropriate for courts to apply the doctrine. *Crews*, 445 U.S. at 471.

However, because the exclusionary rule is intended as a prophylactic measure against Constitutional violations, judicially created exceptions to the rule are – like exceptions to the Fourth Amendment's warrant requirement – jealously guarded and carefully drawn, encompassing only those situations in which no deterrent effect is possible. *Id.* at 258 ("such exceptions are few and far between"); *see Jones v. United States*, 357 U.S. 493, 499 (1958)("jealously and carefully drawn").

One of these exceptions is the "good-faith" exception established in *United States v. Leon*. This exception prevents exclusion when Government agents act with objective good faith, *i.e.* with reasonable reliance on the law, both under the circumstances and in scope. This includes Government agents acting within the scope of an invalid warrant under circumstances in which the agent has no reason to believe the warrant was erroneously issued and did not cause the magistrate's error. 468 U.S. 897 (1984); *see also Davis*, 564 U.S. at 557 (citing *Illinois v. Krull*, 480 U.S. 340 (1987))(warrantless search arising from breach of law later held unconstitutional); *United States v. Gonzales*, 399 F.3d 1225, 1230 (10th Cir. 2005)("law enforcement officials are presumed to have a reasonable knowledge of the law"). However, when Government agents cause a warrant's invalidity, the Government agent does not act in good faith, and exclusion remains an appropriate sanction for the constitutional violation. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

A second exception is the inevitable discovery doctrine, which militates against exclusion when the record demonstrates that the Government *would have* obtained the evidence from a source or under conditions unrelated to the Government's tainted

conduct. *See Nix v. Williams*, 467 U.S. 431, 443-444 (1984); *Utah v. Strieff*, 579 U.S. 232, 238 (2016). The inevitable discovery doctrine is not subject to speculation as to what *could have* happened. The inevitable discovery doctrine only permits consideration of "historical facts capable of ready verification," *i.e.* what *did* happen, and render a decision as to the natural consequence of those events. *See Nix*, 467 U.S. at 444, n. 5 ("inevitable discovery involves no speculative elements").

2. Search Warrant #1 was not sufficiently broad in scope to authorize Search #3, thus the discovery of the fruits of Search #3 were not inevitable.

"[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967); *also Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). "When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognized as reasonable,'" then government intrusions "into that private sphere generally qualif[y] as a search and require[] a warrant supported by probable cause." *Carpenter*, 138 S. Ct. at 2213 (internal citations omitted).

Cellular phones and computers, their contents and related data, constitute such a "private sphere." *Riley v. California*, 573 U.S. 373, 386 (2014); *Carpenter*, 138 S. Ct. at 2214; *United States v. Russian*, 848 F.3d 1239, 1245 (10th Cir. 2017); *United States v. Christie*, 717 F.3d 1156, 1164 (10th Cir. 2013). Thus, the *Riley* Court adopted a new rule: a warrant must issue which particularly describes the device as a place to be searched prior to accessing its contents even when the phone itself is lawfully seized. *Riley*, 573 U.S. at 400-401; *Russian*, 848 F.3d at 1245.

Russian is on point and instructive. 848 F.3d at 1239-1250. Therein, law enforcement officers physically seized three cellular phones during searches incident to arrest. *Id.* at 1242-1243. Once seized of the devices themselves, law enforcement applied for a search warrant. "The search warrant application identified three places to be searched" – the three phones. *Id.* at 1243. The warrant application also identified the following items to be searched for and seized: "text messages, phone numbers, phone calls sent and received, any data contained within the phone or on any removable media device within the phone and Images contributing to the possession or sale of any illegal drug and drug paraphernalia." *Id.* Thereafter

> [t]he state district court issued a search warrant that referenced [law enforcement]'s affidavit and warrant application and identified the crimes being investigated and items to be seized, including "cell phones that could be used to facilitate the commission of the crimes." The warrant also described the location to be searched ([defendant]'s apartment), but it failed to authorize the search of cell phones already in law enforcement custody.

Id. Law enforcement searched the cell phones anyway. *See id.*

The *Russian* Court, "[had] little difficulty concluding the warrant on which [law enforcement] relied to search [the defendant]'s phones was invalid for lack of particularity." *Id.* at 1245. Thus, the *Russian* Court draws a bright line between the warrant application and the warrant itself. The only relevant consideration is information on the face of the warrant itself. As the *Russian* Court stated:

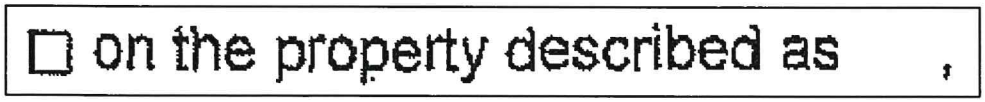
> Although the application requested authorization to search the two Samsung cell phones law enforcement had seized at the time of [defendant]'s arrest and certain data that might be found on them, the warrant itself merely authorized a search of Russian's residence and seizure of any cell phones found inside. The warrant did not identify either of the phones that were already in law enforcement's custody, nor did it specify what material (e.g.,

> text messages, photos, or call logs) law enforcement was authorized to seize. . . . Accordingly, we agree with [defendant] that the warrant failed to meet the Fourth Amendment's particularity requirement.

Id. at 1245-1246. The warrant's deficiency voids the search and nullifies its fruits. *See Boyd*, 116 U.S. at 638 (order to seize evidence was "unconstitutional and void").

In the context of cell phones and computers, *Riley* and *Russian* stand for the proposition that mobile digital storage devices, like cell phones, laptops and hard drives, constitute not simply evidence to be seized, but co-extensively are also places to be searched. Therefore, in cases in which the Government wishes to investigate a digital storage device's contents, even if the device itself has been lawfully seized, the Fourth Amendment's particularity requirement requires either (i) the original warrant concurrently describe the device as both an "effect" to be seized and a "place" to be searched, or (ii) a subsequent, separate and independent warrant issue which describes the device as a "place" to be searched.

In this case, Search Warrant #1 particularly describes "records, and/or receipts, written or electronically stored" as items to be seized. But Search Warrant #1 only particularly describes the places to be searched for such records as "on the person" of Appellant, "on the premises of" Appellant's residence, and "in the vehicle" owned by Appellant. This is not left ambiguous. Search Warrant #1 provides a catch-all which Judge Brown left unchecked and blank:



Furthermore, Judge Brown leaves unchecked the "other property" catch-all box evidencing a finding that probable cause existed to search any digital storage devices for "records, and/or receipts, written or electronically stored" in connection with any of the drug crimes alleged in Search Warrant #1:

I am satisfied that good cause is shown by the Affidavit, which is incorporated by reference hereto, that this Warrant should be executed and as I am satisfied that there is probable cause to believe that the said property is being concealed:

☒ on the person ☒ on the premises ☒ in the vehicle ☐ on the property

above described, because of the information contained from the affidavit, attached hereto and made a part hereof; you are hereby commanded to search the person named for; the property specified;

The search *for* devices containing digitally-stored records evidencing drug crimes (*i.e.* Search #1) was executed pursuant to Search Warrant #1, and was therefore presumptively reasonable. But the search for devices containing digitally-stored records evidencing sex crimes (*i.e.* Search #2) was outside the scope of Search Warrant #1. And the search *of* devices containing digitally-stored records evidencing either drug crimes or sex crimes (*i.e.* Search #3) was outside the scope of Search Warrant #1. Thus, despite the Government's protestations, [R4.162], Search #3 was altogether a warrantless search, was therefore unreasonable, and its fruits must be suppressed pursuant to *Riley/Russian*.

3. The record is insufficient to prove CPD would have obtained a *Russian* warrant, thus the discovery of the fruits of Search #3 was not inevitable.

The "inevitable discovery does not apply when the government's only argument is that it had probable cause at the time of the search." *United States v. Christy*, 739 F.3d 534, 543 (10th Cir. 2014). The inevitable discovery doctrine applies only if CPD had probable cause to obtain a warrant listing the devices as "places to be searched" ***and*** if

CPD "[had] 'taken steps in an attempt to obtain [that] search warrant.'" *Id.* at 543; *United States v. Souza*, 223 F.3d 1197, 1203-1204 (10th Cir. 2000)("inevitable discovery requires 'probable cause plus a chain of events that would have led to a warrant'").

Without conceding the fact, the Government arguably can identify evidence in the record giving rise to a finding of probable cause that evidence of drug distribution would have been found on the iPhone, and possibly other devices. However, nothing in the record on appeal gives rise to a finding that CPD took steps to act on that probable cause, *i.e.* to apply for and obtain a search warrant authorizing CPD to either (i) search Appellant's residence for additional digital devices, *i.e.* the Seagate hard drive and the Sony laptop, or (ii) to search the iPhone, Seagate hard drive, Sony laptop and other devices for evidence of drug distribution. In fact, the record aptly demonstrates through Officer Husted's testimony and Detective Daley's testimony that CPD more than believed they had probable cause, but took no steps to obtain a *Russian* warrant.

At first blush, this Court may be tempted to hold that Officer Meyers' efforts to obtain Search Warrant #2 fulfills the second *Souza* requirement. After all, Officer Meyers actually drafted a second affidavit, prepared a warrant application, and presented it to Judge Brown. And Judge Brown actually issued Search Warrant #2 which, at least arguably, granted CPD authorization to conduct Search #3.[2] However, Officer Meyers' efforts fall below the *Souza* threshold for two reasons.

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[2] Even if Search Warrant #2 listed devices and files as items to be seized, it failed to identify such devices as places to be searched; it failed to particularly describe items seized during Search #1, including the iPhone, as places to be searched for digital files; and to the extent it granted authorization to conduct digital searches on such devices, it was a qualified

First, Search Warrant #2 does not constitute a *Russian* warrant because it relies on a wholly-independent crime: sexual exploitation of a child. Had Search Warrant #2 constituted an extension of Search Warrant #1, *i.e.* the drug investigation, it might survive scrutiny. But nothing on the face of Search Warrant #2 suggests it was at all related to a search for narcotics evidence. Second, the heart of the inevitable discovery doctrine is that the discovery of evidence or information in question would have occurred independent of the taint of CPD's Fourth Amendment violation. In this case, it is not even a question whether Search Warrant #2 is sufficiently attenuated from a Fourth Amendment violation because Search Warrant #2 was the instrument by which CPD engaged in its Fourth Amendment violation. Search #3 – the Fourth Amendment violation – arises directly from CPD's actions allegedly authorized by the scope of Search Warrant #2. And Search Warrant #2 was authorized by an additional Constitutional misconduct – CPD's *Franks* misconduct. Thus, CPD's efforts to obtain Search Warrant #2 are inextricably intertwined with the Fourth Amendment violation, incapable of attenuation and fatally tainted. In other words, CPD's efforts to obtain Search Warrant #2 – the alleged *Riley/Russian* warrant – are a Fourth Amendment violation in and of themselves, already found by the District Court.

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authorization permitting CPD to conduct such searches on devices it found at the residence if they were found in a running or operating condition, and so long as such searches were completed on the premises at Appellant's residence. Thus, even the plain language of Search Warrant #2 did not grant authority to CPD to conduct Search #3 on the iPhone, or to otherwise conduct a forensic digital search of *any* devices at any time other than March 2, or at any place other than Appellant's residence. However, this is immaterial as the District Court properly held that Search Warrant #2 was invalid for lack of probable cause after engaging in the *Franks* inquiry.

Thus, as the District Court ultimately held, Search Warrant #2 is invalid. It is void. It is as though it was never issued. Thus, Officer Meyers' efforts to obtain Search Warrant #2 are also a nullity. And nothing in the record on appeal supports a finding that CPD engaged in efforts to obtain a third, untainted *Riley/Russian* warrant, even assuming *arguendo* probable cause existed to do so. Thus, the mere fact that CPD arguably could have obtained a third, untainted warrant does not prove that CPD would have obtained a third, untainted warrant to either (i) seize the Sony laptop and Seagate hard drive, or (ii) search the iPhone, Sony laptop or Seagate hard drive. Thus, the exclusionary rule is not mitigated under this factual theory.

4. The record is insufficient to support a finding that CPD would have obtained Appellant's consent to search the iPhone on April 13, thus the discovery of the fruits of Search #3 was not inevitable.

This Court "recognize[s] the danger of admitting unlawfully obtained evidence 'on the strength of some judge's speculation that it would have been discovered legally anyway.'" *United States v. Owens*, 782 F.2d 146, 152-153 (10th Cir. 1986). For this reason, the *Nix* Court notes that "inevitable discovery involves no speculative elements" about what might have or could have occurred, "but focuses [instead] on demonstrated historical facts capable of ready verification or impeachment." 467 U.S. at 444, n. 5; *also United States v. Neugin*, 958 F.3d 924, 935, n. 11 (10th Cir. 2020)(citing *Owens*, 782 F.2d at 153). For this reason, prognostications under the inevitable discovery doctrine must be strictly limited. The Government is entitled to one level of speculation based on events as they *actually* occurred. In other words, the Government is limited to proof that

the presumptively excludable evidence "would have been discovered *because* . . ." But the Government is not entitled to multiple levels of speculation; proof that the excludable evidence "would have been discovered *so long as* . . ."

This Court's recent decision in *United States v. Shrum* provides the proper framework:

> Where an unlawful seizure . . . precedes a "consensual" search . . . and the discovery of incriminating evidence then used to procure a search warrant, the Government's burden to prove the primary taint of the illegality has been purged. . . . The Government must prove the voluntariness of a defendant's consent consistent with the principles set forth in *Schneckloth v. Bustamonte*. But in addition, the Government must demonstrate a break in the causal chain somewhere between the illegality and discovery of the incriminating evidence used to support the defendant's prosecution. . . . This means "the fruit of the poisonous tree doctrine may also extend to invalidate consents which *are* voluntary" in the traditional sense. We require the Government to demonstrate a break in the causal chain for two reasons. First, we are concerned the illegal seizure may have affected the voluntariness of the defendant's consent that led to discovery of the incriminating evidence. Second, we are bound, where appropriate, to effectuate the exclusionary rule's deterrence principle.

908 F.3d 1219, 1233-1234 (10th Cir. 2018)(internal citations omitted). It must be emphasized that "[t]he inevitable discovery doctrine countenances the admission of evidence that would have been discovered regardless of prior police illegality." *Id.* at 1235. Thus, the inevitable discovery doctrine requires consideration of causal relationships between past events.

When the Government asserts "inevitable discovery of evidence" would have occurred based on law enforcement obtaining consent to search, subsequent to law enforcement's unconstitutional search, the Government does not merely argue inevitable discovery. It argues inevitable *consent*. Thus, the real question for this Court is: but for

CPD's constitutional violations, was Appellant's consent truly inevitable? In other words, in a hypothetical timeline in which CPD did not commit *Franks* error, and in which CPD did not conduct Search #3,[3] what would events have been forming the *Shrum* causal chain leading to Appellant's consent? And is the record sufficiently developed for the Government to identify evidence proving that causal chain to be inevitable, and not merely possible or even probable?

The Government theorizes that Appellant *would have* given CPD consent to search his phone, as he did on April 13, under *every* conceivable permutation of historical events. However, the Government's theory fails immediately because it presumes – without proof – that because Appellant *did* grant consent deriving from charges against him in the domestic violence case that he *always would have* granted the same consent, even absent the Constitutional errors that factually occurred. The problem in this case is that what factually occurred, *i.e.* the decision Appellant made, was the natural outcome of CPD's unlawful conduct; neither independent of nor in spite of the unlawful conduct.

The Government's theory is immediately unreasonable. It relies on a sprawling web of "what ifs" instead of what the *Nix* Court described as "historical facts capable of ready verification," *supra*. But the theory is further complicated because it requires this Court to go back in time and invade recesses of the Appellant's mind; to move forward

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[3] Reminding the Court that the inevitable discovery doctrine does not apply to ratify an otherwise-unlawful search. The Government's reliance on the doctrine simply lifts the specter of exclusion. Thus, Search #3 is properly excised from the analysis as it remains an unlawful search due to the limited scope of Search Warrant #1, *supra*, and the District Court's nullification of Search Warrant #2 due to CPD's *Franks* misconduct.

from that point, determine what would have happened, and *then* determine what Appellant would have done in response to the occurrence or non-occurrence of that first level of hypothetical events. In other words, it is not just asking what would have *happened*, but what would Appellant have decided to do *so long as* what happened did, in fact, happen. The Government asks this Court to supplant Appellant's *actual* values, motives and intents implicit in personal decision-making processes with this Court's assumptions about what Appellant *should have or would have* valued, been motivated by or intended. It asks this Court to exercise precognition or traverse alternate timelines in a manner elevating into legal fact that which up until now was exclusively the purview of science fiction.[4] This, of course, is dangerously speculative and should cease the inquiry into the Government's third theory.

But for the sake of argument, consider the facts and assumptions reasonably within Appellant's knowledge. In the timeline as events actually played out, *i.e.* this case, by the time Appellant gave his consent to search the phone on April 13, he knew or reasonably assumed the following:

(i) on March 2, CPD had seized his iPhone;

(ii) no later than March 2, CPD was investigating him for narcotics distribution;

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[4] *E.g. Minority Report*, 20th Century Fox 2002 (In which the police arrest people for crimes they will *never* commit because humans with precognitive capabilities can see a "future" that will never occur by virtue of the crimes being averted); *e.g. Loki* [Series], Marvel Studios 2022 (In which a law enforcement agency can view multiple timelines based on the occurrence or non-occurrence of certain events, and determine what people will or will not do based on such occurrences and non-occurrences).

(iii) after March 2, CPD immediately "search[ed] [his] phone," *United States v. Thurman*, 889 F.3d 356, 368 (7th Cir. 2018)("a reasonable person in his position would expect them . . . to search the phone");

(iv) CPD had the ability to retrieve and reconstruct deleted information from his iPhone, *id.*;

(v) after March 2, CPD had, in fact, accessed the contents on his iPhone and other devices (confirmed when CPD officers confronted him during March 31 questioning with information about contents of his phone);

(vi) on March 31, he gave statements identifying the iPhone as belonging to him, admitting to sexual relations with an underage person, and admitting that those sexual activities were captured in images and videos on his iPhone;

(vii) on April 13, he had charges pending against him in an unrelated domestic violence case; and

(viii) on April 13, his iPhone included evidence exculpating him in the domestic violence case.

Thus, when Appellant gave his consent on April 13, he knew or assumed that CPD already had accessed and reviewed *all* of the contents on his iPhone. Thus, he had nothing to lose in the sexual exploitation case by granting consent. CPD already knew everything and had the evidence to prove it. On the other hand, he had something to gain in the domestic violence case by granting consent. This, of course, becomes a simple exercise in cost-benefit analysis that *all* humans engage in on a daily basis, from small decisions to big decisions.

Now, contrast events within Appellant's knowledge as they factually occurred against the chain of events within Appellant's knowledge had CPD's constitutional violations not occurred. The District Court held that Search Warrant #2 was invalid due to CPD's *Franks* error. Thus, Search Warrant #2 was void *ab initio*. Thus, Search #2 deriving from Search Warrant #2 is a nullity. Thus, independent discovery or seizure of the fruits of Search #2, *i.e.* the Sony laptop and the Seagate hard drive, is not inevitable.

Additionally, Search #3 is a nullity. First, Search Warrant #1 was not so broad as to constitute a *Riley/Russian* warrant. Thus, to the extent Search #3 was executed based on Search Warrant #1, Search #3 was a nullity, *supra*. Second, Search Warrant #2 was void *ab initio* due to *Franks* misconduct. Thus, to the extent Search #3 was executed based on Search Warrant #2, Search #3 was an unreasonable search, *i.e.* a nullity. And it goes without saying that Search #3 cannot be justified by consent deriving from the fruits of Search #3. *See Sibron v. New York*, 392 U.S. 40, 63 (1968)("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification"). Thus, independent discovery of the fruits of Search #3, *i.e.* the data and files on the iPhone, the Sony laptop and the Seagate hard drive, is not inevitable. Following therefrom, CPD would not have had the data from the iPhone to confront Appellant with during March 31 questioning. And CPD would not have had reason to question Appellant about the contents of his iPhone. Thus, no evidence supports a finding that Appellant would have inevitably given his March 31 statements. If the layers of hypotheticals make Appellant's statements less than an inevitability, then the same layers of hypotheticals must act to make Appellant's statements of consent similarly less than inevitable.

Thus, on April 13, absent CPD's unlawful conduct, the *only* information Appellant reasonably could have believed or assumed is (i) CPD seized his iPhone, (ii) CPD could apply for a warrant to search his phone in a drug investigation, and (iii) CPD had the capability of accessing the data on his phone. However, just as this Court is precluded from finding inevitable discovery based merely on the existence of probable cause, *supra, Christy*, 739 F.3d at 543; *Souza*, 223 F.3d at 1203-1204, it is only fair to hold Appellant to the same presumption. Based merely on the fact that CPD had probable cause sufficient that it could have obtained a warrant, Appellant – like this Court – cannot be deemed to have assumed that CPD would have obtained such a warrant.

Under such circumstances, Appellant would have been faced with a wholly new situation impacting his decision-making with regard to consent to search his phone. On one hand, he would know or reasonably assume that CPD had not discovered any evidence on his phone or any other devices. And he would not know or reasonably assume that issuance of a warrant to search his iPhone, to search his residence a second time for other digital devices, and the issuance of a warrant to search other devices was inevitable. Thus, his decision would change fundamentally. On one hand, he could decide to grant consent to search his iPhone to benefit from the exculpatory evidence in the domestic violence case at the risk of revealing to CPD evidence of sexual exploitation crimes. On the other hand, he could decide to withhold consent to avoid that risk even if it meant abandoning a defense in the domestic violence case based on exculpatory evidence.

The point, though, is not which decision Appellant would have made. The point is that it is reasonable to infer that circumstances would have sufficiently evolved into a "win-win/lose-lose decision" (depending on how one might look at that choice) instead of the "nothing to lose/everything to gain" circumstances with which Appellant was actually faced. Because such an inference is equally reasonable, if not more so, this Court cannot satisfy itself that the record reflects sufficient evidence giving rise to a finding that under a change of the circumstances that Appellant's decision-making process and cost-benefit analysis whether to grant consent would not have changed. In other words, this Court cannot satisfy itself that the record reflects evidence demonstrating that had events unfolded differently, *i.e.* if the constitutional violations had not occurred, that Appellant would have made the same decision to grant consent to search his iPhone. Absent such certainty, this Court cannot hold that Appellant inevitably would have granted consent on which the Government relies.

The Government can guess, assume, prognosticate and hypothesize as to what Appellant's state-of-mind *might have been*, *i.e.* his decision-making method, his cost-benefit analysis, etc. But any such guesswork is unreasonably attenuated, if it is to be given any weight at all. The record is not sufficient to elevate guesswork as to what Appellant would have done absent CPD's unlawful content to certainty by a preponderance as to what his actions would have been. Therefore, the inevitable discovery doctrine is inapplicable with regard to any alleged consent Appellant might have or might not have given on April 13, and exclusion and suppression was the appropriate sanction.

II. ASSUMING THIS COURT GRANTS RELIEF REQUESTED IN CONNECTION WITH THE UNLAWFUL MARCH 8 CONTENT SEARCH OF APPELLANT'S CELL PHONE AND OTHER DEVICES (SEARCH #3), *SUPRA*, THIS COURT MUST ALSO SUPPRESS APPELLANT'S STATEMENTS ON MARCH 31 AS THE FRUIT OF THAT POISONOUS TREE.

A. Standard of Review.

When reviewing an order denying a motion to suppress, "this [C]ourt accepts the district court's factual findings unless clearly erroneous." *United States v. Cook*, 599 F.3d 1208, 1213 (10th Cir. 2010).

B. Argument and Authority.

The District Court made the following findings:

> To me, the confession [on March 31] is tied to the motion to suppress [the fruits of Search #3]. If the . . . search of the pone is valid, the motion to suppress [Appellant]'s statements would be denied. . . . Conversely, however, if the [District] Court were to [grant] the motion to suppress the items seized from the second search warrant, then I think under the fruit-of-the-poisonous-tree doctrine, the statement would have to be suppressed because the statement [Appellant] made and the questions he was asked [by CPD] were derived from the officer having viewed the cell phone [contents].

[R4.173]. In other words, the District Court found that *but for* CPD having conducted the unlawful March 8 search, Appellant would not have made inculpating statements on March 31. The Government bears the burden of proving the District Court's findings are the result of clear error.

If this Court finds that, in the absence of clear error, the search of Appellant's devices, including the iPhone, on March 8 (Search #3) was unconstitutional, that the exclusionary rule applies, and that no exception to the exclusionary rule applies thereto, *supra*, then this Court must give accord to the District Court's factual finding that but for

Search #3 on March 8, Appellant never would have given incriminating statements to CPD officers during the March 31 inquiry. In other words, this Court must order Appellant's March 31 statements suppressed as "fruit of the poisonous tree," *supra*, even assuming *arguendo* Appellant had assistance of counsel or waived his right to counsel, *infra*. *Wong Sun*, 371 U.S. at 484; *see Crews*, 445 U.S. at 470 ("confessions or statements of the accused obtained during an illegal arrest," *i.e.* unlawful custodial interrogation).

CONCLUSION

For the foregoing reasons, this Court must overturn Appellant's conviction and remand to the District Court and order a new trial, and order (i) that the evidence recovered from the iPhone and other digital devices (*i.e.* photographs, videos, texts and other data or files) be excluded and suppressed in such proceedings; and (ii) that Appellant's statements be excluded and suppressed as the "fruit of the poisonous tree," deriving from unlawful Search #3.

STATEMENT OF ORAL ARGUMENT

Oral argument is requested.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,514 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain the word count, and it is Microsoft Word 2016. This brief complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 13, Times New Roman. I certify that the foregoing information is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

/s/Kari S. Schmidt
Kari S. Schmidt

CERTIFICATIONS

Service: I hereby certify that this document, with any attachments, was electronically filed on the 20th day of September, 2023, with the Clerk of the Court using the CM/ECF system, which will send a copy with a notice of docket activity to all ECF system participants as of the time of the filing. I further certify that this document, with any attachments, was served on Appellant, by depositing a copy on the 20th day of Septembers, 2023, with U.S. Mail, first class, postage pre-paid, to be delivered to him at the following address:

Salvador Salas, Jr., #56657-509
USP Tucson
U.S. Penitentiary
P.O. Box 24550
Tucson, AZ 85734

Privacy Redactions: I further certify that all required privacy redactions, if any, have been made.

Paper Copies: I further certify that any paper copies required to be submitted to the Court are exact copies of the versions submitted electronically.

Virus Scan: I further certify that the electronic submission was scanned for viruses using Webroot SecureAnywhere Endpoint Protection v.9.0.21.18, which is updated continuously, and according to the program is free of viruses.

/s/Kari S. Schmidt
Kari S. Schmidt

United States v. Salvador Salas, Jr.
Case No. 23-8027
Brief of Defendant-Appellant

ATTACHMENT A

District Court Judgment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA

vs

SALVADOR SALAS, JR.

Case Number: 21-CR-77-SWS

Defendant's Attorney(s):
Mark Hardee

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT was found guilty on counts 1, 2, 3, 4, 5 and 6 after pleas of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2252A(a)(5)(B), (b)(2)	Possession of Child Pornography	March 2, 2021	1
18 U.S.C. § 2251(a), (e)	Production of Child Pornography	February 27, 2021	2-6

The defendant is sentenced as provided in pages 2 through 11 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's USM No: **56657-509**

April 13, 2023
Date of Imposition of Sentence

Scott W. Skavdahl
Chief United States District Judge

4/13/23
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 months as to Count 1 and 360 months as to Counts 2, 3, 4, 5 and 6, all counts to be served consecutively to each other.

The Court recommends to the Bureau of Prisons that the defendant be placed in Englewood, Colorado, or in a facility as close as possible to his family near Wyoming. The Court also recommends that the defendant participate in the Residential Drug Abuse Program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at

_____, with a certified copy of this Judgment.

_____
United States Marshal/Bureau of Prisons

By: _____
Authorized Agent

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 years, per count, to be served concurrently.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance and must submit to one drug test within 15 days of release from imprisonment and at least at least two periodic drug tests thereafter, not to exceed ten (10) drug tests per month, for use of controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant.

If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine.

The defendant shall (A) make restitution in accordance with 18 U .S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S .C. § 3572(d)), the defendant shall adhere to the schedule.

The defendant shall submit to the collection of a DNA sample at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S .C. § 14135a).

The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.

The defendant shall comply with the standard conditions that have been adopted by this Court as defined in the contents of the Standard Conditions page (if included in this judgment). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant may use a personal computer(s) or personal Internet capable device(s); however, he/she must limit that use and/or possession to personal computers or personal Internet capable devices that are capable of being monitored by the U.S. Probation Officer, and have monitoring software installed and approved by the U.S. Probation Officer. Any computer or Internet capable device must be able to be effectively monitored by and comply with the requirements of

monitoring software utilized by the Probation Office. In order to allow for effective monitoring, the defendant may be limited to possessing a total of only two computer(s) or personal Internet capable device(s). For the purposes of this condition, the term computer is defined at 18 U.S.C. § 1030(3), which includes, but is not limited to, traditional computers (Windows/Apple/Linux based machines), cellular phones, internet tablets, and game machines and related accessories. The defendant must disclose any username or identification(s) and password(s) for all wireless routers, computers or Internet capable devices to the probation officer.

The defendant must, at his/her own expense, allow the Probation Officer to install any software/ hardware designed to monitor activities on any computer or Internet capable device you are authorized by the Probation Officer to use. This monitoring may record any and all activity on the device, including, but limited to, the capture of keystrokes, application information, Internet use history, email correspondence, and chat conversations. You must inform all parties who access approved computer(s) or similar electronic devices(s) that the device(s) is subject to search and monitoring. You must not attempt to remove, tamper with, reverse engineer, or in any way circumvent the monitoring software/hardware. The defendant shall not make any attempt to conceal or erase the names of sites visited, or any other data. The defendant shall be prohibited from using any form of encryption, cryptography, steganography, compression, password protected files and/or other method that might limit access to, or change the appearance of, data and/or images without prior approval from the Probation Officer.

The defendant shall provide a complete and accurate inventory of all computers, computer-related equipment, and communications devices and services on an inventory form provided by the Probation Office. The defendant agrees to ensure that all information on the inventory form is complete, accurate, and current at all times. The defendant shall not use, possess, or access any electronic device or service not reported on the inventory form. The defendant shall consent to the Probation Officer conducting periodic unannounced examinations of his/her computer(s), hardware, software, and other electronic devices, which may include retrieval and copying of data from his/her computer(s). This also includes the removal of such equipment if necessary, for the purpose of conducting a more thorough inspection or investigation.

The defendant shall participate in a sex-offense specific evaluation and treatment program approved by the Probation Officer. The Probation Officer, in consultation with the treatment provider, will supervise the defendant's participation in and compliance with the treatment program. The defendant must comply with all rules and regulations of the treatment program that are specified by the treatment agency. The defendant shall not discontinue treatment without the permission of the Probation Officer.

The defendant shall be required to submit to periodic polygraph testing as a means to assess risk and ensure that he/she is in compliance with the requirements of his/her supervision or treatment program.

The defendant shall not meet, have direct contact or spend time with, any person under the age of 18, or have verbal, written, telephonic, or electronic communication with any such person, except with the express permission of the minor's parent or legal guardian who is aware of the

nature of the defendant's background and current offense, and the supervising Probation Officer. Direct contact does not include incidental contact during ordinary daily activities in public places.

The defendant is permitted to use computer systems at his/her place of employment, or school, for employment or educational purposes only. If your employment requires the use of a computer, you may use an employer-owned computer in connection with your employment, at your place of employment, provided you notify your employer of: (1) the nature of your conviction; and (2) the fact that your conviction was facilitated by the use of a computer. The Probation Officer shall confirm your compliance with this notification requirement. Employer-owned computers may not be used in the defendant's residence, or any other location outside the employer's place of business, unless monitoring software is installed and approved by the Probation Officer. The defendant may use computer systems at an approved public employment agency for employment purposes only and shall complete a computer activity log provided by the Probation Office any time such computer system is accessed.

The defendant shall not possess, send, or receive, any material constituting or containing child pornography as defined in 18 U.S.C. § 2256(8), or any material constituting or containing the obscene visual representation of the sexual abuse of children as defined in 18 U.S.C. § 1466A. The defendant shall not visit bulletin boards, chat rooms, or other Internet sites where any material referenced above is discussed.

The court orders, as an explicit condition of supervised release for the defendant, who is a felon and required to register under the Sex Offender Registration and Notification Act, that he submit his person, and any property, storage facility, house, residence, office, vehicle, papers, computer, or other electronic communications or date storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision function.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act in any federal, state, local or tribal jurisdiction where the defendant resides, is employed, carries on a vocation, or is a student, as direct by law.

The defendant shall participate in and successfully complete substance abuse treatment in a program approved by the U.S. Probation Officer, and abide by the rules, requirements and conditions of the treatment program. The defendant shall not discontinue treatment without the permission of the U.S. Probation Officer.

The defendant must submit to substance abuse testing to determine if he/she has used a prohibited substance. Testing may include urine testing, the wearing of a sweat patch, breathalyzer, a remote alcohol testing system, an alcohol monitoring technology program, and/or any form of prohibited substance screening or testing. The defendant shall not attempt to obstruct or tamper with the testing methods nor possess any device or item used to evade or impede testing. Furthermore, the defendant may be required to pay all, or a portion, of the costs

of the testing.

The defendant shall participate in a cognitive-behavioral treatment regimen that may include, but is not limited to, Moral Reconation Therapy, Cognitive Thinking, Thinking for a Change, or Interactive Journaling. The defendant shall actively participate in treatment until successfully discharged or until the U.S. Probation Officer has excused the defendant from the treatment regimen.

The defendant shall have no contact, direct, indirect, or through a third party, with "Lily," the victim identified in the Vicky series.

The defendant shall have no contact, direct, indirect, or through a third party, with V. S., or any member of her family.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced or released from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

3. The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

4. The defendant shall answer truthfully the questions asked by the probation officer.

5. The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

7. The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

10. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

11. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may, after obtaining Court approval, require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

13. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Restitution	Fine	
1	$100.00	$132,056.32		
Notes:				
2	$100.00			
Notes:				
3	$100.00			
Notes:				
4	$100.00			
Notes:				
5	$100.00			
Notes:				
6	$100.00			
Notes:				
Totals:	$600.00	$132,056.32		

The fine and/or restitution includes any costs of incarceration and/or supervision. The fine and/or restitution, which is due immediately, is inclusive of all penalties and interest, if applicable.

The defendant shall pay interest on any fine and/or restitution of more than Two Thousand Five Hundred Dollars ($2,500.00), unless the fine and/or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the below payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

The court has determined that the defendant does not have the ability to pay interest or penalties and it is ordered that:

The interest and penalties not be applied to fine and/or restitution.

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Office of the Clerk United States District Court 2120 Capitol Avenue 2nd Floor, Room 2131 Cheyenne, WY 82001	$132,056.32

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties; (7) JVTA Assessment.

The total fine and other monetary penalties shall be due in full immediately.

IT IS ORDERED the defendant shall pay a special assessment fee in the amount of $600.00, which shall be due immediately. Payments for monetary obligations shall be made payable by cashier's check or money order to the Clerk of the U.S. District Court, 2120 Capitol Avenue, Room 2131, Cheyenne, Wyoming 82001 and shall reference the defendant's case number, 21-CR-77-SWS. The defendant shall participate in the Inmate Financial Responsibility Program to pay his/her monetary obligations. The defendant shall pay all financial obligations immediately. While incarcerated, the defendant shall make payments of at least $25 per quarter. Any amount not paid immediately or through the Inmate Financial Responsibility Program shall be paid commencing 60 days after his/her release from confinement in monthly payments of not less than 10% of the defendant's gross monthly income. All monetary payments shall be satisfied not less than 60 days prior to the expiration of the term of supervised release.

United States v. Salvador Salas, Jr.
Case No. 23-8027
Brief of Defendant-Appellant

ATTACHMENT B

Order Denying Motion to Suppress Search Warrant #2

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. SALVADOR SALAS, JR., Defendant.	Case No. 21-CR-77-SWS

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS ITEMS SEIZED FROM SECOND SEARCH WARRANT

This matter comes before the Court on the Defendant's Motion to Suppress Items Seized from Second Search Warrant (ECF 112). The Government submitted an opposition (ECF 121), and the Defendant replied (ECF 128). The Court held an evidentiary hearing on the motion on December 2, 2022. (ECF 147.) The parties were provided an opportunity to submit supplemental briefing after the hearing, and the Government did so. (ECF 148.) Having considered the evidence and testimony as well as the arguments of the parties, the Court concludes suppression is not warranted.

INTRODUCTION

Defendant Salvador Salas, Jr. was indicted by a grand jury on one count of possessing child pornography and five counts of producing child pornography. (ECF 1.) Pursuant to two search warrants, law enforcement seized and accessed Mr. Salas' electronic devices, discovering photos and videos of alleged child pornography. In this motion, he seeks to suppress the evidence discovered from the second search warrant, which was specific to

electronic devices.

FACTUAL FINDINGS

Around 4:30 a.m. on February 28, 2021, Chelsea Gonzales (Mother) took her (then) 13-year-old daughter, SV, to the hospital because she appeared under the influence of drugs and had burns on her lips. (ECF 112-1 p. 1.) SV tested positive for methamphetamine at the hospital. (*Id.*) From the hospital, Mother took SV to the Wyoming Behavioral Institute (WBI), where SV could recover from her methamphetamine use and they could determine whether further treatment was warranted. (*Id.*)

1. The Search Warrant for Drugs (First Search Warrant)

Around 4:00 p.m. on the same day, SV's Mother went to the Casper Police Department to report the matter. (*Id.*) Mother told Officer Matthew Meyers she had allowed SV to go to Mr. Salas' home the evening before to babysit for him. (*Id.*) Mother and Mr. Salas had been friends before, and Mother reported SV had babysat for Mr. Salas on prior occasions. (*Id.*) However, when SV came home around 3:00-3:30 a.m. after this babysitting session, SV acted odd and uncontrollable, which is when Mother decided to take her to the hospital for evaluation. (*Id.*)

The following day (March 1, 2021), Officer Meyers met Mother and SV at WBI to interview SV. (ECF 112-1 p. 2.) Though claiming she could not remember anything at first, SV eventually stated Mr. Salas supplied her the methamphetamine and smoked it with her. (*Id.*) She denied any "acts of violence or sexual advances towards her from [Mr. Salas] or anyone else present, especially at the time when she had smoked." (*Id.* p. 3.) Later that day, Officer Meyers corroborated SV's description of Mr. Salas' home and car by driving by to

observe them, and dispatch confirmed the car in front of the residence was registered to Mr. Salas. (*Id.*)

In the evening of March 1, 2021, Officer Meyers applied by telephone to a state circuit court judge for a search warrant to search Mr. Salas' home and vehicle for drugs and other evidence of drug distribution. (ECF 112-1 p. 3; Govt Ex. 1.) The state court judge found probable cause based on Officer Meyers' supporting affidavit and issued the requested search warrant. (ECF 112-2 p. 5.) This drugs search warrant is not challenged in this case.

The next afternoon, March 2, 2021, Officer Meyers and other officers executed the search warrant at Mr. Salas' residence. (ECF 112-1 p. 4.) Mr. Salas and an adult female, Marti Parmenter, were present inside the residence at the time. (*Id.*) Both were handcuffed, searched, and transported to the police station for questioning while the search was conducted. (*Id.*) On the way to the police station, though, Mr. Salas informed the transporting officer that he wanted a lawyer, so he was taken instead to the detention center without questioning and booked on several drug-related felonies. (*Id.*) Parmenter agreed to talk to the police, and she was interviewed by Officer Meyers and Detective Shannon Daley. (ECF 112-1 p. 3; ECF 112-3.) During the search of Mr. Salas' home and car, law enforcement found various suspected drugs, drug paraphernalia, a handgun, and ammunition. (ECF 112-2 pp. 3-4.)

According to Officer Andrea Husted at the December 2, 2022 evidentiary hearing[1], and relevant to this motion to suppress, she seized a cellphone lying on the bed next to Mr. Salas, who was also lying on the bed at the time he was arrested. That cellphone was an Apple iPhone with a green protective case. (*See* ECF 112-2 p. 4 (property receipt for first search

[1] The Court found Officer Husted credible and informative at the evidentiary hearing.

warrant showing an iPhone with a green case was found on the bed in the bedroom).)

2. The Search Warrant for Electronic Devices (Second Search Warrant)

Based in part on what law enforcement had found during the search of Mr. Salas' home as well as the interview of Parmenter, Officer Meyers applied by telephone to the same state circuit court judge for another search warrant, this one to seize and search Mr. Salas' electronic devices for "[i]tems of evidence related to the sexual exploitation of children," including images and videos. (ECF 112-4 p. 3; Govt Ex. 2.) This was done while the first search warrant was still being executed by other officers. Relevant to the instant motion to suppress, Officer Meyers' affidavit in support of the second search warrant request stated the following:

> 3. On March 1, 2021 Your Affiant was granted a Court authorized Search Warrant for 8300 Tubbs Road #A, Casper, WY 82604 by Circuit Court Judge, Honorable H. Steven Brown.
>
> 4. On March 2, 2021 at approximately 1530 hours, Officers of the Casper Police Department executed the Search Warrant at 8300 Tubbs Road #A, Casper, WY 82604, searching for marijuana, methamphetamine, and heroin. During the course of the officers' investigation, they discovered an entire room in Salas' apartment devoted to computers, cameras, and other photography/videography equipment.
>
> 5. Located in the apartment were two subjects identified as Salvador Salas [DOB omitted] and Marti Parmenter.
>
> 6. Officer M. Meyers conducted an interview with Parmenter after she was advised of her Miranda warnings. Parmenter stated that last night (03/01/2021), her [sic] and Salas smoked methamphetamine and heroin inside the apartment.
>
> 7. Officer M. Meyers spoke to a known but unnamed source who stated substantially the following: they had used controlled substances, specifically methamphetamine and heroin with Salas. Upon using that, Salas had taken photographs of this person naked. It is also known by this person that Salas has other photographs of other naked women stored on this phone and computers that were captured in the same context as them.

8. Officer M. Meyers believes that it is probable, based on the above information that Salas had used controlled substances with subjects under the age of 18 years old, and taken photographs of them in the same manner described above.

9. Based on the amount of electronics, cameras, phones and video equipment, Officer M. Meyers believes that the equipment may possess images of child pornography.

(ECF 112-4 pp. 5-6.) During the phone application, the state court judge referenced the first search warrant (which had been for drugs):

Judge: Alright, and what is the difference in scope between this warrant and your previous warrant?

Officer Meyers: The scope of this warrant is for electronics, everything related to electronics, digital software, stuff like that. I can read it all to you if you want me to.

Judge: Alright, go ahead.

[Officer Meyers then read all the digital items he wanted to search for to the state court judge.]

Judge: Okay. Now, I -- last warrant we were talking about the use of controlled substances. Has there been more information brought to you about child pornography, or --

Officer Meyers: Yes, sir, based off of a known but unnamed source that we have. But that's -- that's all outlined for you in my affidavit portion.

Judge: Okay. Why don't you go ahead and [inaudible]. Again, you can skip your qualifications paragraphs because I know you. Just go ahead and start with the different paragraphs that you have in this one.

[Officer Meyers then read paragraphs 3 through 9 of his affidavit to the state court judge, which were quoted above.]

(Unofficial Transcript of Govt Ex. 2.) After Officer Meyers finished reading his affidavit, the state court judge granted the application and approved the requested search warrant for electronic devices. (ECF 112-4 pp. 1-2.)

Law enforcement seized a number of electronic devices while executing the second search warrant, including additional cellphones, cameras, computers, and digital storage devices. (ECF 112-4 pp. 7-8.) The electronic devices were provided to Caleb Forness[2], a computer analyst who works with the Casper Police Department, who accessed the devices and, on the iPhone with a green case and other devices as well, found images and videos allegedly depicting child pornography, including sexual acts between Mr. Salas and SV. (ECF 142-1 p. 3.)

Based on the images and videos discovered, Mr. Salas was arrested on March 31, 2021, on several state charges, including exploitation of children and sexual assault of a minor. (ECF 142-1 pp. 6, 7.) In July 2021, he was indicted by a grand jury on the current federal charges of possessing and producing child pornography (ECF 1), which commenced this federal proceeding.

ANALYSIS

As noted above, Mr. Salas focuses his challenge in this matter on whether the electronics search warrant (the second search warrant) was supported by sufficient probable cause. Based on his briefing as well as the arguments of counsel at the evidentiary hearing, the Court understands Mr. Salas to be challenging the electronics search warrant both facially (by arguing Officer Meyers' affidavit did not provide sufficient probable cause for a search warrant) and factually (by arguing Officer Meyers' affidavit included material misrepresentations and omitted information that would vitiate probable cause). (*Compare* ECF

[2] Mr. Forness testified at the December 2, 2022 evidentiary hearing, and the Court found him credible and informative.

112 p. 7 (contending the state court judge merely ratified the bare conclusions or hunches of Officer Meyers) *with* ECF 112 pp. 6, 8, 9 (contending exculpatory information was left out of the warrant and challenging Officer Meyers' representations about what Parmenter or the known-but-unnamed source had reported). The Court will review the matter under both tests.

1. Whether the Electronics Search Warrant Lacked Probable Cause on its Face

The Fourth Amendment protects people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Three requirements must exist for searches and seizures conducted pursuant to a warrant to be lawful under the Fourth Amendment:

> First, warrants must be issued by neutral, disinterested magistrates. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense. Finally, warrants must particularly describe the things to be seized, as well as the place to be searched.

Mink v. Knox, 613 F.3d 995, 1003 (10th Cir. 2010) (quoting *Dalia v. United States*, 441 U.S. 238, 255 (1979)). Mr. Salas' facial challenge asserts the affidavit offered in support of the search warrant is insufficient on its face to establish sufficient probable cause for the search.

> "A search warrant must be supported by probable cause, requiring more than mere suspicion but less evidence than is necessary to convict." *Danhauer*, 229 F.3d at 1005 (internal quotation marks omitted). "Probable cause exists when the facts presented in the affidavit would warrant a [person] of reasonable caution to believe that evidence of a crime will be found at the place to be searched." *Poolaw v. Marcantel*, 565 F.3d 721, 729 (10th Cir. 2009) (internal quotation marks omitted).

United States v. Romero, 749 F.3d 900, 904 (10th Cir. 2014). "Probable cause undoubtedly requires a nexus between suspected criminal activity and the place to be searched." *United States v. Corral-Corral*, 899 F.2d 927, 937 (10th Cir. 1990). The task of the judicial officer

presented with a search warrant application

> is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983). The judicial officer "may draw reasonable inferences from the material provided in the warrant application." *United States v. Rowland*, 145 F.3d 1194, 1205 (10th Cir. 1998).

To encourage the use of warrants, a reviewing court accords "great deference to the probable cause determination made by the judge who issued the warrant." *Romero*, 749 F.3d at 904 (quoting *Poolaw*, 565 F.3d at 728); *see also Untied States v. Moses*, 965 F.3d 1106, 1112 (10th Cir. 2020) ("A district court reviewing the probable cause for a warrant puts itself in the shoes of the warrant's issuing jurist and gives substantial deference to the prior decision."). This Court's duty is only to ensure the judicial officer had a "substantial basis" for concluding that probable cause existed. *Gates*, 462 U.S. at 238-39.

1.1 The electronics search warrant was supported by sufficient probable cause on its face.

As demonstrated by Government's Exhibit 2, which is the bodycam video recording of Officer Meyers' search warrant application to the state court judge that was quoted at length above, the state court judge remembered and considered the information from the previous day's affidavit in addition to the new information included in the second affidavit. This was perfectly appropriate. When determining the existence of probable cause, a judicial officer can rely on facts and matters outside the four corners of the affidavit of probable cause, but those extraneous considerations must be sworn to in some manner, which usually takes the

form of sworn, recorded testimony from the officer, but not always. For example, in *Kaiser v. Lief*, 874 F.2d 732 (10th Cir. 1989), the Tenth Circuit held the magistrate judge who issued the search warrant was able to rely on the facts contained in a sworn complaint in support of an arrest warrant that had been presented to the same magistrate judge the previous day. *Id.* at 734-35. Of course, when examining a facial challenge, the reviewing court is limited to reviewing only that which was actually considered by the judicial officer who issued the warrant. *See Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 565 n.8 (1971) ("Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate.").

Considering both of Officer Meyers' affidavits in support of the search warrants together, the state court judge knew the following:

- SV had been admitted to the hospital with burned lips and under the influence of methamphetamine, and she reported to police that the methamphetamine had been provided to her by Mr. Salas the night before, and he had smoked the methamphetamine with her at his residence. (ECF 112-2 p. 7.)

- SV had reported to police that Mr. Salas had provided drugs to her and her friends on prior occasions. (ECF 112-2 p. 8.)

- SV's burned lips were consistent with smoking out of a pipe that had become too hot, and SV's behavior, which included uncontrollable movements, dilated pupils, and bruxism (grinding teeth or clenching jaw) was consistent with the recent use of methamphetamine. (ECF 112-2 p. 8.)

- While executing the drugs (first) search warrant, officers found a room in Mr. Salas' apartment devoted to computers, cameras, and other photography/videography equipment. (ECF 112-4 p. 5.)

- Marti Parmenter was present with Mr. Salas at his residence when police arrived to execute the first search warrant. In an interview with police, Parmenter said she

and Mr. Salas had smoked methamphetamine and heroin inside the apartment the previous night. (ECF 112-4 p. 5.)

- A known but unnamed source reported to police that they had used methamphetamine and heroin with Mr. Salas, and upon doing so, Mr. Salas then took photographs of the known but unnamed source while they were naked. (ECF 112-4 p. 5.)

- The known but unnamed source knows that Mr. Salas had photographs of other naked women stored on his phone and computers that were captured in the same context as the naked photos of the known but unnamed source, i.e., after using drugs together. (ECF 112-4 p. 5.)

Thus, the state court judge was informed that Mr. Salas had previously taken drugs with women and then photographed them naked. The state court judge also knew that Mr. Salas had taken drugs with SV, a 13-year-old female. It was reasonable for the state court judge to infer it was probable that Mr. Salas had taken naked photos of SV after consuming drugs with her. After all, the state court judge knew that Mr. Salas did not differentiate between adults and children when providing them methamphetamine, so it was a practical, common-sense deduction that he also did not differentiate between adults and children in his photography of females after providing them methamphetamine. And it is obvious that naked photos of a 13-year-old are likely to constitute child pornography. While taking consensual naked photos of an adult is not illegal, "innocent or legal conduct may be infused with the degree of suspicion necessary to support a finding of probable cause when examined through the lens of those versed in the field of law enforcement." *United States v. Edwards*, 813 F.3d 953, 965 (10th Cir. 2015) (internal quotations omitted). Therefore, considering all this information together, a "substantial basis" existed for the state court judge to reasonably conclude there was a fair probability that evidence of child pornography would be found on Mr. Salas' electronic devices. When combined with the information contained in the earlier

affidavit, the electronics search warrant was supported by sufficient probable cause.

1.2 Even if the electronics search warrant was not supported by sufficient probable cause on its face, suppression is not warranted under *Leon's* good-faith exception.

The Supreme Court explained in *United States v. Leon*, 468 U.S. 897 (1984), "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 919. *Leon* modified the exclusionary rule "so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Id.* at 900. "Leon's good faith exception applies only narrowly, and ordinarily only when an officer relies, in an objectively reasonable manner, on a mistake made by someone other than the officer." *United States v. Loera*, 923 F.3d 907, 925 (10th Cir. 2019) (quoting *Unites States v. Cos*, 498 F.3d 1238, 1251 (10th Cir. 2006)).

If the state court judge was mistaken in finding Officer Meyers' affidavits provided probable cause for the electronics (second) search warrant, then it was the state court judge who erred and not the law enforcement officers who executed the electronics search warrant. In order to encourage law enforcement officers to apply for and obtain warrants before conducting searches and/or seizures, *Leon's* good-faith exception avoids punishing police officers or the prosecution for a judicial officer's mistake. "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth

Amendment violations." *Leon*, 468 U.S. at 921. The evidence here does not suggest the state court judge acted as anything but a detached and neutral magistrate when issuing the electronics search warrant. Examining the affidavits and search warrants on their faces, *Leon's* good-faith exception applies to the state court judge's error, if any, and precludes suppressing the evidence obtained pursuant to the electronics search warrant. "The test for good faith requires 'significantly less' than a finding of probable cause." *United State v. Brown*, 586 F. Supp. 3d 1075, 1091 (D. Kan. 2022) (quoting *United States v. Welch*, 291 F. App'x 193, 202 (10th Cir. 2008)).

In sum, when considering both of Officer Meyers' affidavits together, there is a substantial basis for the state court judge to conclude probable cause supported issuing the electronics search warrant. Even if that is not the case, though, the error is that of the judicial officer and suppression is not appropriate under *Leon's* good-faith exception.

2. Whether the Electronics Search Warrant Lacked Probable Cause Factually Under *Franks v. Delaware*

Mr. Salas also argues that by looking beyond the four corners of Officer Meyers' affidavits, we see the affidavits contain material misrepresentations and omit important exculpatory information, which vitiates the existence of probable cause. (*See* ECF 112 pp. 6, 8, 9; ECF 128 pp. 5-8, 10.)

The U.S. Supreme Court case of *Franks v. Delaware*, 438 U.S. 154 (1978), guides this issue. "Under *Franks*, a Fourth Amendment violation occurs if (1) an officer's affidavit supporting a search warrant application contains a reckless misstatement or omission that (2) is material because, but for it, the warrant could not have lawfully issued." *United States v. Herrera*, 782 F.3d 571, 573 (10th Cir. 2015). In other words, when conducting a *Franks* analysis,

the reviewing court considers information beyond that known by the judicial officer who issued the search warrant. The reviewing court must first excise from the affidavit intentional or reckless misstatements as well as read into the affidavit any intentional or reckless omissions, and then the reviewing court reconsiders the affidavit to determine whether probable cause would exist under the corrected affidavit. *Id.* at 575 ("But whether we're talking about acts or omissions the [reviewing] judge's job is much the same—we must ask whether a warrant would have issued in a but-for world where the attesting officer faithfully represented the facts.... If not, a Fourth Amendment violation has occurred and the question turns to remedy."). "Because probable cause is an objective standard, it may exist [independent of and] despite a police officer's false statements or material omissions." *Sanchez v. Hartley*, 299 F. Supp. 3d 1166, 1195 (D. Colo. 2017).

It is the defendant's burden to prove by a preponderance of the evidence the existence of each intentional or reckless misstatement or omission. *United States v. Campbell*, 603 F.3d 1218, 1228 (10th Cir. 2010). Innocent or negligent mistakes by the affiant do not warrant the exclusion of evidence under *Franks*. *United States v. Artez*, 389 F.3d 1106, 1116 (10th Cir. 2004).

> Judge Frankel, in *United States v. Halsey*, 257 F.Supp. 1002, 1005 (S.D.N.Y.1966), aff'd, Docket No. 31369 (CA2, June 12, 1967) (unreported), put the matter simply: "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Franks, 438 U.S. at 164–65.[3]

2.1 The second affidavit included material misstatements and omissions, and the corrected affidavit would not set forth sufficient probable cause for the electronics search warrant.

When looking at information beyond the four corners of the document, the affidavit in support of the electronics search warrant contains several issues of concern to the Court.

First, the "known but unnamed" source referenced in Paragraph 7 (ECF 112-4 p. 5) is actually Marti Parmenter, who was named in the previous Paragraph. (*See* ECF 121 p. 11.) This suggested to the state court judge that Officer Meyers had spoken with two different people—Parmenter and the "known but unnamed" source—when in reality it was only Parmenter. This is significant in this case because Officer Meyers informed the state court judge that Parmenter had confessed to smoking methamphetamine and heroin with Mr. Salas the night before, which could have been a factor the judge weighed in determining Parmenter's credibility, but the judge was denied that same opportunity to consider the "known but unnamed" source's use of methamphetamine and heroin with Mr. Salas the night before.

[3] A defendant has an initial burden to allege a problem with the underlying warrant and support that allegation with some evidence to be entitled to an evidentiary hearing under *Franks*. *See United States v. Herrera*, 782 F.3d 571, 573 (10th Cir. 2015). In this case, the Court determined an evidentiary hearing was appropriate because the affidavit in support of the electronics search warrant included assertions not matching Detective Daley's summary of the Parmenter interview, and Mr. Salas' prior attorney included both the affidavit and the summary with the motion to suppress. (ECF 112-3, 112-4 pp. 5-6.) For example, Officer Meyers' affidavit reported the known but unnamed source (now known to be Parmenter) said Mr. Salas had taken naked photos of her after they used drugs together, yet nowhere in Detective Daley's interview summary does it say Parmenter reported the photos taken by Mr. Salas of her were nude photos. (*Compare* ECF 112-4 p. 5 *with* ECF 112-3 p. 3.) In any event, a district court rarely abuses its discretion by holding an evidentiary hearing to pursue a *Franks* issue without the prerequisite showing being made. *See Herrera*, 782 F.3d at 573-74 ("And often enough courts will choose to err on the side of granting more process than might be strictly necessary in order to ensure not only that justice is done but that justice is seen to be done. Whether because of intuition born of experience that a meritorious issue may lurk in an imperfectly drawn application, or simply out of a jealous wish to guard individual rights against governmental intrusions, judges sometimes allow a claimant a fuller hearing than the law demands.").

"Certainly, the basis of a confidential informant's knowledge, as well as his reliability, are important factors in deciding whether information in an affidavit supports a finding of probable cause for a search." *United States v. Avery*, 295 F.3d 1158, 1167–68 (10th Cir. 2002), *abrogated on other grounds, United States v. O'Brien*, 560 U.S. 218, 235 (2010).[4] According to the testimony of Detective Daley, the Court understands Officer Meyers referred to Parmenter as a "known but unnamed" source as to certain information in an effort to protect her from potential repercussions, and he was instructed to do so by Detective Daley. Perhaps there are circumstances when such is warranted, but it must be considered and weighed against the likelihood of misleading the judicial officer. The Court finds this misrepresentation was not malicious, but it was intentional and knowing.

Second, also in Paragraph 7, Officer Meyers stated that the "known but unnamed" source (Parmenter) had reported that upon using methamphetamine and heroin with Mr. Salas, "Salas had taken photographs of [Parmenter] naked." (ECF 112-4 p. 5.) The recorded interview of Parmenter does not support this assertion. (*See* ECF 146; H'rg Ex. 13.) During the interview with Officer Meyers and Detective Daley, Parmenter reported that Mr. Salas had taken pictures of her that he would not give her, that he had photos of her naked, and that he had posted (non-naked) photos of her on the internet without her consent and would not

[4] The Government contends Parmenter should be considered an identified private citizen informant. "The veracity of identified private citizen informants (as opposed to paid or professional criminal informants) is generally presumed in the absence of special circumstances suggesting that they should not be trusted." (ECF 121 p. 12 (quoting *United States v. Brown*, 496 F.3d 1070, 1075 (10th Cir. 2007).) The Court cannot agree. Parmenter was "from the criminal milieu." *Brown*, 496 at 1075 (quoting *Easton v. City of Boulder*, 776 F.2d 1441, 1449 (10th Cir. 1985)). She was not an ordinary citizen witness. She admitted to smoking methamphetamine and heroin with Mr. Salas the night before the interview out of a "flashlight bong," and on several occasions before that. She was taken into police custody while at Mr. Salas' home, *Mirandized*, and easily could have been charged with a crime (but wasn't). She was not just a concerned citizen making a complaint to law enforcement. As Officer Meyers' primary source of information, the state court judge's ability to assess her credibility was extremely important to the probable cause determination.

remove them upon request. (H'rg Ex. 13, part 1 39:20-40:02, 51:14- 52:31.) She also said that since Mr. Salas would never let her touch or look at his cellphone, it made her feel like he had something on his phone about her that he didn't want her to see. (*Id.* 51:14-52:31.) And she said she suspected Mr. Salas of doing "weird shit" but could not describe anything specific because she said she would wake up and be unable to remember what had happened (ostensibly after using drugs with Mr. Salas). (*Id.* 51:55-52:31, 57:34-57:49.) Stated simply, Parmenter never reported Mr. Salas took naked photos of her, or any photos of her, after they used drugs together or in connection with drug use. The Court finds by a preponderance of the evidence that Officer Meyers included this misstatement in Paragraph 7 with reckless disregard for its truth because Officer Meyers was present for and participated in the interview of Parmenter. There has been no innocent or negligent explanation offered for this misstatement.

Third, and probably most concerning to the Court, Officer Meyers wrote in Paragraph 7, "It is also known by this person [known-but-unnamed Parmenter] that Salas has other photographs of other naked women stored on his phone and computers that were captured in the same context as them." (ECF 112-4 p. 5.) Unfortunately, this not what Parmenter said in her interview with Officer Meyers and Detective Daley. Parmenter reported during the interview that Mr. Salas never allowed her to look at or use his phone. (H'rg Ex. 13 52:09-52:52.) Additionally, she said she knew there were photos of other women "that inquire about photos" (*id.* 58:12-58:20), thus suggesting the photos of other women were consensual and requested by the other women, and she did not suggest they were naked photos. (*See also id.* 53:56-54:02 ("I think most of the people that he takes pictures of inquire of photos from

him."), 39:20-39:33 (Parmenter thinks most of the pictures Mr. Salas takes of other girls are "of age"), 39:38-39:40 (Parmenter has not been present when Mr. Salas has taken pictures of clients).) Parmenter never stated she knew Mr. Salas has photos of other naked women on his phone or computer, and she never stated the photos of other women or "clients" were captured in the same context (i.e., after they had taken drugs with Mr. Salas). The Court finds the Government's assertion that this statement in Officer Meyers' affidavit "is a fair summary based on the entirety of the interview and its context" (ECF 148 p. 6) to be rather unpersuasive. The Court again finds by a preponderance of the evidence that Officer Meyers included this misstatement in Paragraph 7 with reckless disregard for its truth because he was present for and participated in the interview of Parmenter. There has been no innocent or negligent explanation offered for this misstatement.

Finally, Paragraphs 8 and 9 convey only Officer Meyers' beliefs about what evidence might exist upon an electronics search, which adds very minimally to the probable cause determination. *See Loera*, 923 F.3d at 924. But of some relevance to Officer Meyers' belief that "Salas had used controlled substances with subjects under the age of 18 years old, and taken photographs of them in the same manner described above" (ECF 112-4 p. 6) is the fact that SV expressly denied to Officer Meyers any "acts of violence or sexual advances towards her from [Mr. Salas] or anyone else present, especially at the time when she had smoked" (ECF 112-1 p. 3). SV's denial was not included in Officer Meyers' affidavits. To be sure, SV's denial does not nullify the possibility that Mr. Salas may have taken photos of her while she was high on methamphetamine, as photographing is not the same as acts of violence or sexual advances, but it is a consideration that would have been appropriate for the state court judge to weigh

during the probable cause determination.

After excising the misrepresentations in Paragraph 7 from the affidavit and including SV's denial of any "acts of violence or sexual advances towards her from [Mr. Salas] or anyone else present, especially at the time when she had smoked" (ECF 112-1 p. 3), the Court finds the corrected affidavit would wholly lack probable cause to support a search of Mr. Salas' electronic devices for evidence of child pornography. Together, the corrected affidavit and the first affidavit would establish that Mr. Salas gave methamphetamine to SV and used it with her, gave methamphetamine and heroin to Parmenter and used it with her, and had a room devoted to photography/videography and other digital equipment. This falls woefully short of a fair probability that child pornography would be found on Mr. Salas' electronic devices. *See Loera*, 923 F.3d at 924 (an affidavit in support of a search warrant for child pornography must provide information "such that a magistrate could independently assess whether the images meet the legal definition of child pornography").

2.2 *Leon's* good-faith exception cannot save the electronics search warrant when examined under *Franks*.

The good-faith exception discussed above applies where a judicial officer errs in finding the existence of sufficient probable cause and law enforcement officers reasonably rely in good faith on the resulting search warrant. "*Leon's* good faith exception applies only narrowly, and ordinarily only when an officer relies, in an objectively reasonable manner, on a mistake made by **someone other than the officer**." *United States v. Cos*, 498 F.3d 1115, 1132 (10th Cir. 2007) (emphasis added). Under the *Franks* analysis, the error in this matter was Officer Meyers' reckless disregard for whether the statements he attributed to Parmenter (or to the "known but unnamed" source that was Parmenter) were attributed to Parmenter and

accurately reflected what Parmenter had said; it was not the error of the state court judge who reasonably relied on those misstatements. *Leon* does not apply here where the error "was the fault of the officer, not the magistrate." *Loera*, 923 F.3d at 925; *see also United States v. Danhauer*, 229 F.3d 1002, 1007 (10th Cir. 2000) (*Leon's* good-faith exception does not apply "if the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false if not for his 'reckless disregard of the truth'") (quoting *Leon*, 468 U.S. at 923).

2.3 The inevitable-discovery doctrine renders suppression inappropriate, even in light of the *Franks* analysis.

The Government argues the alleged child pornography involving SV underlying the charges in this case should not be suppressed because it would have been inevitably discovered by law enforcement. (ECF 121 pp. 16-18.) The inevitable-discovery doctrine says that unlawfully obtained evidence may still be admissible against the defendant at trial if it "ultimately or inevitably would have been discovered by lawful means." *United States v. Christy*, 739 F.3d 534, 540 (10th Cir. 2014) (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)). It is the Government's burden to prove, by a preponderance of the evidence, the unlawfully-seized evidence would have been discovered independent of the constitutional violation. *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005).

2.3.1 Law enforcement would have inevitably discovered the alleged child pornography involving SV as part of the investigation into Mr. Salas' drug possession and distribution to SV.

The primary circumstances surrounding this argument were largely established at the December 2, 2022 evidentiary hearing. Officer Andrea Husted testified that she saw and seized an Apple iPhone with a green protective case that was lying next to Mr. Salas on his

bed when he was arrested on March 2, 2021. She further testified that she seized this iPhone pursuant to the drugs (first) search warrant, before the electronics (second) search warrant was sought or issued.

Caleb Forness, the computer forensic analyst, testified that he found photographs and videos of SV constituting suspected child pornography on the same Apple iPhone, specifically Item No. 505. (*See* Govt Ex. 5 at ECF 143-1 pp. 2-5.) He said he conducted the forensic download of the iPhone (i.e., searched its contents) on March 8, 2021. He further testified the iPhone showed the videos and photos of SV had been taken (produced) on the same iPhone on February 27, 2021. (As noted earlier, SV and her mother reported SV was at Mr. Salas' home on the evening of February 27, 2021, until the early morning of February 28, 2021.) The photographs and videos of SV found on the Apple iPhone with a green case comprise the child pornography charges in this case.[5] (*See* Govt. Ex. 5 at ECF 143-1 pp. 4-5 (redacted videos and photos).)

The drugs search warrant, which is not challenged, authorized officers to search for and seize evidence of the "use and delivery of a controlled substance; to include … records, and/or receipts, written or electronically stored." (ECF 112-2 p. 5.) This allowed law enforcement to lawfully seize Mr. Salas' iPhone and search it for electronic records or receipts

[5] At the evidentiary hearing, Caleb Forness described the iPhone to have a "tan" case. The Court does not find this "green vs. tan" difference to be material, particularly considering the cellphone shown in Government's Exhibit 5 (ECF 143-1 pp. 2-5) has a protective case that reasonably could be described as green or tan. Moreover, the cellphone in Government's Exhibit 5 shows a "selfie" picture of Mr. Salas (ECF 143-1 p. 3) as well as non-selfie photos taken of SV (ECF 143-1 p. 5). Moreover, the selfie picture is the album cover for the first photo album in the phone's "Photos" application, and the next photo album is labeled "Sal," which is the name Mr. Salas goes by. (ECF 143-1 p. 3.) Based on the testimony at the hearing as well as the identification of the cellphone as Item No. 505, the Court finds the iPhone discussed by Officer Husted and Caleb Forness to be the same item.

evincing drug use or delivery. *See, e.g., Loera*, 923 F.3d at 916 ("The general Fourth Amendment rule is that investigators executing a warrant can look anywhere where evidence described in the warrant might conceivably be located.").

In response to questions from the Court, Caleb Forness credibly testified that when he's looking for electronic evidence of illegal drug transactions on a device, he would first open the "settings" on the phone to try to identify the phone's user and then he would examine the "Photos" application. Forness described a reasonable procedure for searching for electronic evidence of drug possession and distribution, as this and other courts well know it is commonplace nowadays for pictures of drugs and drug transactions to be found on cellphones. *See United States v. Palms*, 21 F. 4th 689, 700-01 (10th Cir. 2021) (the reasonableness of a search of a computer or other similar electronic device is determined based "on *how* the computer search was conducted rather than *what* was searched") (emphases in original); *Loera*, 923 F.3d at 920 (when searching electronic devices, officers must "reasonably direct their search toward evidence specified in the warrant").

When Mr. Salas was arrested at the time the officers executed the drugs (first) search warrant, he was charged in state court with possessing felony amounts of controlled substances, child endangerment with methamphetamine, and delivery of a controlled substance to SV. (ECF 112-1 p. 5.) On March 8, 2021, when Caleb Forness searched the iPhone seized by Officer Husted during the execution of the drugs search warrant, the felony drug charges were pending against Mr. Salas. Accordingly, the photos and videos of SV underlying the charges in this federal case would have been inevitably discovered by Forness as part of the execution of the drugs search warrant while Forness was looking for electronic

records or receipts evincing drug use or delivery.[6] Thus, the Court concludes the Government has proved by a preponderance of the evidence that the alleged child pornography at issue in this case ultimately would have been discovered by lawful means as part of the drug investigation, which renders suppression based on Mr. Salas' *Franks* argument unwarranted.

2.3.2 Alternatively, law enforcement would have inevitably discovered the alleged child pornography involving SV during the consensual search of Mr. Salas' iPhone in connection with his domestic violence charges.

Finally, law enforcement would have inevitably found the photos and videos of SV on Mr. Salas' iPhone through a separate and independent avenue. On February 14, 2021, Mr. Salas was arrested on state court charges of domestic battery against Parmenter. (ECF 112-5 pp. 5-12.) He bonded out of jail within a short time, but those misdemeanor charges remained active until they were eventually dismissed in August 2021. (ECF 112-5 p. 1.)

In April 2021, after his iPhone had been seized by Officer Husted under the drugs (first) search warrant and was being held by the police, Mr. Salas provided written consent to law enforcement to search his cellphones for videos that he believed would exculpate him of the domestic battery charges. (ECF 112-5 pp. 2-3; Govt Ex. 3 at ECF 121 pp. 1-2.) Accordingly, the Court concludes the Government has established by a preponderance of the evidence that law enforcement would have inevitably discovered the alleged child pornography

[6] Forness testified that he found the passcode for the iPhone containing the alleged child pornography on a different device that was not encrypted. It's unclear whether that other device was seized as part of the drugs or electronics search warrant. However, he also credibly testified that if he had not found the passcode (e.g., he did not possess the other device), he would have used forensic software to "brute-force" the passcode in the iPhone, which is simply using the forensic software to enter every possible passcode on the device until the correct passcode is entered. He testified that using the "brute-force" method is just a matter of giving the forensic software enough time to try numerous passcodes until the correct one is found. Thus, even without the passcode from the other device, Forness would have ultimately gained entry into the iPhone and discovered the photos and videos involving SV.

involving SV on his iPhone during their consensual (and requested) search of his phones for videos involving Parmenter.

CONCLUSION AND ORDER

Examining only Officer Meyers' affidavits, the state court judge had a substantial basis for concluding probable cause existed to issue the electronics (second) search warrant. And even if the state court judge was mistaken on that call, *Leon's* good-faith exception applies and renders suppression of the evidence unwarranted.

Looking beyond the affidavits pursuant to *Franks*, though, the Court finds certain material misstatements and omissions that, when corrected for, vitiate probable cause. And *Leon's* good-faith exception cannot prevent suppression because this error was Officer Meyers' error and not a judicial error. Nonetheless, the inevitable-discovery doctrine can apply if the Government would have ultimately discovered the incriminating evidence through lawful means. *See Loera*, 923 F.3d at 927-29. Here, law enforcement would have ultimately discovered the alleged child pornography on Mr. Salas' iPhone while searching it pursuant to the drugs (first) search warrant for evidence of drug possession and distribution. Alternatively and independently, law enforcement would have ultimately discovered it while searching Mr. Salas' iPhone pursuant to his request and consent for police to search his phones for videos exculpating him of the domestic battery charges (while police were in lawful possession of the phone under the drugs search warrant). Therefore, even looking behind the four corners of the affidavits pursuant to *Franks*, suppression of the evidence found on the iPhone with the green/tan protective case (which included a selfie photo of Mr. Salas as the cover photo of the photo album containing the alleged child pornography) is not warranted.

IT IS THEREFORE ORDERED that the Defendant's Motion to Suppress Items Seized from Second Search Warrant (ECF 112) is **DENIED**.

ORDERED: December 8th, 2022.

Scott W. Skavdahl
United States District Judge

United States v. Salvador Salas, Jr.
Case No. 23-8027
Brief of Defendant-Appellant

ATTACHMENT C

Order Denying Motion to Suppress Statements

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UNITED STATES OF AMERICA,

Plaintiff,

v.

SALVADOR SALAS, JR.,

Defendant.

Case No. 21-CR-77-SWS

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

This matter comes before the Court on the Defendant's Motion to Suppress Mr. Salas's Statements Under *Edwards v. Arizona*, 451 U.S. 477 (1981) (ECF 141) and the Government's opposition (ECF 143). The Court held an evidentiary hearing on the motion on December 2, 2022. (ECF 147.) The parties were also provided an opportunity to submit supplemental briefing, and the Government did so. (ECF 148.) Having considered the evidence and testimony as well as the arguments of the parties, the Court concludes suppression is not warranted.

INTRODUCTION

Defendant Salvador Salas, Jr. was indicted by a federal grand jury on one count of possessing child pornography and five counts of producing child pornography. (ECF 1.) Upon his arrest on related state charges on March 31, 2021, he was transported to the Casper Police Department and interviewed by police. In this motion, he seeks to suppress the statement he gave to police that day.

FACTUAL FINDINGS

In the afternoon of March 31, 2021, police arrested Mr. Salas on state charges of sexual exploitation of children, sexual assault in the first and second degree, and controlled substances offenses. (ECF 142-1 pp. 6-7.) He was handcuffed in the parking lot outside Marti Parmenter's apartment and placed in the backseat of Officer Andrea Husted's patrol car. Shortly after being put there, as captured on the video camera in the vehicle, Officer Husted opened her front driver's side door and Mr. Salas immediately asked her to report to "the detective" that Parmenter had drugs inside her apartment.

> Mr. Salas: Ma'am, hey, can you tell the detec- -- can you tell the detective that -- this guy or whatever [indicating toward another officer outside the car] --, she's got -- she's got fucking dope in her fucking deal, bro.
>
> Officer Husted: There's dope in the house?
>
> Mr. Salas: In the fucking house, yeah.
>
> Officer Husted: Okay.

(Unofficial Court Transcription of Govt Ex. 6 at 1:31-1:42.[1]) He then proceeded to complain to Officer Husted that Parmenter was trying to "set [him] up." Officer Husted assured Mr. Salas she would convey his message to the appropriate officer, and he then said he wanted to talk to the officer himself:

> Officer Husted: Oh, okay. I'll let him know.
>
> Mr. Salas: No, like, I need to talk to him [the detective or officer] because he was in my -- remember when you first took me over there? She wasn't supposed to be, like, there at my place. She gave herself a code.
>
> Officer Husted: Okay.

[1] Government's Exhibit 6 is also part 2 of Defendant's Exhibit 2.

(*Id.* at 1:52-2:03.) Mr. Salas then said Parmenter had been found in his sunroom, and the following exchange occurred:

> Officer Husted: Okay. We'll get -- we'll get you down to talk to them. I don't --
>
> Mr. Salas: Dude, I got a --
>
> Officer Husted: I don't know all the details, bro. I just know that --
>
> Mr. Salas: What?
>
> Officer Husted: You know, I just know a little bit.
>
> Mr. Salas: What is it? Can you tell me?
>
> Officer Husted: That you're under arrest right now. I don't know what your charges are. So, we'll get somebody out to talk to ya, okay? I'll roll this window down a bit for ya.
>
> Mr. Salas: Can you -- hey -- can you -- can you call my lawyer, J. Cole, please, to see if they can talk to me too, like, to see -- tell me what's going on?
>
> Officer Husted: Okay. As soon as I know, bro, I'll let you know. I don't know, uh, shit, though.
>
> Mr. Salas: Alright.

(*Id.* at 2:09-2:37.) Officer Husted then shut the door and left Mr. Salas alone in the patrol vehicle. Within a minute, he started trying to get the attention of officers who walked past the patrol car by yelling at them, whistling at them, and asserting through the cracked window that Parmenter was in the apartment and had his iPad.

A couple of minutes later, Officer Husted and Officer Matthew Meyers got into the front seats of the patrol car to transport Mr. Salas to the police department for a custodial interview. As soon as they got in, without them questioning him and during much of the ride to the station, Mr. Salas spoke at length to the officers, mostly about him having told

Parmenter to not "mess around," about Parmenter and others trying to set him up to get him into trouble, about him trying to retrieve his iPad from her, about Parmenter and others having trashed his apartment, about Parmenter hanging around people of questionable integrity, and about Parmenter treating him poorly. (*Id.* at 4:20-6:50, 8:05-15:05.)

Upon arriving at the police department, officers escorted Mr. Salas to a videorecorded interview room. (Govt Ex. 7; Govt Ex. 8.[2]) After a few minutes, Detective Chase Nash and Officer Meyers entered the room to commence the interview. (Govt Ex. 8 at 22:36.) When asked how he was doing, Mr. Salas responded he was tired and immediately began complaining about the ways he felt Parmenter had wronged him. (*Id.* at 22:52-23:46.) Detective Nash interrupted Mr. Salas to get his name and date of birth, and then Mr. Salas started talking about his work as a DJ, and a car he used to own, and how he lost $24,000. (*Id.* at 23:46-25:53.) Detective Nash again interrupted Mr. Salas and informed Mr. Salas of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), which took several minutes because Mr. Salas kept interrupting to talk about learning about options as a little kid, to assert more complaints about Parmenter, and to say he wanted his property returned to him. (*Id.* at 25:54-28:39.) Detective Nash then asked Mr. Salas if he understood his *Miranda* rights, which Mr. Salas confirmed. (*Id.* at 28:40-28:57.) Detective Nash then asked Mr. Salas whether, with those rights in mind, he wanted to talk to Detective Nash and give a statement to police. (*Id.* at 28:58-29:08.) Mr. Salas said, "You know what, I will give a statement." (*Id.* at 29:09-29:11.) After agreeing to give a statement and for the remainder of the interview (about another hour), Mr. Salas spoke about

[2] The police interview of Mr. Salas is broken up into three parts, which the prosecution has labeled as Government's Exhibits 8, 9, and 10, and the defense has identified as Parts 1, 2, and 3 of Defendant's Exhibit 3.

a variety of topics (mostly involving Parmenter), talked in circles, and avoided directly answering most questions.[3] Some of his answers, though, have incriminating value weighing on the child pornography charges in this case. For example, he agreed that he recorded himself having sex with SV (who was then 13 years old). (Govt Ex. 9 at 4:15-4:31.) He also said the reason "those videos" were on his devices was to disprove any assertion that the acts were coerced or forced against someone's will (*id.* at 14:39-15:21) and that SV "came onto" him (*id.* at 15:33-15:49).

After Detective Nash and SA Hieb left the interview room mostly out of frustration with Mr. Salas' tendency to talk in circles about unrelated matters, but while still being videorecorded, Mr. Salas said, "Can I get a lawyer? Fuck." (*Id.* at 32:33-32:47.) He was not asked any additional questions after that and was left alone in the room for about half an hour. Officers Meyers and Husted then returned to the interview room to escort Mr. Salas out and transport him to Urgent Care and then to the detention center. (Govt Ex. 10 at 4:07-5:04.)

In his current motion, Mr. Salas seeks to suppress the police interview, arguing he invoked his right to counsel while in the back of Officer Husted's police car and should never have been subjected to custodial interrogation.

LEGAL STANDARD

In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the U.S. Supreme Court held that once a suspect has expressed a desire "to deal with the police only through counsel," they may not be subjected to further interrogation or questioning by law enforcement until (1) counsel

[3] About 20 minutes into the interview, Officer Meyers left the room and Ryan Hieb, a special agent with the Wyoming Division of Criminal Investigation assigned to investigate crimes involving computers, entered the room. (Govt Ex. 8 at 52:00-52:52.) SA Hieb stayed and participated in the rest of the interview.

has been provided or (2) they themselves initiate "further communication, exchanges, or conversations with the police." *See Davis v. United States*, 512 U.S. 452, 458 (1994) ("But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation.").

This rule requires courts to "determine whether the accused *actually invoked* his right to counsel." *Id.* (emphasis in original) (quoting *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam)). "[A]mbiguous or equivocal statements that might be construed as invoking the right to counsel do not require the police to discontinue their questioning." *United States v. Nelson*, 450 F.3d 1201, 1212 (10th Cir. 2006). "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Davis*, 512 U.S. at 459 (emphasis in original). "Determining whether a suspect has invoked his right to counsel 'is an objective inquiry.'" *Nelson*, 450 F.3d at (10th Cir. 2006) (quoting *Davis*, 512 U.S. at 459).

Finally, a suspect need not wait until they are being questioned by police to invoke their right to counsel so long as custodial interrogation is imminent. The Tenth Circuit has determined that a suspect under arrest is considered subject to custodial interrogation where "'the police intended to question [the suspect] at some point' in the near future." *United States v. Santistevan*, 701 F.3d 1289, 1294 (10th Cir. 2012) (quoting *United States v. Kelsey*, 951 F.2d 1196, 1199 (10th Cir. 1991)). Thus, *Edwards'* bar against further interrogation without counsel applies to those suspects who clearly invoke their right to counsel shortly before custodial

interrogation begins. *See id.* (where defendant was under arrest and interrogation was imminent, defendant was subject to custodial interrogation and successfully invoked his right to preclude questioning without an attorney present).

ANALYSIS

Mr. Salas contends the following statement, made to Officer Husted after Mr. Salas had been placed in the back of her patrol vehicle and before he was transported to the police department, constituted a clear invocation of this right to counsel:

> Mr. Salas: Can you -- hey -- can you -- can you call my lawyer, J. Cole, please, to see if they can talk to me too, like, to see -- tell me what's going on?

(Govt Ex. 6 at 2:24-2:32.)

The Court concludes Mr. Salas did not actually and unambiguously invoke his right to preclude custodial interrogation without an attorney. Based on the context and circumstances surrounding Mr. Salas' statement, a reasonable officer would not have understood he was demanding the presence of counsel during questioning. Mr. Salas initiated that conversation with Officer Husted, saying he wanted her to tell the detective that Parmenter had drugs in her apartment. He then expressed his desire to speak with the detective himself so he could tell the detective about Parmenter entering Mr. Salas' residence without authorization:

> Mr. Salas: No, like, I need to talk to him [the detective or officer] because he was in my -- remember when you first took me over there? She wasn't supposed to be, like, there at my place. She gave herself a code.

(Govt Ex. 6 at 1:54-2:03.) Additionally, after that, he proceeded to try to talk to several officers who walked by the vehicle while he sat in the backseat. And during the ride to the police department, he talked nearly non-stop to Officers Meyers and Husted, albeit in an attempt to get Parmenter into trouble.

Mr. Salas' request that Officer Husted call his lawyer so that his lawyer could explain to him what was going on was, at best, an ambiguous statement that might be construed as invoking his right to counsel. *See Davis*, 512 U.S. at 461-62 (defendant's statement, "Maybe I should talk to a lawyer," was not an unambiguous request for counsel requiring officers to refrain from questioning defendant); *United States v. Zamora*, 222 F.3d 756, 765 (10th Cir. 2000) (defendant's statement, "I might want to talk to my attorney" was ambiguous and did not trigger right to counsel); *United States v. Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999) (concluding suspect's question, "What time will I see a lawyer?" made before interrogation began "did not invoke his right to have counsel present during interrogation"). While Officer Husted's reaction does not control the outcome here because it is an objective rather than a subjective inquiry, it tends to show the ambiguity of Mr. Salas' statements. After conversing with Mr. Salas while he was in the backseat of her car, she immediately reported to her fellow officers that she was confused by what Mr. Salas wanted because he had said both that he needed to talk to the detective and that he wanted Officer Husted to call his lawyer so his lawyer could explain what was happening. (Govt Ex. 7 1:06-1:116.) Such an ambiguous statement in this case did not preclude police from subjecting Mr. Salas to custodial interrogation at the police station. *See Davis*, 512 U.S. at 459; *Nelson*, 450 F.3d at 1212.

Moreover, even if Mr. Salas' request for Officer Husted to call his lawyer could be construed as a clear invocation of his right to counsel, he spent the next 11 minutes initiating and engaging in further communication, exchanges, and conversations with the police. (Govt Ex 6 at 3:00-14:10.) And at the station, Mr. Salas expressly agreed to "make a statement" to police after being apprised of his *Miranda* rights. (Govt Ex. 8 at 25:54-29:11.) Law

enforcement did not deprive Mr. Salas of his right to counsel under *Miranda* and *Edwards* when they interviewed him at the police station.

CONCLUSION AND ORDER

Mr. Salas' request for Officer Husted to call his lawyer so his lawyer could explain what was happening was, at best, an ambiguous reference to counsel that a reasonable officer would have understood only to mean that Mr. Salas *might* be invoking his right to have counsel present during any interrogation. It was not a clear invocation of counsel warranting officers to avoid questioning him without the presence of counsel. Alternatively, even if Mr. Salas' request for Officer Husted to call his lawyer could be construed as a clear invocation of his right to counsel, he himself initiated and engaged in further communication, exchanges, and conversations with the police within minutes. Indeed, he was a veritable chatterbox with police after any such invocation. Consequently, law enforcement did not err by subjecting Mr. Salas to custodial interrogation at the police department on March 31, 2021.

IT IS THEREFORE ORDERED that the Defendant's Motion to Suppress Mr. Salas's Statements Under *Edwards v. Arizona*, 451 U.S. 477 (1981) (ECF 141) is **DENIED**.

ORDERED: December 9th, 2022.

Scott W. Skavdahl
United States District Judge

Salvador Salas, Jr. v. United States

Case No. _____

Petition for Writ of Certiorari
from U.S. Court of Appeals for the Tenth Circuit
10th Cir. Case No. 23-8027

APPENDIX C

Petitioner's Reply Brief to U.S. Court of Appeals for the Tenth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 23-8027

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVADOR SALAS, JR.,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Wyoming

The Hon. Scott W. Skavdahl, United States District Judge

D.C. No. 21-CR-77-SWS

REPLY BRIEF OF DEFENDANT-APPELLANT

ORAL ARGUMENT IS REQUESTED

Respectfully submitted,

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I. THE DIGITAL DATA EVIDENCE SEIZED DURING SEARCH #3 WOULD NOT HAVE BEEN INEVITABLY DISCOVERED UNDER ANY OF THE GOVERNMENT'S THREE THEORIES.

A. The Government raises one ultimate question, to wit, whether the data and other digitally-stored evidence discovered during Search #3[1] would inevitably have been discovered independently of Search #3; and poses three alternative theories attempting to answer this question in the affirmative.

The ultimate question whether to exclude the digitally-stored data evidence arises not with Defendant-Appellant, but with the Government. Defendant-Appellant filed a motion to suppress the fruits of Search #2 and Search #3, asserting that Search Warrant #2 authorizing those searches was constitutionally defective. [R3.67-72]. The Government filed a response arguing suppression was inappropriate because the fruits of Search #3 would have been inevitably discovered. [R2.63-65]. In support of this proposition, the Government offered three alternative theories. First, that Search Warrant #1 was sufficiently broad in scope to authorize Search #3[2]; thus the evidence would have been inevitably found during the narcotics investigation. [R2.64-65]. Second, that

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[1] Except as otherwise noted herein, Defendant-Appellant uses the same shorthand and defined terms as used in his initial brief.

[2] Defendant-Appellant acknowledges that the phrase "Search Warrant #1 was sufficiently broad in scope to authorize Search #3," or any similar phrasing, is not technically correct. The legal question is not whether Search #3 was outside the scope of Search Warrant #1, but whether Search Warrant #1 *would have* authorized a forensic search of the digital storage devices, such as that conducted during Search #3. However, for the sake of clarity and convenience, such phrases as used herein referring to whether "Search Warrant #1 was sufficiently broad in scope to authorize Search #3," or something similar, unless otherwise stated, refer to Search Warrant #1's breadth and scope in connection with a hypothetical digital forensic search of any of the devices recovered by law enforcement during and in the course of the events which form the factual nexus for this case.

probable cause existed to obtain an untainted search warrant which would have authorized Search #2 and Search #3. [R4.63]. Third, that Defendant-Appellant "requested that his cell phones be searched for videos and he provided written consent" for Search #3; thus implying that the evidence would have been inevitably found if law enforcement acted on such request and consent. [R2.65]. The District Court denied Defendant-Appellant's motion, ruling that exclusion was inappropriate because the fruits of Search #3 inevitably would have been discovered. [R2.146]. The District Court ruled that only two of the Government's three theories supported its holding: the first theory, that Search Warrant #1 was sufficiently broad in scope to authorize Search #3, [R2.146-149]; and, in the alternative, the third theory, that Defendant-Appellant *would have* provided consent, [R2.149-150].

B. Government's First Theory: Scope of Search Warrant #1.

1. The Government erroneously suggests that Defendant-Appellant's failure to challenge Search Warrant #1 constitutes a waiver of his right to challenge Search #3.

There is a difference between an argument attacking the *validity* of Search Warrant #1, and an argument attacking the *breadth and scope* of Search Warrant #1. Thus, the Government is only half correct in its first argument. (*See* Aple's Br. at 20). Defendant-Appellant has not challenged the validity of Search Warrant #1. However, throughout the proceedings at each level, Defendant-Appellant has challenged the breadth and scope of Search Warrant #1; specifically, whether Search Warrant #1 is so broad in scope so as to authorize Search #3.

2. Defendant-Appellant's objection to the Government's first inevitable discovery theory is sufficiently preserved for *de novo* review.

An argument is fully and fairly preserved for appeal "when 'it is properly raised . . . and is submitted for determination, and is determined" by the District Court. *Truman v. Orem City*, 1 F.4th 1227, 1242 (10th Cir. 2021). An argument is properly raised below if it (i) provides fair notice to all parties about the substance of an issue, and (ii) provides fair opportunity to develop a record for appeal purposes. *Id*.; *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *contra In re Rumsey Land Co.*, 944 F.3d 1259, 1271 (10th Cir. 2019); *contra Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993); *contra Truman*, 1 F.4th at 1242-1243 ("bald-faced" new issues, vague or ambiguous arguments, abandoned arguments"). Issue preservation "does not demand the incantation of particular words" or particular cases. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000). This Court must look at the record as a whole, giving it "a liberal reading." *See Truman*, 1 F.4th at 1242; 10th Cir. R. 28.1(A).

Federal courts at every level have, for decades, acknowledged or treated questions about a warrant's "scope" or "breadth" as synonymous with arguments regarding such warrant's particularity. *See Maryland v. Garrison*, 480 U.S. 79, 84 (1987)("[particularity] requirement ensures that the search will be carefully tailored"); *e.g. United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988)("When law enforcement officers grossly exceed the scope of a search warrant . . . the particularity requirement is undermined"); *see e.g. United States v. Cotto*, 2019 U.S. Dist. LEXIS 35544 at *42 (N.M. 2019). In accord with *Nelson* and *Truman*, reasonable jurists would understand arguments

challenging a warrant's "scope" or "breadth" to be arguments challenging the particularity of a warrant in connection with a particular search. Defendant-Appellant sufficiently, even if unartfully, gave the Government notice of the substance of his claim when he objected to the Government's allegation that Search Warrant #1 was sufficiently "broad" to authorize Search #3.

In this case, the Government raised the question, arguing:

> The first warrant [*i.e.* Search Warrant #1] authorized officers to search electronic records for evidence to show use and delivery of a controlled substance, including "records, and/or receipts, written or electronically stored, records that show ownership of other property." The Government will present testimony that the officers executing the search warrant [*i.e.* Search Warrant #1] would have seized the [Defendant-Appellant]'s cell phones, which would have been searched [*i.e.* Search #3]. . . . Because officers would have searched the [Defendant-Appellant]'s cellular phone and viewed his photographs in their search for evidence of his use and distribution of drugs, they would have come across the charged child pornography images.

[R2.65].

Thereupon, in his reply, Defendant-Appellant argued:

> The United States claims that the evidence would have been discovered pursuant to the initial search warrant, which authorized officers to search for "records, and/or receipts, written or electronically stored." However, it does not allow searching of electronics, but allows seizing. If it allows searching, it is too broad. However, the evidence at issue was discovered on an iPhone 7 Plus, a Sony laptop, a Hitachi hard disk drive, and a Seagate expansion desktop drive, all of which were *seized* pursuant to the second warrant [*i.e.* invalidated Search Warrant #2], not the first. The Government sought the second warrant because the Government knew that the first warrant did not allow for the search of the computers, phones, and cameras in a manner that allowed for a legitimate constitutional search – otherwise why seek the [second] warrant. . . . [I]t stands to reason that if officers truly believed they would have discovered the evidence at issue pursuant to the first warrant, they would not have bothered applying for the second warrant in the first place.

[R2.80-81] (emphasis added).

These arguments were then addressed again during the hearing before the District Court. [R4.135-139, 150-153]. The Government flip-flopped, asserting that, "[b]y itself, no," Search Warrant #1 did *not* give the Government "authorized access to the data on" Defendant-Appellant's devices. [R4.135-136]. Instead, the Government represented to the District Court and Defendant-Appellant:

> [GOVERNMENT COUNSEL]: What I think was necessary was to get that second search warrant that all the officers have talked about. . . . I think that's consistent with the evolution of the case law in this area, recognizing that these cell phones, because of the vast amount of data that they contain, really should be given that extra measure of privacy. . . . It's arguable that the first warrant [*i.e.* Search Warrant #1] would give that authority [*i.e.* to conduct Search #3], but I think it's also arguable that the first warrant is not sufficient in breadth to allow that.

[R4.136]. Not to look a gift horse in the mouth, Defendant-Appellant agreed with the Government's change of tune:

> [DEFENSE COUNSEL]: [O]n its face, the first warrant [*i.e.* Search Warrant #1] does not give the Government authority to download -- do a forensic download and gather all that data [*i.e.* conduct Search #3].

[R4.153].

Based on that record, the District Court ruled on the merits of the arguments to deny Defendant-Appellant's motion as follows:

> The drugs search warrant [*i.e.* Search Warrant #1], which is not challenged, authorized officers to search for and seize evidence of the 'use and delivery of a controlled substance; to include . . . records, and/or receipts, written or electronically stored.' This allowed law enforcement to lawfully seize [Defendant-Appellant]'s iPhone and search it for electronic records or receipts evidencing drug use or delivery [i.e. Search #3]. . . . [T]he photos and videos of SV underlying the charges in this federal case would have been inevitably discovered by [law enforcement] as part of its execution of the

> drugs search warrant [i.e. Search Warrant #1]. . . . Thus, the [District] Court concludes the Government has proved by a preponderance of the evidence that the alleged child pornography [evidence] at issue in this case ultimately would have been discovered by lawful means as part of the drug investigation.

[R1.147-149]. On this record, three things are apparent. First, Defendant-Appellant provided fair notice to the Government of the substance of his argument. Second, Defendant-Appellant made his argument in a manner that gave the Government fair opportunity to object and respond, vis-à-vis its reply brief, its supplemental briefing, and its statements at the hearing. Third, the District Court ruled on the substance of the argument. Defendant-Appellant did not waive or forfeit the issue. It was raised and ruled upon by the District Court. The question is, therefore, properly preserved for appeal under a *de novo* standard.

3. Assuming, *arguendo*, Defendant-Appellant failed to preserve the issue, this Court nevertheless should exercise its discretion to grant *de novo* review.

This Court has discretion whether to take review of the particularity issue. *See Cox v. Glanz*, 800 F.3d 1231, 1244 (10th Cir. 2015). Furthermore, this Court has discretion whether to apply a *de novo* or plain error standard of review. *Cf. Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013)(panel engaged in discussion whether to apply plain error standard or *de novo* standard). This Court should exercise such discretion because injustice would otherwise result. *Id*. (internal citations omitted); *Singleton*, 428 U.S. at 120-121.

a. The Government's flip-flopping of its position on whether Search Warrant #1 was sufficiently broad to authorize Search #3 worked an undue hardship on Defendant-Appellant.

The Government first asserted, in its responsive pleading, that Search Warrant #1 *was* broad enough to authorize Search #3. But then, the Government, vis-à-vis its counsel's representations in the hearing, conceded that Search Warrant #1 was *not* so broad; asserting that it was not simply prudent but necessary for law enforcement to obtain an independent warrant to authorize Search #3. But *then*, the Government *re*-asserted, in its supplemental pleading, that Search Warrant #1 was broad enough to authorize Search #3 *after all*.

Compounding the problem was the supplementary briefing. The District Court imposed two limitations thereon. First, in terms of content, briefing was to address "the fruit-of-the-poisonous-tree question" related exclusively to the independent question whether Defendant-Appellant's March 31 statements should be suppressed - not whether the digital data evidence should be suppressed. [R4.167]. Second, pleadings were due from both parties on the same date: December 7, 2022. [R4.166]. The Government did not file its supplement until the due date. [R2.121].

These circumstances together worked an undue hardship on Defendant-Appellant. Defendant-Appellant had no reason to submit briefing on the government's particularity theory because (i) Government counsel expressly conceded the argument in the hearing, and (ii) the District Court limited briefing to a wholly independent issue. Thus, he had no notice that the argument was still live. Second, the Government's second flip-flop in its supplemental briefing constituted unfair surprise. By waiting until the due date to re-

assert its claim, the Government deprived Defendant-Appellant of reasonable opportunity to respond. Thus, the first opportunity to do so was in Defendant-Appellant's initial brief before this Court.

b. Absent *de novo* review of Defendant-Appellant's claim, this Court will not have the opportunity to correct the mistakes of *United States v. Loera*.

Both the Government and the District Court rely principally on this Court's decision in *United States v. Loera*, 923 F.3d 907 (10th Cir. 2019), for the proposition that data searches are akin to container searches. (Aple's Br. at 26). Pursuant to this doctrine, police may search containers found within a place subject to and during a lawful search so long as police have probable cause to believe contraband or evidence to be seized is contained therein. *California v. Acevedo*, 500 U.S. 656, 580 (1991). The *Loera* Court held that the Fourth Amendment's particularity requirement "is less effective in the electronic-search context" because "[g]iven the enormous amount of data that computers can store and the infinite places within a computer that electronic evidence might conceivably be located, the traditional rule risks allowing unlimited electronic searches." 923 F.3d at 916. Thus, "rather than focusing . . . on 'what' a particular warrant permitted the government to search (i.e., 'a computer' or 'a hard drive'), [this Court has] focused on 'how' the agents carried out the search." *Id*. at 916-917. The *Loera* Court's theory suggests that police may conduct a forensic digital search of a digital storage device's records and contents so long as (i) a warrant particularly describes digital records with evidentiary value in connection with a specific crime is contraband to be seized, (ii) the manner in which police conduct the search of digital storage devices is reasonably

calculated to uncover such evidence. *See id*. In other words, so long as the warrant fulfills the "evidence" prong of the particularity requirement and police search methods are designed to uncover such evidence, then *both* prongs of the particularity requirement are fulfilled. In other words, the container doctrine applied to digital storage devices and data.

Loera rests on faulty foundations. *Loera* relies on three Tenth Circuit precedents: *United States v. Burgess*, *United States v. Walser* and *United States v. Carey*. *Id*. at 917-921 (discussing *Burgess*, 576 F.3d 1078 (10th Cir. 2009); *Walser*, 275 F.3d 981 (10th Cir. 2001); and *Carey*, 172 F.3d 1268 (10th Cir. 1999)). The *Loera* Court concluded that its reliance on these three cases "brings [it] in line with every other circuit" regarding the particularity issue. *Id*. at 920. The *Loera* Court cited to the following cases for support: *United States v. Stabile*, *United States v. Williams*, *United States v. Miranda*, and *United States v. Wong*. *Id*. (citing *Stabile*, 633 F.3d 219 (3d Cir. 2011); *Williams*, 592 F.3d 511 (4th Cir. 2010); *Miranda*, 325 F. App'x. 858 (11th Cir. 2009); and *Wong*, 334 F.3d 831 (9th Cir. 2003)).

Loera was decided in 2019. But the *Loera* Court relied exclusively on persuasive authority from a decade earlier. *Burgess* is the most recent, decided in 2009. The other two, *Walser* and *Carey*, were decided before Facebook even existed.[3] As for those sister circuit decisions, the Third Circuit's 2011 decision in *Stabile* was the most recent.

[3] Mythili Devarakonda, *'The Social Network': When was Facebook created? How long did it take to create Facebook?* USA Today [Website], July 25, 2022 (last accessed: January 9, 2024)(available at: <https://www.usatoday.com/story/tech/2022/07/25/when-was-facebook-created/10040883002/>).

Despite nearly a decade of binding authority from the Supreme Court, prior precedent of this Court, and persuasive authority from lower courts of this circuit, *infra*, the *Loera* Court relied on obsolete, anachronistic, non-binding case law.

In 2012, the Supreme Court in *United States v. Jones* highlighted growing concerns regarding privacy and application of the Fourth Amendment to emerging technologies. *See generally* 565 U.S. 400. The watershed moment was in 2014, when the Supreme Court rendered its decision in *Riley v. California*, 573 U.S. 373, 385-398. The *Riley* Court begins its analysis by noting that "[a] smart phone of the sort taken from [defendant]" in 2014 "was unheard of" at the time *Walser* and *Carey* were decided. *Id*. at 385. Following therefrom, the *Riley* Court categorically held the container doctrine inapplicable when the alleged "container" is a digital storage device. First, the *Riley* Court held that "[t]reating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter. But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen. That is what cell phones . . . are designed to do by taking advantage of 'cloud computing.'" *Id*. at 397. The *Riley* Court ruled:

> The United States asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches of these sorts of physical items. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. . . . Modern cell phones, ***as a category***, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond [in this case, Search #3] itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

Id. at 393 (emphasis added). Presciently, the *Riley* Court rejected what would later become *Loera*'s proposition that so long as a warrant merely describes the crime for which evidence is sought, such warrant is sufficiently particular:

> The United States also proposes a rule that would restrict the scope of a cell phone search to those areas of the phone where an officer reasonably believes that information relevant to the crime . . . will be discovered. This approach would again impose few meaningful constraints on officers[,] . . . would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where.

Id. at 399. Instead, the Supreme Court treats digital storage devices as *places* to be searched. *See e.g. id*. at 392, 394 (analogizing to "search of the person" and searches of "the arrestee's entire house;" "a cell phone collects in one place many distinct types of information"). As though not to put too fine a point on it, the *Riley* Court holds unequivocally: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest," or other lawful search, "is accordingly simple - get a warrant." *Id*. at 403. Clearly implicated is the Fourth Amendment's warrant particularity requirement. In 2018, the Supreme Court revisited these same concerns in connection with information stored on *third-parties'* digital storage devices, re-confirming *Riley* in *Carpenter v. United States*. 138 S. Ct. 2206, 2216-2220.

This Court published a volume of precedent in the post-*Burgess*/*Stabile* period before *Loera*. In 2013, this Court held in *United States v. Christie* that "[n]o doubt the particularity requirement and its underlying purposes are fully engaged when investigators seek to search a personal computer." 717 F.3d 1156, 1164 (10th Cir. 2013). In that context, the *Christie* Court unequivocally identified digital storage devices as

"places to be searched." First, this Court stated that "if any *place* or thing is especially vulnerable to a worrisome exploratory rummaging by the government, it may be our personal computers." *Id*. Following therefrom, the *Christie* Court considered that "[t]he text of the Fourth Amendment says the government must identify with particularity 'the place to be searched' and requiring it to describe that place tersely as 'a computer' is to allow the government to traipse willy-nilly through an entire virtual world." *Id*. at 1166.

As for the "evidence" prong, the defendant "suggest[ed] a warrant must go further: it must specify limitations not just *what* the government may search for but *how* the government should go about its search." *Id*. Considering *Burgess*, the *Christie* Court did not hold that the particularity requirement is satisfied solely if the search method employed is "sufficient to ferret out the evidence [police] legitimately seek." *Id*. In other words, *Christie* does not stand for the proposition that the proof of *how* a digital search is conducted satisfies *both* the Fourth Amendment's "evidence" and "place" particularity prongs. Instead, the "manner of search" inquiry constitutes a judicially-implied *third* particularity prong when the search at issue involves a digital storage device. *See id*. ("must go further . . . not just").

Then, in 2017, this Court published its decision in *United States v. Russian*, 848 F.3d 1239 (10th Cir. 2017). Relying on both *Riley* and *Christie*, this Court expressly held a search warrant "was invalid because it failed to describe with particularity the place to be searched (*the two Samsung cell phones*) and the things to be seized (the cell phone data)." *Id*. at 1244 (emphasis added). The sheer volume of precedent ignored by the *Loera* Court, and that would be ignored by this Court otherwise, would work a manifest

injustice on Defendant-Appellant, as well as other persons in the future. This justifies this Court to exercise its discretion to grant *de novo* review.

4. Assuming *arguendo* this Court determines plain error is the proper standard of review, the District Court committed plain error because its finding failed to conform to *Leora*'s requirement that Search #3 be subject to limiting procedures.

To satisfy the plain error standard, Defendant-Appellant bears the burden of demonstrating "(1) an error, (2) that is plain, which means clear or obvious under current law, . . . (3) that affects substantial rights, [and] . . . [4] seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Goode*, 483 F.3d 676, 681 (10th Cir. 2007). An error is plain if it was obvious at the time of appeal. *United States v. Koch*, 978 F.3d 719, 726 (10th Cir. 2020). To be obvious, an error must be "contrary to well-settled law." *Id*. An error is contrary to well-settled law if either the Supreme Court or this Court has addressed the issue. *Id*. An error affects substantial rights if there is a reasonable probability that the error affected the outcome of the proceedings. *Id*. at 729. To determine whether the error seriously affects the fairness, integrity or public reputation of judicial proceedings, this Court "conduct[s] plain-error review 'less rigidly when reviewing a potential constitutional error." *United States v. Chatwin*, 60 F.4th 604, 609 (10th Cir. 2023). Under this relaxed standard, Defendant-Appellant need not demonstrate that allowing the error to stand "would be 'particularly egregious' and would constitute a 'miscarriage of justice,'" but merely requires Defendant-Appellant to show "that an exercise of [this Court's] discretion is appropriate." *United States v. Dazey*, 403 F.3d 1147, 1178 (10th Cir. 2005). Factors that

favor such a finding include: the alleged error's constitutional nature, the Defendant-Appellant's "vigorous" contestation of the error before the District Court, and whether the error had a practical impact on Defendant-Appellant or his case. *See id.* at 1178-1179.

In this case, the District Court committed constitutional error. It denied Defendant-Appellant's motion to suppress by finding the inevitable discovery exception to the Fourth Amendment exclusionary rule applied on the theory that Search Warrant #1 was constitutionally particularized to authorize Search #3 despite not facially describing the digital storage devices at issue as places to be searched. Such error was clear and obvious. The plain language of the Fourth Amendment identifies two particularity prongs, not one: the evidence to be seized, and the places to be searched. U.S. Const., amt. iv. Supreme Court precedent clearly establishes that these are elements of a valid warrant. *United States v. Grubbs*, 547 U.S. 90, 97 (2006) ("two matters that must be 'particularly described'"). And this Court's precedent in *Russian* remains undisturbed that a warrant is insufficient which fails to describe such devices as "place[s] to be searched" *or* which fails to describe the data thereon as "the things to be seized." 848 F.3d at 1244. The District Court's error affected the outcome of the proceedings. But for the District Court's constitutional error, the photographs, videos and other digitally-stored records and media which formed the bulk and heart of the Government's case would not have been admitted against him. The circumstances merit this Court to exercise its discretion. The error complained of is constitutional in nature. Defendant-Appellant maintained and re-asserted his claim at every reasonable opportunity. The Government's flip-flopping, *supra*, lulled the Defendant-Appellant into a false belief the Government

had abandoned or acquiesced. The Government's re-assertion caught Defendant-Appellant by surprise which could not be addressed in the District Court. And the evidence sought to be excluded formed the core of the Government's case. Without it, Defendant-Appellant would not have been convicted.

C. Government's Second Theory: Probable Cause and Hypothetical Warrant.

1. The District Court did not identify this second theory as alternative grounds to find the fruits of Search #3 inevitably would have been discovered.

The Government presented three different theories to support a finding of inevitable discovery. The District Court accepted only two of those three theories as alternative ground for an inevitable discovery finding. [R2.146, 149]. The one not addressed by the District Court is the theory that a warrant would have been issued sufficient in scope to seize the digital storage devices, and to conduct a forensic search of the digital storage devices seized during Search #1 and Search #2. It follows that the District Court either (i) determined this theory was an improper alternative basis for a finding of inevitable discovery, or (ii) simply failed to rule upon it, in which case it is not sufficiently preserved, *i.e.* it was not "raised *and ruled on*" in the District Court. Thus, Defendant-Appellant proceeds here cautiously to assure this Court that the record is insufficiently developed to have done so. But generally, Defendant-Appellant rests on his initial brief.

2. *United States v. Souza*, and thus its progeny including *United States v. Streett*, merit reconsideration because they derive from *United States v. Cabassa*, which relies on preliminary steps having been taken to apply the inevitable discovery test therein.

The Government relies primarily on *United States v. Streett*, 83 F.4th 842 (10th Cir. 2023), for the proposition that "officers would have obtained an additional drug search warrant for the contents of the iPhone." (Aple's Br. at 33, 34-38). "What makes a discovery 'inevitable' is not probable cause alone . . . but probable cause plus a chain of events that would have led to a warrant . . . independent of the [tainted] search." *United States v. Souza*, 223 F.3d 1197, 1204 (10th Cir. 2000)(internal citation omitted) The ultimate question to be answered, then, is whether a search warrant "would inevitably have been granted." *Streett*, 83 F.4th at 849-850. To make that determination, courts ask "how likely [is it] that a proper warrant inevitably would have been granted." *Id*. at 850; *Souza*, 223 F.3d at 1204 ("The key issue in these cases" is "one of probability").

To answer that question, the *Streett* Court relies on the law articulated in *Souza* and *United States v. Cunningham*. 83 F.4th at 850 (citing *Souza*, 223 F.3d 1197, and *Cunningham*, 413 F.3d 1199 (10th Cir. 2005)). In turn, the *Cunningham* Court also co-extensively relies on the law articulated in *Souza*. *Cunningham*, 413 F.3d at 1203-1204 (citing *Souza*). And in turn again, the *Souza* Court relies on the Second Circuit's decision in *United States v. Cabassa*, holding it to be "helpful in this determination." *Souza*, 223 F.3d at 1204 (citing *Cabassa*, 62 F.3d 470, 473-474 (2d Cir. 1995)).

Cabassa articulates four factors to aid resolution of the ultimate question: First, "the extent to which the warrant process has been completed at the time" of the

challenged search; second, whether probable cause exists to issue the warrant, and if so, the strength of such a finding; third, whether a warrant ultimately was obtained; and fourth, whether "law enforcement agents 'jumped the gun' because they lacked confidence in their showing of probable cause. 62 F.3d at 473-474. However, as a threshold matter before considering such factors, *Cabassa* requires a showing that police had taken at least preliminary steps to secure a search warrant. *Cf. id*. ("FBI agents had commenced the process for obtaining a warrant;" "[A]lthough the warrant process had commenced, the application was not completed at the time of the search"); *Souza*, 223 F.3d at 1204 (citing *Cabassa*)("although police had announced an intent to secure a warrant, courts have declined to apply the inevitable discovery exception"). This is logical, as to consider the extent to which the warrant process has been completed, one must first assume that the warrant process has been started in the first place. Thus, historically, a court may find the inevitable discovery exception to apply on the theory that a warrant *would have* been issued. But it may not make such a finding merely on the basis that a warrant *could have* been issued, *i.e.* that at the time of the search probable cause existed to issue a warrant. *United States v. Christy*, 739 F.3d 534, 543 (10th Cir. 2014).

The problem is that *Souza* and its progeny, including *Streett*, appear to have dispensed with this preliminary showing. The *Souza* Court adopted a "relevant contingencies" approach instead, treating *Cabassa* as a simple four-part factorial test. 223 F.3d at 1205. Under this test, whether police ever even started a warrant application process is not a threshold inquiry, but merely relevant to determining whether the first

factor favors inevitable discovery or not. *Id*.; *Streett*, 83 F.4th at 850. The problem with this approach is that even if the first factor is found to disfavor inevitable discovery, the remaining three factors could be found to favor inevitable discovery. More likely, only two factors would disfavor inevitable discovery if the warrant application process never begins because then, obviously, a warrant ultimately will not have been issued. However, that still leaves two factors related exclusively to whether probable cause exists, and the strength of that probable cause objectively, under the second factor, and subjectively, under the fourth factor. In other words, the *Souza* Court's formulation allows an ultimate finding that a warrant *would have* been issued simply because it *could have* been issued, *i.e.* simply because probable cause existed.

The *Streett* Court not only approves the *Souza* formulation, but extends it. Beyond dispensing with the threshold "preliminary steps" showing, *Streett* reforms the first factor. Citing *Cunningham*, the *Streett* Court held "[t]he first factor - i.e., the extent of the warrant process - clearly favors the [g]overnment . . . when [police] had taken steps to start the warrant application process" or "when the officers were deep into the investigative process." 83 F.4th at 850. Ironically, in the same sentence in which the *Streett* Court refers to the first factor as "the extent of the *warrant process*," it undermines the entire formulation and implicitly turns the first factor into an examination of "the extent of the *investigative* process" instead. The *Streett* Court fully divorces inevitable discovery on the grounds a warrant would have been issued from the warrant entirely, and creates a test wherein the only practical factors are whether and to the extent probable cause exists. Thus, *Souza, Cunningham* and *Streett* take what was a logical and

rational test to determine the likelihood whether a warrant *would have* issued, and transformed it into a test that practically requires only a showing of *strong* probable cause, *i.e.* "probable cause deluxe" or "substantial cause." Meanwhile, the plain language of the Fourth Amendment requires *both* probable cause *and* a warrant. So this Court continues to pay unceasing lip service to the idea that inevitable discovery on a theory that an untainted warrant would have issued requires more than probable cause. *Souza*, 223 F.3d at 1204; *Christy*, 739 F.3d at 543.

Additionally, *Souza* and *Cunningham* (and therefore *Streett*), suffer from the malady of intellectual dishonesty. Words must matter. Words do matter. Words are the tools of law. Therefore, the words *of the law*, *i.e.* the language judges use, must have meaning. In *Christy*, this Court noted that its judges used the word "prerequisite" in *Souza*, and "requirement" in *Cunningham* to describe the "preliminary steps" finding adopted by other courts, *supra*. 739 F.3d at 543 (citing *Souza*, 223 F.3d at 1205; and *Cunningham*, 413 F.3d at 1204). When courts use words like "requirement" and "prerequisite," there simply is no ambiguity to them. Despite the lack of vagueness in such terms, the *Christy* Court suggests these clearly-imperative words and phrases as used in *Souza* and *Cunningham* are "likely dicta." *Id*.

Judges and courts should be presumed to mean what they say. Thus, if this Court refers to a certain finding as a "requirement," then it must be presumed to be a *requirement* and treated as such. If this Court refers to a certain ruling as a "prerequisite" before applying another legal test, then such ruling must be presumed to be a *prerequisite* and treated as such. As though to bring this point home, the *Christy* Court does not even

hold that the use of these words - these legal tools - *is* dicta, but merely that they are "likely" dicta. *Id*. To proceed under the theory that the law *does not* say what it means breeds only contempt and disrespect for the law, if not for the broader concept of the rule of law. This is of particular concern with trust in the judiciary already at an all-time low.[4]

D. Government's Third Theory: Consent.

The Government takes an unreasonably narrow view of the showing its burden requires. The ultimate question is not whether Defendant-Appellant *needed* to consent for a particular purpose. The question is simply whether absent the unlawful conduct, *i.e.* Search #2 and Search #3, Defendant-Appellant *would have* consented to a forensic search of his phone, regardless of the purpose for granting such consent. Defendant-Appellant generally rests on his initial brief except to say the Government's two responsive theories should be given little weight for the following reasons.

First, the Government's appeal to Defendant-Appellant's March 31 statements is immaterial. The fact the alleged invitations occurred on March 31 indicates merely that the facts which would have been known to or reasonably assumed by Defendant-Appellant absent the unlawful searches, (Aplt's Br. at 33-34), existed within his sphere of knowledge as early as March 31. Logic dictates that events known to Defendant-

[4] David F. Levi, et al., *Losing Faith: Why Public Trust in the Judiciary Matters*. Judicature, vol. 106 No. 2 (2022) (Bolch Judicial Institute, Duke Law School)(last accessed: January 10, 2024)(available at: <https://judicature.duke.edu/articles/losing-faith-why-public-trust-in-the-judiciary-matters/>); Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*. Gallup News Online (September 29, 2022)(last accessed: January 10, 2024)(available at: <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>).

Appellant on March 31 were also known to him on April 13. The Government fails to point to events in the record which *actually* occurred between March 31 and April 13 which would challenge Defendant-Appellant's proposition. The Government fails to allege fictional-though-likely events in a hypothetical timeline, after excising Search #2 and Search #3 therefrom, that would call into question Defendant-Appellant's proposition. Defendant-Appellant's March 31 statements merely support Defendant-Appellant's theory regarding his state-of-mind and risk-benefit analysis.

Second, the Government suggests that general statements "about his troubles with his girlfriend" are proof that he *would have* consented, even absent Search #2 and Search #3. However, again, this merely supports Defendant-Appellant's theory that, absent the unlawful searches, Defendant-Appellant still would have been faced with choosing between two bad, mutually exclusive options: (i) consent to a cell phone data search to gain an advantage in his domestic battery case, or (ii) withhold consent to a cell phone data search to avoid disadvantage in the present case. Defendant-Appellant's general statements may provide color to the fact he believed his phone contained data embodying exculpatory evidence. But they do not add to, detract from, or otherwise aid this Court in determining which of those two bad options Defendant-Appellant would have chosen under hypothetical circumstances in which neither Search #2 nor Search #3 had occurred.

II. REGARDING SUPPRESSION OF THE STATEMENTS, THE GOVERNMENT RESTS ON THE SAME THEORY AS DEFENDANT-APPELLANT.

The Government's sole argument is that "[a] confession cannot be 'fruit of the poisonous tree' if the tree itself is not poisonous." (Aple's Br. at 40-41). Its theory here is

that "[b]ecause the district court determined that the child pornography would have been inevitably discovered by lawful means, and thus was not subject to suppression, there was no need to determine the reach of the exclusionary rule in this case." (Aple's Br. at 40). This is simply a restatement of Defendant-Appellant's argument on the same issue to give accord to the District Court's factual findings. (Aplt's Br. at 38-39). Thus, the inevitable discovery issues, *supra*, are determinative of this issue and must be treated as such.

CONCLUSION

For the foregoing reasons, this Court must grant Defendant-Appellant's prayer for relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,463 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I relied on my word processor to obtain the word count, and it is Microsoft Word 2016. This brief complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 13, Times New Roman. I certify that the foregoing information is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

/s/Kari S. Schmidt
Kari S. Schmidt

CERTIFICATIONS

Service: I hereby certify that this document, with any attachments, was electronically filed on the 10th day of January, 2024, with the Clerk of the Court using the CM/ECF system, which will send a copy with a notice of docket activity to all ECF system participants as of the time of the filing. I further certify that this document, with any attachments, was served on Defendant-Appellant, by depositing a copy on the 10th day of January, 2024, with U.S. Mail, first class, postage pre-paid, to be delivered to him at the following address:

Salvador Salas, Jr., #56657-509
USP Tucson
U.S. Penitentiary
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Tucson, AZ 85734

Privacy Redactions: I further certify that all required privacy redactions, if any, have been made.

Paper Copies: I further certify that any paper copies required to be submitted to the Court are exact copies of the versions submitted electronically.

Virus Scan: I further certify that the electronic submission was scanned for viruses using Webroot SecureAnywhere Endpoint Protection v.9.0.21.18, which is updated continuously, and according to the program is free of viruses.

/s/Kari S. Schmidt
Kari S. Schmidt

Salvador Salas, Jr. v. United States

Case No. _____

Petition for Writ of Certiorari
from U.S. Court of Appeals for the Tenth Circuit
10th Cir. Case No. 23-8027

APPENDIX D

Order of U.S. District Court for the District of Wyoming*†

*Also reported at U.S. Dist. LEXIS 251733, 2022 WL 22840740 (D. Wyo. 2022)

†Also located at 10th Cir. Record on Appeal, Vol. II, pp. 128-151

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UNITED STATES OF AMERICA,

Plaintiff,

v.

SALVADOR SALAS, JR.,

Defendant.

Case No. 21-CR-77-SWS

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS ITEMS SEIZED FROM SECOND SEARCH WARRANT

This matter comes before the Court on the Defendant's Motion to Suppress Items Seized from Second Search Warrant (ECF 112). The Government submitted an opposition (ECF 121), and the Defendant replied (ECF 128). The Court held an evidentiary hearing on the motion on December 2, 2022. (ECF 147.) The parties were provided an opportunity to submit supplemental briefing after the hearing, and the Government did so. (ECF 148.) Having considered the evidence and testimony as well as the arguments of the parties, the Court concludes suppression is not warranted.

INTRODUCTION

Defendant Salvador Salas, Jr. was indicted by a grand jury on one count of possessing child pornography and five counts of producing child pornography. (ECF 1.) Pursuant to two search warrants, law enforcement seized and accessed Mr. Salas' electronic devices, discovering photos and videos of alleged child pornography. In this motion, he seeks to suppress the evidence discovered from the second search warrant, which was specific to

electronic devices.

FACTUAL FINDINGS

Around 4:30 a.m. on February 28, 2021, Chelsea Gonzales (Mother) took her (then) 13-year-old daughter, SV, to the hospital because she appeared under the influence of drugs and had burns on her lips. (ECF 112-1 p. 1.) SV tested positive for methamphetamine at the hospital. (*Id.*) From the hospital, Mother took SV to the Wyoming Behavioral Institute (WBI), where SV could recover from her methamphetamine use and they could determine whether further treatment was warranted. (*Id.*)

1. The Search Warrant for Drugs (First Search Warrant)

Around 4:00 p.m. on the same day, SV's Mother went to the Casper Police Department to report the matter. (*Id.*) Mother told Officer Matthew Meyers she had allowed SV to go to Mr. Salas' home the evening before to babysit for him. (*Id.*) Mother and Mr. Salas had been friends before, and Mother reported SV had babysat for Mr. Salas on prior occasions. (*Id.*) However, when SV came home around 3:00-3:30 a.m. after this babysitting session, SV acted odd and uncontrollable, which is when Mother decided to take her to the hospital for evaluation. (*Id.*)

The following day (March 1, 2021), Officer Meyers met Mother and SV at WBI to interview SV. (ECF 112-1 p. 2.) Though claiming she could not remember anything at first, SV eventually stated Mr. Salas supplied her the methamphetamine and smoked it with her. (*Id.*) She denied any "acts of violence or sexual advances towards her from [Mr. Salas] or anyone else present, especially at the time when she had smoked." (*Id.* p. 3.) Later that day, Officer Meyers corroborated SV's description of Mr. Salas' home and car by driving by to

observe them, and dispatch confirmed the car in front of the residence was registered to Mr. Salas. (*Id.*)

In the evening of March 1, 2021, Officer Meyers applied by telephone to a state circuit court judge for a search warrant to search Mr. Salas' home and vehicle for drugs and other evidence of drug distribution. (ECF 112-1 p. 3; Govt Ex. 1.) The state court judge found probable cause based on Officer Meyers' supporting affidavit and issued the requested search warrant. (ECF 112-2 p. 5.) This drugs search warrant is not challenged in this case.

The next afternoon, March 2, 2021, Officer Meyers and other officers executed the search warrant at Mr. Salas' residence. (ECF 112-1 p. 4.) Mr. Salas and an adult female, Marti Parmenter, were present inside the residence at the time. (*Id.*) Both were handcuffed, searched, and transported to the police station for questioning while the search was conducted. (*Id.*) On the way to the police station, though, Mr. Salas informed the transporting officer that he wanted a lawyer, so he was taken instead to the detention center without questioning and booked on several drug-related felonies. (*Id.*) Parmenter agreed to talk to the police, and she was interviewed by Officer Meyers and Detective Shannon Daley. (ECF 112-1 p. 3; ECF 112-3.) During the search of Mr. Salas' home and car, law enforcement found various suspected drugs, drug paraphernalia, a handgun, and ammunition. (ECF 112-2 pp. 3-4.)

According to Officer Andrea Husted at the December 2, 2022 evidentiary hearing[1], and relevant to this motion to suppress, she seized a cellphone lying on the bed next to Mr. Salas, who was also lying on the bed at the time he was arrested. That cellphone was an Apple iPhone with a green protective case. (*See* ECF 112-2 p. 4 (property receipt for first search

[1] The Court found Officer Husted credible and informative at the evidentiary hearing.

warrant showing an iPhone with a green case was found on the bed in the bedroom).)

2. The Search Warrant for Electronic Devices (Second Search Warrant)

Based in part on what law enforcement had found during the search of Mr. Salas' home as well as the interview of Parmenter, Officer Meyers applied by telephone to the same state circuit court judge for another search warrant, this one to seize and search Mr. Salas' electronic devices for "[i]tems of evidence related to the sexual exploitation of children," including images and videos. (ECF 112-4 p. 3; Govt Ex. 2.) This was done while the first search warrant was still being executed by other officers. Relevant to the instant motion to suppress, Officer Meyers' affidavit in support of the second search warrant request stated the following:

> 3. On March 1, 2021 Your Affiant was granted a Court authorized Search Warrant for 8300 Tubbs Road #A, Casper, WY 82604 by Circuit Court Judge, Honorable H. Steven Brown.
>
> 4. On March 2, 2021 at approximately 1530 hours, Officers of the Casper Police Department executed the Search Warrant at 8300 Tubbs Road #A, Casper, WY 82604, searching for marijuana, methamphetamine, and heroin. During the course of the officers' investigation, they discovered an entire room in Salas' apartment devoted to computers, cameras, and other photography/videography equipment.
>
> 5. Located in the apartment were two subjects identified as Salvador Salas [DOB omitted] and Marti Parmenter.
>
> 6. Officer M. Meyers conducted an interview with Parmenter after she was advised of her Miranda warnings. Parmenter stated that last night (03/01/2021), her [sic] and Salas smoked methamphetamine and heroin inside the apartment.
>
> 7. Officer M. Meyers spoke to a known but unnamed source who stated substantially the following: they had used controlled substances, specifically methamphetamine and heroin with Salas. Upon using that, Salas had taken photographs of this person naked. It is also known by this person that Salas has other photographs of other naked women stored on this phone and computers that were captured in the same context as them.

8. Officer M. Meyers believes that it is probable, based on the above information that Salas had used controlled substances with subjects under the age of 18 years old, and taken photographs of them in the same manner described above.

9. Based on the amount of electronics, cameras, phones and video equipment, Officer M. Meyers believes that the equipment may possess images of child pornography.

(ECF 112-4 pp. 5-6.) During the phone application, the state court judge referenced the first search warrant (which had been for drugs):

Judge: Alright, and what is the difference in scope between this warrant and your previous warrant?

Officer Meyers: The scope of this warrant is for electronics, everything related to electronics, digital software, stuff like that. I can read it all to you if you want me to.

Judge: Alright, go ahead.

[Officer Meyers then read all the digital items he wanted to search for to the state court judge.]

Judge: Okay. Now, I -- last warrant we were talking about the use of controlled substances. Has there been more information brought to you about child pornography, or --

Officer Meyers: Yes, sir, based off of a known but unnamed source that we have. But that's -- that's all outlined for you in my affidavit portion.

Judge: Okay. Why don't you go ahead and [inaudible]. Again, you can skip your qualifications paragraphs because I know you. Just go ahead and start with the different paragraphs that you have in this one.

[Officer Meyers then read paragraphs 3 through 9 of his affidavit to the state court judge, which were quoted above.]

(Unofficial Transcript of Govt Ex. 2.) After Officer Meyers finished reading his affidavit, the state court judge granted the application and approved the requested search warrant for electronic devices. (ECF 112-4 pp. 1-2.)

Law enforcement seized a number of electronic devices while executing the second search warrant, including additional cellphones, cameras, computers, and digital storage devices. (ECF 112-4 pp. 7-8.) The electronic devices were provided to Caleb Forness[2], a computer analyst who works with the Casper Police Department, who accessed the devices and, on the iPhone with a green case and other devices as well, found images and videos allegedly depicting child pornography, including sexual acts between Mr. Salas and SV. (ECF 142-1 p. 3.)

Based on the images and videos discovered, Mr. Salas was arrested on March 31, 2021, on several state charges, including exploitation of children and sexual assault of a minor. (ECF 142-1 pp. 6, 7.) In July 2021, he was indicted by a grand jury on the current federal charges of possessing and producing child pornography (ECF 1), which commenced this federal proceeding.

ANALYSIS

As noted above, Mr. Salas focuses his challenge in this matter on whether the electronics search warrant (the second search warrant) was supported by sufficient probable cause. Based on his briefing as well as the arguments of counsel at the evidentiary hearing, the Court understands Mr. Salas to be challenging the electronics search warrant both facially (by arguing Officer Meyers' affidavit did not provide sufficient probable cause for a search warrant) and factually (by arguing Officer Meyers' affidavit included material misrepresentations and omitted information that would vitiate probable cause). (*Compare* ECF

[2] Mr. Forness testified at the December 2, 2022 evidentiary hearing, and the Court found him credible and informative.

112 p. 7 (contending the state court judge merely ratified the bare conclusions or hunches of Officer Meyers) *with* ECF 112 pp. 6, 8, 9 (contending exculpatory information was left out of the warrant and challenging Officer Meyers' representations about what Parmenter or the known-but-unnamed source had reported). The Court will review the matter under both tests.

1. Whether the Electronics Search Warrant Lacked Probable Cause on its Face

The Fourth Amendment protects people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Three requirements must exist for searches and seizures conducted pursuant to a warrant to be lawful under the Fourth Amendment:

> First, warrants must be issued by neutral, disinterested magistrates. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense. Finally, warrants must particularly describe the things to be seized, as well as the place to be searched.

Mink v. Knox, 613 F.3d 995, 1003 (10th Cir. 2010) (quoting *Dalia v. United States,* 441 U.S. 238, 255 (1979)). Mr. Salas' facial challenge asserts the affidavit offered in support of the search warrant is insufficient on its face to establish sufficient probable cause for the search.

> "A search warrant must be supported by probable cause, requiring more than mere suspicion but less evidence than is necessary to convict." *Danhauer,* 229 F.3d at 1005 (internal quotation marks omitted). "Probable cause exists when the facts presented in the affidavit would warrant a [person] of reasonable caution to believe that evidence of a crime will be found at the place to be searched." *Poolaw v. Marcantel,* 565 F.3d 721, 729 (10th Cir. 2009) (internal quotation marks omitted).

United States v. Romero, 749 F.3d 900, 904 (10th Cir. 2014). "Probable cause undoubtedly requires a nexus between suspected criminal activity and the place to be searched." *United States v. Corral-Corral*, 899 F.2d 927, 937 (10th Cir. 1990). The task of the judicial officer

presented with a search warrant application

> is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983). The judicial officer "may draw reasonable inferences from the material provided in the warrant application." *United States v. Rowland*, 145 F.3d 1194, 1205 (10th Cir. 1998).

To encourage the use of warrants, a reviewing court accords "great deference to the probable cause determination made by the judge who issued the warrant." *Romero*, 749 F.3d at 904 (quoting *Poolaw*, 565 F.3d at 728); *see also Untied States v. Moses*, 965 F.3d 1106, 1112 (10th Cir. 2020) ("A district court reviewing the probable cause for a warrant puts itself in the shoes of the warrant's issuing jurist and gives substantial deference to the prior decision."). This Court's duty is only to ensure the judicial officer had a "substantial basis" for concluding that probable cause existed. *Gates*, 462 U.S. at 238-39.

1.1 The electronics search warrant was supported by sufficient probable cause on its face.

As demonstrated by Government's Exhibit 2, which is the bodycam video recording of Officer Meyers' search warrant application to the state court judge that was quoted at length above, the state court judge remembered and considered the information from the previous day's affidavit in addition to the new information included in the second affidavit. This was perfectly appropriate. When determining the existence of probable cause, a judicial officer can rely on facts and matters outside the four corners of the affidavit of probable cause, but those extraneous considerations must be sworn to in some manner, which usually takes the

form of sworn, recorded testimony from the officer, but not always. For example, in *Kaiser v. Lief*, 874 F.2d 732 (10th Cir. 1989), the Tenth Circuit held the magistrate judge who issued the search warrant was able to rely on the facts contained in a sworn complaint in support of an arrest warrant that had been presented to the same magistrate judge the previous day. *Id.* at 734-35. Of course, when examining a facial challenge, the reviewing court is limited to reviewing only that which was actually considered by the judicial officer who issued the warrant. *See Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 565 n.8 (1971) ("Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate.").

Considering both of Officer Meyers' affidavits in support of the search warrants together, the state court judge knew the following:

- SV had been admitted to the hospital with burned lips and under the influence of methamphetamine, and she reported to police that the methamphetamine had been provided to her by Mr. Salas the night before, and he had smoked the methamphetamine with her at his residence. (ECF 112-2 p. 7.)

- SV had reported to police that Mr. Salas had provided drugs to her and her friends on prior occasions. (ECF 112-2 p. 8.)

- SV's burned lips were consistent with smoking out of a pipe that had become too hot, and SV's behavior, which included uncontrollable movements, dilated pupils, and bruxism (grinding teeth or clenching jaw) was consistent with the recent use of methamphetamine. (ECF 112-2 p. 8.)

- While executing the drugs (first) search warrant, officers found a room in Mr. Salas' apartment devoted to computers, cameras, and other photography/videography equipment. (ECF 112-4 p. 5.)

- Marti Parmenter was present with Mr. Salas at his residence when police arrived to execute the first search warrant. In an interview with police, Parmenter said she

and Mr. Salas had smoked methamphetamine and heroin inside the apartment the previous night. (ECF 112-4 p. 5.)

- A known but unnamed source reported to police that they had used methamphetamine and heroin with Mr. Salas, and upon doing so, Mr. Salas then took photographs of the known but unnamed source while they were naked. (ECF 112-4 p. 5.)

- The known but unnamed source knows that Mr. Salas had photographs of other naked women stored on his phone and computers that were captured in the same context as the naked photos of the known but unnamed source, i.e., after using drugs together. (ECF 112-4 p. 5.)

Thus, the state court judge was informed that Mr. Salas had previously taken drugs with women and then photographed them naked. The state court judge also knew that Mr. Salas had taken drugs with SV, a 13-year-old female. It was reasonable for the state court judge to infer it was probable that Mr. Salas had taken naked photos of SV after consuming drugs with her. After all, the state court judge knew that Mr. Salas did not differentiate between adults and children when providing them methamphetamine, so it was a practical, common-sense deduction that he also did not differentiate between adults and children in his photography of females after providing them methamphetamine. And it is obvious that naked photos of a 13-year-old are likely to constitute child pornography. While taking consensual naked photos of an adult is not illegal, "innocent or legal conduct may be infused with the degree of suspicion necessary to support a finding of probable cause when examined through the lens of those versed in the field of law enforcement." *United States v. Edwards*, 813 F.3d 953, 965 (10th Cir. 2015) (internal quotations omitted). Therefore, considering all this information together, a "substantial basis" existed for the state court judge to reasonably conclude there was a fair probability that evidence of child pornography would be found on Mr. Salas' electronic devices. When combined with the information contained in the earlier

affidavit, the electronics search warrant was supported by sufficient probable cause.

1.2 Even if the electronics search warrant was not supported by sufficient probable cause on its face, suppression is not warranted under *Leon's* good-faith exception.

The Supreme Court explained in *United States v. Leon*, 468 U.S. 897 (1984), "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 919. *Leon* modified the exclusionary rule "so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Id.* at 900. "Leon's good faith exception applies only narrowly, and ordinarily only when an officer relies, in an objectively reasonable manner, on a mistake made by someone other than the officer." *United States v. Loera*, 923 F.3d 907, 925 (10th Cir. 2019) (quoting *Unites States v. Cos*, 498 F.3d 1238, 1251 (10th Cir. 2006)).

If the state court judge was mistaken in finding Officer Meyers' affidavits provided probable cause for the electronics (second) search warrant, then it was the state court judge who erred and not the law enforcement officers who executed the electronics search warrant. In order to encourage law enforcement officers to apply for and obtain warrants before conducting searches and/or seizures, *Leon's* good-faith exception avoids punishing police officers or the prosecution for a judicial officer's mistake. "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth

Amendment violations." *Leon*, 468 U.S. at 921. The evidence here does not suggest the state court judge acted as anything but a detached and neutral magistrate when issuing the electronics search warrant. Examining the affidavits and search warrants on their faces, *Leon's* good-faith exception applies to the state court judge's error, if any, and precludes suppressing the evidence obtained pursuant to the electronics search warrant. "The test for good faith requires 'significantly less' than a finding of probable cause." *United State v. Brown*, 586 F. Supp. 3d 1075, 1091 (D. Kan. 2022) (quoting *United States v. Welch*, 291 F. App'x 193, 202 (10th Cir. 2008)).

In sum, when considering both of Officer Meyers' affidavits together, there is a substantial basis for the state court judge to conclude probable cause supported issuing the electronics search warrant. Even if that is not the case, though, the error is that of the judicial officer and suppression is not appropriate under *Leon's* good-faith exception.

2. Whether the Electronics Search Warrant Lacked Probable Cause Factually Under *Franks v. Delaware*

Mr. Salas also argues that by looking beyond the four corners of Officer Meyers' affidavits, we see the affidavits contain material misrepresentations and omit important exculpatory information, which vitiates the existence of probable cause. (*See* ECF 112 pp. 6, 8, 9; ECF 128 pp. 5-8, 10.)

The U.S. Supreme Court case of *Franks v. Delaware*, 438 U.S. 154 (1978), guides this issue. "Under *Franks,* a Fourth Amendment violation occurs if (1) an officer's affidavit supporting a search warrant application contains a reckless misstatement or omission that (2) is material because, but for it, the warrant could not have lawfully issued." *United States v. Herrera*, 782 F.3d 571, 573 (10th Cir. 2015). In other words, when conducting a *Franks* analysis,

the reviewing court considers information beyond that known by the judicial officer who issued the search warrant. The reviewing court must first excise from the affidavit intentional or reckless misstatements as well as read into the affidavit any intentional or reckless omissions, and then the reviewing court reconsiders the affidavit to determine whether probable cause would exist under the corrected affidavit. *Id.* at 575 ("But whether we're talking about acts or omissions the [reviewing] judge's job is much the same—we must ask whether a warrant would have issued in a but-for world where the attesting officer faithfully represented the facts.... If not, a Fourth Amendment violation has occurred and the question turns to remedy."). "Because probable cause is an objective standard, it may exist [independent of and] despite a police officer's false statements or material omissions." *Sanchez v. Hartley*, 299 F. Supp. 3d 1166, 1195 (D. Colo. 2017).

It is the defendant's burden to prove by a preponderance of the evidence the existence of each intentional or reckless misstatement or omission. *United States v. Campbell*, 603 F.3d 1218, 1228 (10th Cir. 2010). Innocent or negligent mistakes by the affiant do not warrant the exclusion of evidence under *Franks*. *United States v. Artez*, 389 F.3d 1106, 1116 (10th Cir. 2004).

> Judge Frankel, in *United States v. Halsey*, 257 F.Supp. 1002, 1005 (S.D.N.Y.1966), aff'd, Docket No. 31369 (CA2, June 12, 1967) (unreported), put the matter simply: "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Franks, 438 U.S. at 164–65.[3]

2.1 The second affidavit included material misstatements and omissions, and the corrected affidavit would not set forth sufficient probable cause for the electronics search warrant.

When looking at information beyond the four corners of the document, the affidavit in support of the electronics search warrant contains several issues of concern to the Court.

First, the "known but unnamed" source referenced in Paragraph 7 (ECF 112-4 p. 5) is actually Marti Parmenter, who was named in the previous Paragraph. (*See* ECF 121 p. 11.) This suggested to the state court judge that Officer Meyers had spoken with two different people—Parmenter and the "known but unnamed" source—when in reality it was only Parmenter. This is significant in this case because Officer Meyers informed the state court judge that Parmenter had confessed to smoking methamphetamine and heroin with Mr. Salas the night before, which could have been a factor the judge weighed in determining Parmenter's credibility, but the judge was denied that same opportunity to consider the "known but unnamed" source's use of methamphetamine and heroin with Mr. Salas the night before.

[3] A defendant has an initial burden to allege a problem with the underlying warrant and support that allegation with some evidence to be entitled to an evidentiary hearing under *Franks*. *See United States v. Herrera*, 782 F.3d 571, 573 (10th Cir. 2015). In this case, the Court determined an evidentiary hearing was appropriate because the affidavit in support of the electronics search warrant included assertions not matching Detective Daley's summary of the Parmenter interview, and Mr. Salas' prior attorney included both the affidavit and the summary with the motion to suppress. (ECF 112-3, 112-4 pp. 5-6.) For example, Officer Meyers' affidavit reported the known but unnamed source (now known to be Parmenter) said Mr. Salas had taken naked photos of her after they used drugs together, yet nowhere in Detective Daley's interview summary does it say Parmenter reported the photos taken by Mr. Salas of her were nude photos. (*Compare* ECF 112-4 p. 5 *with* ECF 112-3 p. 3.) In any event, a district court rarely abuses its discretion by holding an evidentiary hearing to pursue a *Franks* issue without the prerequisite showing being made. *See Herrera*, 782 F.3d at 573-74 ("And often enough courts will choose to err on the side of granting more process than might be strictly necessary in order to ensure not only that justice is done but that justice is seen to be done. Whether because of intuition born of experience that a meritorious issue may lurk in an imperfectly drawn application, or simply out of a jealous wish to guard individual rights against governmental intrusions, judges sometimes allow a claimant a fuller hearing than the law demands.").

"Certainly, the basis of a confidential informant's knowledge, as well as his reliability, are important factors in deciding whether information in an affidavit supports a finding of probable cause for a search." *United States v. Avery*, 295 F.3d 1158, 1167–68 (10th Cir. 2002), *abrogated on other grounds, United States v. O'Brien*, 560 U.S. 218, 235 (2010).[4] According to the testimony of Detective Daley, the Court understands Officer Meyers referred to Parmenter as a "known but unnamed" source as to certain information in an effort to protect her from potential repercussions, and he was instructed to do so by Detective Daley. Perhaps there are circumstances when such is warranted, but it must be considered and weighed against the likelihood of misleading the judicial officer. The Court finds this misrepresentation was not malicious, but it was intentional and knowing.

Second, also in Paragraph 7, Officer Meyers stated that the "known but unnamed" source (Parmenter) had reported that upon using methamphetamine and heroin with Mr. Salas, "Salas had taken photographs of [Parmenter] naked." (ECF 112-4 p. 5.) The recorded interview of Parmenter does not support this assertion. (*See* ECF 146; H'rg Ex. 13.) During the interview with Officer Meyers and Detective Daley, Parmenter reported that Mr. Salas had taken pictures of her that he would not give her, that he had photos of her naked, and that he had posted (non-naked) photos of her on the internet without her consent and would not

[4] The Government contends Parmenter should be considered an identified private citizen informant. "The veracity of identified private citizen informants (as opposed to paid or professional criminal informants) is generally presumed in the absence of special circumstances suggesting that they should not be trusted." (ECF 121 p. 12 (quoting *United States v. Brown*, 496 F.3d 1070, 1075 (10th Cir. 2007).) The Court cannot agree. Parmenter was "from the criminal milieu." *Brown*, 496 at 1075 (quoting *Easton v. City of Boulder*, 776 F.2d 1441, 1449 (10th Cir. 1985)). She was not an ordinary citizen witness. She admitted to smoking methamphetamine and heroin with Mr. Salas the night before the interview out of a "flashlight bong," and on several occasions before that. She was taken into police custody while at Mr. Salas' home, *Mirandized*, and easily could have been charged with a crime (but wasn't). She was not just a concerned citizen making a complaint to law enforcement. As Officer Meyers' primary source of information, the state court judge's ability to assess her credibility was extremely important to the probable cause determination.

remove them upon request. (H'rg Ex. 13, part 1 39:20-40:02, 51:14- 52:31.) She also said that since Mr. Salas would never let her touch or look at his cellphone, it made her feel like he had something on his phone about her that he didn't want her to see. (*Id.* 51:14-52:31.) And she said she suspected Mr. Salas of doing "weird shit" but could not describe anything specific because she said she would wake up and be unable to remember what had happened (ostensibly after using drugs with Mr. Salas). (*Id.* 51:55-52:31, 57:34-57:49.) Stated simply, Parmenter never reported Mr. Salas took naked photos of her, or any photos of her, after they used drugs together or in connection with drug use. The Court finds by a preponderance of the evidence that Officer Meyers included this misstatement in Paragraph 7 with reckless disregard for its truth because Officer Meyers was present for and participated in the interview of Parmenter. There has been no innocent or negligent explanation offered for this misstatement.

Third, and probably most concerning to the Court, Officer Meyers wrote in Paragraph 7, "It is also known by this person [known-but-unnamed Parmenter] that Salas has other photographs of other naked women stored on his phone and computers that were captured in the same context as them." (ECF 112-4 p. 5.) Unfortunately, this not what Parmenter said in her interview with Officer Meyers and Detective Daley. Parmenter reported during the interview that Mr. Salas never allowed her to look at or use his phone. (H'rg Ex. 13 52:09-52:52.) Additionally, she said she knew there were photos of other women "that inquire about photos" (*id.* 58:12-58:20), thus suggesting the photos of other women were consensual and requested by the other women, and she did not suggest they were naked photos. (*See also id.* 53:56-54:02 ("I think most of the people that he takes pictures of inquire of photos from

him."), 39:20-39:33 (Parmenter thinks most of the pictures Mr. Salas takes of other girls are "of age"), 39:38-39:40 (Parmenter has not been present when Mr. Salas has taken pictures of clients).) Parmenter never stated she knew Mr. Salas has photos of other naked women on his phone or computer, and she never stated the photos of other women or "clients" were captured in the same context (i.e., after they had taken drugs with Mr. Salas). The Court finds the Government's assertion that this statement in Officer Meyers' affidavit "is a fair summary based on the entirety of the interview and its context" (ECF 148 p. 6) to be rather unpersuasive. The Court again finds by a preponderance of the evidence that Officer Meyers included this misstatement in Paragraph 7 with reckless disregard for its truth because he was present for and participated in the interview of Parmenter. There has been no innocent or negligent explanation offered for this misstatement.

Finally, Paragraphs 8 and 9 convey only Officer Meyers' beliefs about what evidence might exist upon an electronics search, which adds very minimally to the probable cause determination. *See Loera*, 923 F.3d at 924. But of some relevance to Officer Meyers' belief that "Salas had used controlled substances with subjects under the age of 18 years old, and taken photographs of them in the same manner described above" (ECF 112-4 p. 6) is the fact that SV expressly denied to Officer Meyers any "acts of violence or sexual advances towards her from [Mr. Salas] or anyone else present, especially at the time when she had smoked" (ECF 112-1 p. 3). SV's denial was not included in Officer Meyers' affidavits. To be sure, SV's denial does not nullify the possibility that Mr. Salas may have taken photos of her while she was high on methamphetamine, as photographing is not the same as acts of violence or sexual advances, but it is a consideration that would have been appropriate for the state court judge to weigh

during the probable cause determination.

After excising the misrepresentations in Paragraph 7 from the affidavit and including SV's denial of any "acts of violence or sexual advances towards her from [Mr. Salas] or anyone else present, especially at the time when she had smoked" (ECF 112-1 p. 3), the Court finds the corrected affidavit would wholly lack probable cause to support a search of Mr. Salas' electronic devices for evidence of child pornography. Together, the corrected affidavit and the first affidavit would establish that Mr. Salas gave methamphetamine to SV and used it with her, gave methamphetamine and heroin to Parmenter and used it with her, and had a room devoted to photography/videography and other digital equipment. This falls woefully short of a fair probability that child pornography would be found on Mr. Salas' electronic devices. *See Loera*, 923 F.3d at 924 (an affidavit in support of a search warrant for child pornography must provide information "such that a magistrate could independently assess whether the images meet the legal definition of child pornography").

2.2 *Leon's* good-faith exception cannot save the electronics search warrant when examined under *Franks*.

The good-faith exception discussed above applies where a judicial officer errs in finding the existence of sufficient probable cause and law enforcement officers reasonably rely in good faith on the resulting search warrant. "*Leon's* good faith exception applies only narrowly, and ordinarily only when an officer relies, in an objectively reasonable manner, on a mistake made by **someone other than the officer**." *United States v. Cos*, 498 F.3d 1115, 1132 (10th Cir. 2007) (emphasis added). Under the *Franks* analysis, the error in this matter was Officer Meyers' reckless disregard for whether the statements he attributed to Parmenter (or to the "known but unnamed" source that was Parmenter) were attributed to Parmenter and

accurately reflected what Parmenter had said; it was not the error of the state court judge who reasonably relied on those misstatements. *Leon* does not apply here where the error "was the fault of the officer, not the magistrate." *Loera*, 923 F.3d at 925; *see also United States v. Danhauer*, 229 F.3d 1002, 1007 (10th Cir. 2000) (*Leon's* good-faith exception does not apply "if the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false if not for his 'reckless disregard of the truth'") (quoting *Leon*, 468 U.S. at 923).

2.3 The inevitable-discovery doctrine renders suppression inappropriate, even in light of the *Franks* analysis.

The Government argues the alleged child pornography involving SV underlying the charges in this case should not be suppressed because it would have been inevitably discovered by law enforcement. (ECF 121 pp. 16-18.) The inevitable-discovery doctrine says that unlawfully obtained evidence may still be admissible against the defendant at trial if it "ultimately or inevitably would have been discovered by lawful means." *United States v. Christy*, 739 F.3d 534, 540 (10th Cir. 2014) (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)). It is the Government's burden to prove, by a preponderance of the evidence, the unlawfully-seized evidence would have been discovered independent of the constitutional violation. *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005).

2.3.1 Law enforcement would have inevitably discovered the alleged child pornography involving SV as part of the investigation into Mr. Salas' drug possession and distribution to SV.

The primary circumstances surrounding this argument were largely established at the December 2, 2022 evidentiary hearing. Officer Andrea Husted testified that she saw and seized an Apple iPhone with a green protective case that was lying next to Mr. Salas on his

bed when he was arrested on March 2, 2021. She further testified that she seized this iPhone pursuant to the drugs (first) search warrant, before the electronics (second) search warrant was sought or issued.

Caleb Forness, the computer forensic analyst, testified that he found photographs and videos of SV constituting suspected child pornography on the same Apple iPhone, specifically Item No. 505. (*See* Govt Ex. 5 at ECF 143-1 pp. 2-5.) He said he conducted the forensic download of the iPhone (i.e., searched its contents) on March 8, 2021. He further testified the iPhone showed the videos and photos of SV had been taken (produced) on the same iPhone on February 27, 2021. (As noted earlier, SV and her mother reported SV was at Mr. Salas' home on the evening of February 27, 2021, until the early morning of February 28, 2021.) The photographs and videos of SV found on the Apple iPhone with a green case comprise the child pornography charges in this case.[5] (*See* Govt. Ex. 5 at ECF 143-1 pp. 4-5 (redacted videos and photos).)

The drugs search warrant, which is not challenged, authorized officers to search for and seize evidence of the "use and delivery of a controlled substance; to include … records, and/or receipts, written or electronically stored." (ECF 112-2 p. 5.) This allowed law enforcement to lawfully seize Mr. Salas' iPhone and search it for electronic records or receipts

[5] At the evidentiary hearing, Caleb Forness described the iPhone to have a "tan" case. The Court does not find this "green vs. tan" difference to be material, particularly considering the cellphone shown in Government's Exhibit 5 (ECF 143-1 pp. 2-5) has a protective case that reasonably could be described as green or tan. Moreover, the cellphone in Government's Exhibit 5 shows a "selfie" picture of Mr. Salas (ECF 143-1 p. 3) as well as non-selfie photos taken of SV (ECF 143-1 p. 5). Moreover, the selfie picture is the album cover for the first photo album in the phone's "Photos" application, and the next photo album is labeled "Sal," which is the name Mr. Salas goes by. (ECF 143-1 p. 3.) Based on the testimony at the hearing as well as the identification of the cellphone as Item No. 505, the Court finds the iPhone discussed by Officer Husted and Caleb Forness to be the same item.

evincing drug use or delivery. *See, e.g., Loera*, 923 F.3d at 916 ("The general Fourth Amendment rule is that investigators executing a warrant can look anywhere where evidence described in the warrant might conceivably be located.").

In response to questions from the Court, Caleb Forness credibly testified that when he's looking for electronic evidence of illegal drug transactions on a device, he would first open the "settings" on the phone to try to identify the phone's user and then he would examine the "Photos" application. Forness described a reasonable procedure for searching for electronic evidence of drug possession and distribution, as this and other courts well know it is commonplace nowadays for pictures of drugs and drug transactions to be found on cellphones. *See United States v. Palms*, 21 F. 4th 689, 700-01 (10th Cir. 2021) (the reasonableness of a search of a computer or other similar electronic device is determined based "on *how* the computer search was conducted rather than *what* was searched") (emphases in original); *Loera*, 923 F.3d at 920 (when searching electronic devices, officers must "reasonably direct their search toward evidence specified in the warrant").

When Mr. Salas was arrested at the time the officers executed the drugs (first) search warrant, he was charged in state court with possessing felony amounts of controlled substances, child endangerment with methamphetamine, and delivery of a controlled substance to SV. (ECF 112-1 p. 5.) On March 8, 2021, when Caleb Forness searched the iPhone seized by Officer Husted during the execution of the drugs search warrant, the felony drug charges were pending against Mr. Salas. Accordingly, the photos and videos of SV underlying the charges in this federal case would have been inevitably discovered by Forness as part of the execution of the drugs search warrant while Forness was looking for electronic

records or receipts evincing drug use or delivery.[6] Thus, the Court concludes the Government has proved by a preponderance of the evidence that the alleged child pornography at issue in this case ultimately would have been discovered by lawful means as part of the drug investigation, which renders suppression based on Mr. Salas' *Franks* argument unwarranted.

2.3.2 Alternatively, law enforcement would have inevitably discovered the alleged child pornography involving SV during the consensual search of Mr. Salas' iPhone in connection with his domestic violence charges.

Finally, law enforcement would have inevitably found the photos and videos of SV on Mr. Salas' iPhone through a separate and independent avenue. On February 14, 2021, Mr. Salas was arrested on state court charges of domestic battery against Parmenter. (ECF 112-5 pp. 5-12.) He bonded out of jail within a short time, but those misdemeanor charges remained active until they were eventually dismissed in August 2021. (ECF 112-5 p. 1.)

In April 2021, after his iPhone had been seized by Officer Husted under the drugs (first) search warrant and was being held by the police, Mr. Salas provided written consent to law enforcement to search his cellphones for videos that he believed would exculpate him of the domestic battery charges. (ECF 112-5 pp. 2-3; Govt Ex. 3 at ECF 121 pp. 1-2.) Accordingly, the Court concludes the Government has established by a preponderance of the evidence that law enforcement would have inevitably discovered the alleged child pornography

[6] Forness testified that he found the passcode for the iPhone containing the alleged child pornography on a different device that was not encrypted. It's unclear whether that other device was seized as part of the drugs or electronics search warrant. However, he also credibly testified that if he had not found the passcode (e.g., he did not possess the other device), he would have used forensic software to "brute-force" the passcode in the iPhone, which is simply using the forensic software to enter every possible passcode on the device until the correct passcode is entered. He testified that using the "brute-force" method is just a matter of giving the forensic software enough time to try numerous passcodes until the correct one is found. Thus, even without the passcode from the other device, Forness would have ultimately gained entry into the iPhone and discovered the photos and videos involving SV.

involving SV on his iPhone during their consensual (and requested) search of his phones for videos involving Parmenter.

CONCLUSION AND ORDER

Examining only Officer Meyers' affidavits, the state court judge had a substantial basis for concluding probable cause existed to issue the electronics (second) search warrant. And even if the state court judge was mistaken on that call, *Leon's* good-faith exception applies and renders suppression of the evidence unwarranted.

Looking beyond the affidavits pursuant to *Franks*, though, the Court finds certain material misstatements and omissions that, when corrected for, vitiate probable cause. And *Leon's* good-faith exception cannot prevent suppression because this error was Officer Meyers' error and not a judicial error. Nonetheless, the inevitable-discovery doctrine can apply if the Government would have ultimately discovered the incriminating evidence through lawful means. *See Loera*, 923 F.3d at 927-29. Here, law enforcement would have ultimately discovered the alleged child pornography on Mr. Salas' iPhone while searching it pursuant to the drugs (first) search warrant for evidence of drug possession and distribution. Alternatively and independently, law enforcement would have ultimately discovered it while searching Mr. Salas' iPhone pursuant to his request and consent for police to search his phones for videos exculpating him of the domestic battery charges (while police were in lawful possession of the phone under the drugs search warrant). Therefore, even looking behind the four corners of the affidavits pursuant to *Franks*, suppression of the evidence found on the iPhone with the green/tan protective case (which included a selfie photo of Mr. Salas as the cover photo of the photo album containing the alleged child pornography) is not warranted.

IT IS THEREFORE ORDERED that the Defendant's Motion to Suppress Items Seized from Second Search Warrant (ECF 112) is **DENIED**.

ORDERED: December 8th, 2022.

Scott W. Skavdahl
United States District Judge

Salvador Salas, Jr. v. United States

Case No. _____

Petition for Writ of Certiorari
from U.S. Court of Appeals for the Tenth Circuit
10th Cir. Case No. 23-8027

APPENDIX E

Narcotics Search Warrant*
("Warrant #1")

*Also located at 10th Cir. Record on Appeal, Vol. III, pp. 87-90

STATE OF WYOMING)
} ss
COUNTY OF NATRONA)

IN THE ☐ DISTRICT COURT
☒ CIRCUIT COURT

7th JUDICIAL DISTRICT

THE STATE OF WYOMING
Plaintiff,

vs.

Salas, Salvador

Defendant.

WARRANT FOR SEARCH AND SEIZURE

TO: ANY OFFICER AUTHORIZED TO ENFORCE OR ASSIST IN ENFORCING THE LAW OF THE STATE OF WYOMING, GREETINGS:

Affidavit having been made before me by Officer M. Meyers A328 that he has reason to believe that;

☒ on the person of Salvador Salas a white male standing 5'10" tall and weighing 220 pounds with brown eyes and short black hair.
☒ on the premises of 8300 Tubbs Road #A, Casper, WY 82604, a tan 4 apartment complex where all front doors are located on the south side of the building. Apartment #A is located on the top left of the apartment complex as described by two independent witnesses, one of which being the victim. Apartment #A has a black/grey front door, with no indication, numbeirng, or lettering on the outside of the apartment. As you are looking at the complex from Tubbs Road, Apartment #A is located in the top left of the complex.
☒ in the vehicle of a red Cadillac CTS Wagon passenger car bearing Wyoming registration 1-P-68281, VIN #: 1G6DM8EG8A0131742.
☐ on the property described as ,

in the County of NATRONA, State of Wyoming, there is being concealed, certain property, to-wit: Controlled substances including, methamphetamine, heroin and marijuana; Evidence to show use and delivery of a controlled substance; to include, paraphernalia designed for used in the weighing, cutting, ingesting, and packaging of controlled substances, records, and/or receipts, written or electronically stored, records that show ownership of other property. Containers commonly used to store controlled substances; to include safes.

and as I am satisfied that good cause is shown by the Affidavit, which is incorporated by reference hereto, that this Warrant should be executed and as I am satisfied that there is probable cause to believe that the said property is being concealed:

☒ on the person ☒ on the premises ☒ in the vehicle ☐ on the property

above described, because of the information contained from the affidavit, attached hereto and made a part hereof; you are hereby commanded to search the person named for; the property specified; serve this Warrant and make the search:

☐ in the daytime from 6 am to 10 pm ☒ at any time day or night

within ten days thereafter the date of this warrant, if the property be found there, to seize it, prepare a written inventory of the property seized and return the Warrant and written inventory before me within five days of seizing the property.

DATED this _____ day of _____, _____

JUDGE BROWN VIA TELEPHONIC AT 1900 HOURS
( ) District Court Commissioner on 3/1/2021
( ) District Court Judge
(X) Circuit Court Judge

STATE OF WYOMING)
} ss
COUNTY OF NATRONA)

IN THE ☐ DISTRICT COURT
☒ CIRCUIT COURT

7th JUDICIAL DISTRICT

THE STATE OF WYOMING
Plaintiff,

vs.

Salas, Salvador

Defendant.

AFFIDAVIT FOR SEARCH WARRANT

The undersigned, being of lawful age and upon his oath first duly sworn, depose and say: The affiant is employed as a Police Officer, Casper Police Department, Casper, State of Wyoming. The affiant has reason to believe that

☒ on the person of Salvador Salas ([redacted] a white male standing 5'10" tall and weighing 220 pounds with brown eyes and short black hair.
☒ on the premises of 8300 Tubbs Road #A, Casper, WY 82604, a tan 4 apartment complex where all front doors are located on the south side of the building. Apartment #A is located on the top left of the apartment complex as described by two independent witnesses, one of which being the victim. Apartment #A has a black/grey front door, with no indication, numbeimg, or lettering on the outside of the apartment. As you are looking at the complex from Tubbs Road, Apartment #A is located in the top left of the complex.
☒ in the vehicle of a red Cadillac CTS Wagon passenger car bearing Wyoming registration 1-P-68281, VIN #: 1G6DM8EG8A0131742.
☐ on the property described as ,

there is being concealed, certain property, to-wit: Controlled substances including, methamphetamine, heroin and marijuana; Evidence to show use and delivery of a controlled substance; to include, paraphernalia designed for used in the weighing, cutting, ingesting, and packaging of controlled substances, records, and/or receipts, written or electronically stored, records that show ownership of other property. Containers commonly used to store controlled substances; to include safes.

WHICH: ☒ Property that constitutes evidence of the commission of a criminal offense.
☒ Contraband, the fruits of crime, or things otherwise criminally possessed.
☒ Property designed or intended for use or which is or has been used as the means of committing a criminal offense.
☒ Person for whose arrest there is probable cause, or who is unlawfully restrained.

and that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

"SEE ATTACHED AFFIDAVIT WHICH IS INCORPORATED BY REFERENCE HERETO"

Further your affiant Sayeth not.

A328 Ofc M. Meyers A328
Signature of Affiant

SUBSCRIBED AND SWORN to before me this _____ day of _____, _____

JUDGE BROWN VIA TELEPHONIC AT 1900 HRS
( ) District Court Commissioner on 3/1/2021
( ) District Court Judge
(X) Circuit Court Judge

AFFIDAVIT

1. That your affiant is a member of the Casper Police Department and acted in that official capacity at all times mentioned herein.

2. That Your Affiant has been employed as a Police Officer by the Casper, Wyoming, Police Department since March 2019. Your Affiant attended the Wyoming Law Enforcement Academy. Your Affiant is POST certified in Wyoming. Your Affiant has received approximately 600 hours between the Wyoming Law Enforcement Academy and Casper Police Department in areas such as criminal investigations, court testimony, and evidence collection. Your Affiant has testified in Circuit Court in Natrona County and had those charges bound over to District Court which lead to successful prosecution. Your Affiant has been assigned to the Patrol Division since September 2019 to present. Your Affiant has applied for, obtained, and executed search warrants before and helped on various others. During his tenure as a Law Enforcement Officer, your affiant has gained experience and training in the investigation of sexual assaults, various drug crimes, weapons offenses and person's crimes. This training and experience through handling various calls for service and traffic stops has aided in your affiant being able to better detect the presence of drugs as well as drug paraphernalia. The knowledge your affiant has gained has been by attending the Wyoming Law Enforcement Academy, experience on the job, experiences shared by and with senior officers, and training seminars.

3. On February 28, 2021 [redacted] ([redacted] was admitted into Wyoming Medical Center due to abnormal behavior such as uncontrollable speech and body movements, and burn marks on her lips that were causing her excruciating pain, as well as concern to her mother, Chelsea Gonzalez ([redacted]. While there, she was treated for her condition and ultimately determined by medical professionals that she was under the influence of methamphetamine.

4. After contacting law enforcement, Chelsea spoke with Your Affiant and substantially stated the following. [redacted] her daughter, babysits for her friend, Salvador Salas (12/01/1990) at 8300 Tubbs Road. Salas had picked [redacted] up on the night of 02/27/2021, and brought her to his apartment, where they had already agreed upon her babysitting for him while he worked. Chelsea said that [redacted] has been doing this for some time now, ever since Salvador approached her about [redacted] babysitting for him a few months ago.

5. Chelsea then began receiving text messages from Salvador that he had to go to Walgreens in order to buy medication for [redacted] because she had an allergic reaction. Chelsea was never told at any point that [redacted] had used methamphetamine, and was under the assumption she ate something odd and it affected her negatively. Chelsea then awoke around 0300 hours on 02/28/2021 to [redacted] in her bedroom downstairs, uncontrollably speaking in rapid speech and was making all sorts of body movements that she could not control. Chelsea then observed severe burn marks to [redacted] mouth. That was when Chelsea took [redacted] to Wyoming Medical Center and learned she had used methamphetamine. After Wyoming Medical Center released [redacted] Chelsea took her to Wyoming Behavioral Institute where she was placed in their care for recovery.

6. Your Affiant spoke with [redacted] at Wyoming Behavioral Institute, where [redacted] admitted to the entirety of the situation. [redacted] substantially stated the following. [redacted] had gone over to Salvador's apartment at 8300 Tubbs Road #A, after Salvador came and picked [redacted] up from her house at 1735 Fremont Ave. Salvador, once at his apartment with [redacted] retrieved a baggie of methamphetamine from his car, a red Cadillac bearing Wyoming registration 1-P-68281, and brought the methamphetamine back inside. Once back inside his apartment, Salvador used a flashlight that he had personally modified to be a pipe to smoke out of, to smoke the methamphetamine. Salvador took the first hit on the flashlight pipe and then passed it to [redacted] where she took approximately four (4) or more hits of the same pipe, that she stated contained methamphetamine. [redacted] does not remember much after that, other than being in Salvador's car when he then took her to Walgreens to get medication for her lip burns.

7. [redacted] went on to state that Salvador always supplies drugs to her and her friends, and anyone else. [redacted] stated he both sells drugs and gives them to people when they ask. [redacted] substantially stated he deals, "weed, methamphetamine, and some other dried liquid that is brown that he folds in things like tinfoil." When asked if it was heroin or THC wax, [redacted] stated she did not know. [redacted] stated she has never smoked or used any of that, nor has she seen anyone smoke or use it, just that he has it. [redacted] further stated that Salvador keeps a hidden container underneath his red Cadillac that he somehow mounts to the undercarriage of his car. [redacted] did not know how, with what; or what was inside, just that he had a hidden container underneath his red Cadillac.

8. Your Affiant knows through his training and experience that the burn marks on [redacted] lips are consistent with that of which someone would suffer if they smoked out of a pipe that became too hot when it was in their mouth. [redacted] behavior was also consistent with that of using methamphetamine, as she was still experiencing uncontrollable movements, had dilated pupils, and bruxism at times. Your Affiant also knows that heroin is most commonly packaged, distributed, and used in tinfoil, which is consistent with a brown dried substance which [redacted] described very detailed from memory.

Therefore, your Affiant prays that the court issue a warrant to search the aforementioned locations as described within this affidavit and to search for the suspected evidence, seize evidence, analyze evidence and later review or copying of any media or informational evidence consistent within this warrant for the named crimes, such evidence as having formerly been described in this Affidavit.

Further the affiant Sayeth not.

A328

M. Meyers A328
Officer

SUBSCRIBED AND SWORN to before me this _____ day of _____, _____

JUDGE BROWN VIA TELEPHONIC AT 1900 HRS ON 3/1/2021

( ) District Court Commissioner
( ) District Court Judge
(X) Circuit Court Judge

Salvador Salas, Jr. v. United States

Case No. _____

Petition for Writ of Certiorari
from U.S. Court of Appeals for the Tenth Circuit
10th Cir. Case No. 23-8027

APPENDIX F

Child Exploitation Search Warrant*
("Warrant #2")

*Also located at 10th Cir. Record on Appeal, Vol. III, pp. 95-100

STATE OF WYOMING)
} ss
COUNTY OF NATRONA)

IN THE ☐ DISTRICT COURT
☒ CIRCUIT COURT

7th JUDICIAL DISTRICT

THE STATE OF WYOMING
Plaintiff,

vs.

8300 Tubbs Road #A, Casper WY 82604
Red Cadillac CTS Wagon
Defendant.

WARRANT FOR SEARCH AND SEIZURE

TO: ANY OFFICER AUTHORIZED TO ENFORCE OR ASSIST IN ENFORCING THE LAW OF THE STATE OF WYOMING, GREETINGS:

Affidavit having been made before me by Officer M. Meyers A328 that he has reason to believe that;

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☒ on the premises of 8300 Tubbs Road #A, Casper, WY 82604, a tan 4 apartment complex where all front doors are located on the south side of the building. Apartment #A is located on the top left of the apartment complex as described by two independent witnesses, one of which being the victim. Apartment #A has a black/grey front door, with no indication, numbeirng, or lettering on the outside of the apartment. As you are looking at the complex from Tubbs Road, Apartment #A is located in the top left of the complex.
☒ in the vehicle of a red Cadillac CTS Wagon passenger car bearing Wyoming registration 1-P-68281, VIN #: 1G6DM8EG8A0131742.
☐ on the property described as

in the County of NATRONA, State of Wyoming, there is being concealed, certain property, to-wit: Items of evidence to include but not limited to; video equipment which may be digital or other medium, accessories, video tapes; digital images, digital video equipment, any equipment or device which may store, house, or capture video or digital images, magnetic or electronically stored images and devices which may be associated with the capture, storing, and printing of such images; any such images whether permanently stored or in transient storage, pictures or photographs whether electronically stored, digital, captures, or printed form or any form of images which may show or tend to show criminal acts.

Items of evidence related to the sexual exploitation of children:

1) Images, videos, or visual depictions representing the sexual exploitation of children

2) Computers and Digital communications devices allowing access to the Internet to include desktop computers, laptop computers, netbooks, e-readers, cellular telephones, email devices, tablets, personal digital assistants, and mobile digital storage devices.

3) Computer peripherals and digital input/output devices to include but not limited to keyboards, mice, scanners, printers, monitors, network communication devices, modems, routers, and external or connected devices used for accessing computer storage media. Digital storage media and the digital content to include but not limited to floppy disks, hard drives, tapes, DVD disks, CD-ROM disks, flash storage, USB storage drives, or other magnetic, optical or mechanical storage which can be accessed by computers to store or retrieve data or images of child pornography.

4) Digital software and applications including installation media. Contents of volatile memory (RAM) related to computers and other digital communication devices that would tend to show current and recent use of the computer, use of encryption, and use of other communications devices. Encryption keys or other dynamic details necessary to preserve the true state of running evidence.

5) Computer software, hardware or digital contents related to the sharing of Internet access over wired or wireless networks allowing multiple persons to appear on the Internet from the same IP address. If computers

or other digital devices are found in a running state the investigator may acquire evidence from the devices prior to shutting the devices off. This acquisition may take several hours depending on the volume of data.

6) If computers are found in a running state the investigator may acquire evidence from the computers prior to shutting the computers off. This acquisition may take several hours depending on the volume of data.

7) Manuals and other documents (whether digital or written) which describe operation of items or software seized. Items containing or displaying passwords, access codes, usernames or other identifiers necessary to examine or operate items, software or information seized. Correspondence or other documents (whether digital or written) pertaining to the possession, receipt, collection, origin, manufacture or distribution of images involving the exploitation of children.

8) Correspondence (digital or written) or other items demonstrating an interest in the exploitation of children.

9) Items or digital information that would tend to establish ownership or use of computers and Internet access equipment and ownership or use of any Internet service accounts and cellular digital networks to participate in the exchange, receipt, possession, collection or distribution of child pornography.

10) Items that tend to show dominion and control of the property searched, to include photographs, utility bills, telephone bills, correspondence, rental agreements and other identification documents.

11) Photographic evidence..

and as I am satisfied that good cause is shown by the Affidavit, which is incorporated by reference hereto, that this Warrant should be executed and as I am satisfied that there is probable cause to believe that the said property is being concealed:

☐ on the person ☒ on the premises ☒ in the vehicle ☐ on the property

above described, because of the information contained from the affidavit, attached hereto and made a part hereof; you are hereby commanded to search the person named for; the property specified; serve this Warrant and make the search:

☐ in the daytime from 6 am to 10 pm ☒ at any time day or night

within ten days thereafter the date of this warrant, if the property be found there, to seize it, prepare a written inventory of the property seized and return the Warrant and written inventory before me within five days of seizing the property.

DATED this 2ND day of MARCH, 2021

JUDGE BEHAN VIA TELEPHONE AT 1515 HRS
( ) District Court Commissioner 3/2/21
( ) District Court Judge
( ) Circuit Court Judge

STATE OF WYOMING)
} ss
COUNTY OF NATRONA)

IN THE ☐ DISTRICT COURT
☒ CIRCUIT COURT

7th JUDICIAL DISTRICT

THE STATE OF WYOMING
Plaintiff,

vs.

8300 Tubbs Road #A, Casper WY 82604
Red Cadillac CTS Wagon
Defendant.

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☒ in the vehicle of a red Cadillac CTS Wagon passenger car bearing Wyoming registration 1-P-68281, VIN #: 1G6DM8EG8A0131742.
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or other digital devices are found in a running state the investigator may acquire evidence from the devices prior to shutting the devices off. This acquisition may take several hours depending on the volume of data.

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11) Photographic evidence..

WHICH: ☒ Property that constitutes evidence of the commission of a criminal offense.
☒ Contraband, the fruits of crime, or things otherwise criminally possessed.
☒ Property designed or intended for use or which is or has been used as the means of committing a criminal offense.
☒ Person for whose arrest there is probable cause, or who is unlawfully restrained.

and that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

"SEE ATTACHED AFFIDAVIT WHICH IS INCORPORATED BY REFERENCE HERETO"

Further your affiant Sayeth not.

A328 Ofc M. Meyers A328
Signature of Affiant

SUBSCRIBED AND SWORN to before me this 2nd day of March 2021

JUDGE BROWN VIA TELEPHONIC AT 1515 HRS ON 3/2/21
( ) District Court Commissioner
( ) District Court Judge
( ) Circuit Court Judge

AFFIDAVIT

1. That your affiant is a member of the Casper Police Department and acted in that official capacity at all times mentioned herein.

2. That Your Affiant has been employed as a Police Officer by the Casper, Wyoming, Police Department since March 2019. Your Affiant attended the Wyoming Law Enforcement Academy. Your Affiant is POST certified in Wyoming. Your Affiant has received approximately 600 hours between the Wyoming Law Enforcement Academy and Casper Police Department in areas such as criminal investigations, court testimony, and evidence collection. Your Affiant has testified in Circuit Court in Natrona County and had those charges bound over to District Court which lead to successful prosecution. Your Affiant has been assigned to the Patrol Division since September 2019 to present. Your Affiant has applied for, obtained, and executed search warrants before and helped on various others. During his tenure as a Law Enforcement Officer, your affiant has gained experience and training in the investigation of sexual assaults, various drug crimes, weapons offenses and person's crimes. This training and experience through handling various calls for service and traffic stops has aided in your affiant being able to better detect the presence of drugs as well as drug paraphernalia. The knowledge your affiant has gained has been by attending the Wyoming Law Enforcement Academy, experience on the job, experiences shared by and with senior officers, and training seminars.

3. On March 1, 2021 Your Affiant was granted a Court authorized Search Warrant for 8300 Tubbs Road #A, Casper, WY 82604 by Circuit Court Judge, Honorable H. Steven Brown.

4. On March 2, 2021 at approximately 1530 hours, Officers of the Casper Police Department executed the Search Warrant at 8300 Tubbs Road #A, Casper, WY 82604, searching for marijuana, methamphetamine, and heroin. During the course of the officers' investigation, they discovered an entire room in Salas' apartment devoted to computers, cameras, and other photography/videography equipment.

5. Located in the apartment were two subjects identified as Salvador Salas ([redacted]) and Marti Parmenter

6. Officer M. Meyers conducted an interview with Parmenter after she was advised of her Miranda warnings. Parmenter stated that last night (03/01/2021), her and Salas smoked methamphetamine and heroin inside the apartment.

7. Officer M. Meyers spoke to a known but unnamed source who stated substantially the following; they had used controlled substances, specifically methamphetamine and heroin with Salas. Upon using that, Salas had taken photographs of this person naked. It is also known by this person that Salas has other photographs of other naked women stored on his phone and computers that were captured in the same context as them.

8. Officer M. Meyers believes that it is probable, based on the above information that Salas had used controlled substances with subjects under the age of 18 years old, and taken photographs of them in the same manner described above.

9. Based on the amount of electronics, cameras, phones and video equipment, Officer M. Meyers believes that the equipment may possess images of child pornography.

Therefore, your Affiant prays that the court issue a warrant to search the aforementioned locations as described within this affidavit and to search for the suspected evidence, seize evidence, analyze evidence and later review or copying of any media or informational evidence consistent within this warrant for the named crimes, such evidence as having formerly been described in this Affidavit.

Further the affiant Sayeth not.

A328

M. Meyers A328
Officer

SUBSCRIBED AND SWORN to before me this 2nd day of March, 2021

Judge Brenn via telephonic at RIS on 3/2/21

( ) District Court Commissioner
( ) District Court Judge
( ) Circuit Court Judge