No. 24-

IN THE

Supreme Court of the United States

CORY M. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION 1: Does *Riley v. California*, 573 U.S. 373 (2014) prohibit the Government from searching privacy protected GPS information in the metadata of a digital video labeled contraband when neither the warrant nor the Government's forensic review specified GPS or metadata as responsive to the charges identified in the warrant and the purpose of the search was to look for evidence of a crime not specified in the warrant and for which the Government admitted it had no probable cause?

QUESTION 2: Does the standard federal plea agreement clause that the government agrees not to bring any other charge "known to" the United States at the time of the agreement preclude subsequently bringing a new charge based on a digital video file admittedly in its possession; physically viewed by it; and after informing Defendant all seized files had been thoroughly searched because the government maintains it was unaware of the potential charge due to an undisclosed prosecutorial mistake?

QUESTION 3: Is a search for a file's GPS metadata constitutionally unreasonable/untimely and/or unfair when it is not conducted until fifteen months after the Fed. R. Crim. P. 41(e) forensic review failing to identify the metadata or GPS responsive to the warrant was completed; ten months after a plea agreement resolving the warrant specified charges was executed; eight months after Defendant, in reliance on the agreement, went into custody; and four months after the case and any prospect of trial was terminated by sentencing pursuant to the agreement?

STATEMENT OF RELATED CASES

- *United States of America v. Johnson*, No. 22-1086, U.S. Court of Appeals for the Second Circuit. Judgment entered on Feb. 27, 2024 (petition for rehearing denied on May 14, 2024).

- *United States of America v. Johnson*, No. 5:19-cr-140, U.S. District Court for the District of Vermont. Judgment entered on May 12, 2022.

- *State of Vermont v. Johnson*, Vermont Superior Court, No. 1697-7-20 Cncr. (pending)

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JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on February 27, 2024, and it issued an order denying petition for rehearing on May 14, 2024. 67a.

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

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to United States Constitution provides:

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

U.S. Const., amend. IV.

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const., amend. V.

STATEMENT OF THE CASE

Factual Background

On 3/20/2018, Defendant was served with a warrant authorizing a search for evidence of possession/distribution of child pornography ("CP"), but not production. Nine pages of the 2018 search warrant Affidavit described the Government's ability to comprehensively search digital devices and files. Dkt. 30, pp. 24-33/35. The 2019 production charge was premised on *one* of the videos seized pursuant to that warrant, which is 97 seconds in length and does not reveal the face of either person in it.

The Government's 6/5/2018 Forensic Report (the "Report") summarized the Fed. R. Crim. P. 41(e)(2)(B) review of the seized evidence to determine what was responsive to the warrant. The Report relayed that the seized devices/files had been "thoroughly analyz[ed]" using seven sophisticated software programs. Dkt. 18-9, pp. 5-6/41. All CP videos had been personally viewed. *Id.*, pp. 38/41.

In negotiations preceding the Government drafted 11/15/2018 plea agreement (the "Agreement"), the Government did not retract any of its prior statements or reveal it had not completed its analysis of the seized devices or files.

The Agreement, 69a, was a charge bargain requiring Defendant to plead guilty to possession and receive a sentence of 45 months followed by ten years of supervised release. Agreement ¶5 represented that it would terminate the case upon sentencing. 70-71a. Agreement ¶6 reserved the Government's right to take multiple future actions but not a right to continue searching the files. 71a. Agreement ¶12a contained a Release which, applying dictionary definitions to its terms, barred "any other" charge in connection with Defendant's possession of the files labeled CP, subject only to the "known to the United States" at the time of the agreement clause. 77a.

On 1/4/2019, in reliance on the Agreement, Defendant pleaded guilty to possession and entered custody, with credit for time served thereafter.

On 5/9/2019, the court imposed the recommended sentence. Defendant completed the incarceration portion of that sentence in mid-March 2022.

On 6/10/2019, Agent Moynihan sent the CP files to the National Center for Missing and Exploited Children ("NCMEC") for its CRIS (Child Recognition and Identification System) known victim analysis. Dkt. 53: 12/2/2020 Tr. p. 14. She testified that she had always sent NCMEC the CP files during her 100+ CP investigations and thought she had done so here, only then realizing she had not. *Id.*, pp. 34; 54.

On 9/4/2019, NCMEC emailed Agent Moynihan stating that one of the files she sent had GPS coordinates that "appeared to resolve near Burlington Vermont." Dkt. 18-5, p. 2. The GPS coordinates were provided. NCMEC's email inquired if she knew if her "subject" produced it. The Agent emailed back that she wanted to use the video to add as many charges as possible to Defendant because, in her view, he got off light in the first case. Dkt. 49: Ex. F.

On 9/19/2019, Moynihan sought a warrant to search Defendant's *subsequent* residence for items of bedclothing last seen in the three-year-old video. Dkt. 29-8. The centerpiece of her Affidavit was her statement that Google Maps resolved the NCMEC coordinates to 7 Kingfisher, followed by a page of facts showing that Defendant lived there when the video was supposedly recorded in September 2016. *Id.*, ¶13.

On 10/3/2019, Defendant was indicted for one count of production of CP, 18 U.S.C. § 2251. At the Grand Jury hearing, Agent Moynihan testified that the GPS coordinates resolved to Defendant's 2016 residence.

The Government forwarded the video to the State of Vermont, which, on 7/20/2020, initiated a sexual abuse charge premised on its allegation that the unrevealed people in the video are Defendant and his daughter. *State of Vermont v. Johnson*, No. 1697-7-20 Cncr. Defendant denied that charge, which is pending.

Defendant's 5/7/2021 Franks Motion and 2021 filings in his Motion to Suppress, Dkts. 18; 74, demonstrated that the GPS coordinates do not resolve to Defendant's 2016 residence but rather *always* resolve three residences away

from Defendant's, no matter what GPS search site is used, including those used by the Government and Vermont. Dkt. 64 (exhibits). At the 6/1/2021 hearing, Defendant's digital forensic specialist reproduced Agent Moynihan's GPS search, proving that she immediately became aware the coordinates did not resolve to Defendant's residence upon initiating her search. Dkt. 89, pp. 62-67. At the hearing's conclusion, the Judge stated:

> " . . . I have been frank. I don't like what happened at all because I hope it never happens to me. You know, it makes you sick because they say something and there's such, so earnest, and they're accompanied by a U.S., you know, an Assistant U.S. Attorney and it has to be right."

Id., p. 99. Three weeks later, the court held: " . . . the 'pin' or location where the cellphone video was created is 1 Kingfisher Court, not 7 Kingfisher Court where the Johnson family once lived." 36a.

Nonetheless, the court denied the two Motions, terming Agent Moynihan a "credible" witness, making an innocent mistake. 37a.

On 11/30/2021, Defendant, to present the plea agreement issues to the Second Circuit, entered into a Fed. R. Crim. P. 11(a)(2) Plea Agreement. Defendant pleaded guilty to recording sexually explicit content involving a minor in or about September of 2016. Circuit Appendix 44. He did not admit to producing the instant video or that it depicted him and his daughter.

REASONS FOR GRANTING THE PETITION

QUESTION 1

Question 1 presents an issue of increasing national significance given the permeation of digital information and the need to establish the limitations on the Government's right to search digital files' metadata.

Riley v. California, 573 U.S. 373 (2014) established that a warrantless search of a cell phone is unconstitutional. *Riley* pointed to the privacy concerns associated with GPS information. *Id* at 400. *Riley* explained that cell phones consist of "many distinct types of information" and that "certain types of data" in cell phones are "qualitatively different" from other types. *Id.* at 395. *See also Id.* at 400 (analyzing data from a phone's call log feature separately). *Carpenter v. United States*, 585 U.S. 296, 309 (2018) demonstrates that location metadata has a separate existence and can be subject to privacy protections, *even following a private search of the metadata*. These pronouncements are equally applicable to computers; their digital files; and the relationship between those files and the metadata describing them.

Unlike *Riley*, the Government obtained a warrant. It authorized a search for evidence of CP possession/distribution, 18 U.S.C. § 2252, but not production, 18 U.S.C. § 2251. It contained several catch-all clauses allowing searches for "user" or "contextual" information and an interstate commerce clause using the word "production." The 6/5/2018 Report explained the extensive search undertaken to determine which files were CP and whether they had been distributed on the internet. Dkt.

18-9. The Report does not mention metadata or GPS as having been searched or as being responsive to the warrant. In testimony, the Government admitted it did not search for their GPS during the case, Dkt. 53: p. 21. The Government's appellate brief admitted it had no probable cause to do so. Cir.Dkt. 60, p. 27, n. 7, ("Govt.A.Br.").

Agreement ¶5 stated that the case would be terminated upon sentencing. 70-71a. *After* sentencing, Moynihan sent the files to NCMEC for its CRIS known victim analysis pursuant to which it searched this file's GPS to determine if it resolved to Defendant's residence, Dkt. 29-8: ¶8; Dkt. 53: 12/22020 Tr., p. 14, and, pursuant to its stated dictates, brought the coordinates to the Agent's attention for use in a potential production charge, who then used them to lodge that charge. 81-82a. (NCMEC publication).

The Circuit court's opinion (the "Opinion") interprets the warrant to permit a search for something not specified in it, GPS, in a place not identified in it, metadata, for use in bringing a charge not listed in it, production, and for which the Government had no probable cause. If allowed, each Fourth Amendment prerequisite for a valid search, probable cause and a warrant's need to satisfy particularity, has been violated, even if the warrant fully satisfied the Fourth Amendment as to the warrant identified charge.

While the Opinion says it did not reach the question of whether metadata has a separate existence requiring probable cause and a warrant to search for its GPS, 18a., n. 11, it silently did so by repeatedly stating that NCMEC did not perform a search because it only searched "information" which was responsive to the warrant. 2a,

6a, 13a, 14a (five times), 15a, 19a, 20a, 21a, and 23a, n. 12. The Report, however, makes clear that, while the video was responsive, neither its metadata nor GPS were. Sustaining the Opinion requires this Court to find that digital files are monolithic, with metadata having no existence independent of the file it describes. Otherwise, the Government was required to have, but did not have, a warrant supported by probable cause to search for the GPS/metadata.

The boundaries of the Opinion's holdings are undefined and potentially unlimited. GPS metadata for every digital file found responsive to a warrant will be searchable for evidence of any charge, even ones beyond those specified in the warrant, as was the case here, irrespective of whether there is probable cause to do so and the search occurs after the initial case is terminated. Applying the Opinion, Defendant's GPS could be searched to determine if he was at the site of a bank robbery. While it could be argued that the situation is different because production also involves CP, possession and production are distinct charges, as are possession and bank robbery. The Opinion directs that, if a video is labeled contraband or responsive to the warrant, its metadata is free to be searched for evidence of a charge outside the warrant.

The Opinion's holding that the catch-all clauses conferred the authority to search GPS/metadata for evidence of another charge leads to the same result. Every warrant hereafter will contain those clauses. GPS/metadata may be searched to determine if it links the defendant to another crime and later justify the search because it could have been undertaken, even when it was not, as here, to determine if he was using the computer

when a digital file deemed responsive in the pending charge was created or for "contextual" information. NCMEC's search was pursuant to CRIS, not any of those clauses.

Entire computers have been labeled contraband. *See, e.g.*, *United States v. Adjani*, 452 F.3d 1140, 1145-46 (9th Cir. 2006); *United States v. Hay*, 231 F.3d 630, 637 (9th Cir. 2000); *Davis v. Gracey*, 111 F.3d 1472, 1480 (10th Cir. 1997). Per the Opinion, *anything* in that computer could be searched, as all of it would be "information" responsive to the warrant, for evidence of crimes beyond the warrant used to seize the computer.

At a minimum, the Opinion eliminates the need to obtain warrants pursuant to 18 U.S.C. § 2251, production. Prosecutors will charge possession or distribution, less complicated charges based on internet tracking, then deputize NCMEC to analyze the CP files to determine if GPS information in any of them can be associated with the defendant's so as to bring a production charge, even when there was no evidence of production when the warrant was obtained.

QUESTION 2

Prior to this case, no court had interpreted the known to the Government clause routinely used in federal plea agreement Releases to mean *subjectively* known. *United States v. Rodriguez-Garcia*, 497 F. App'x. 766 (9th Cir. 2012) held "that the government's lawyer failed to appreciate subjectively the significance of the information disclosed on [the] rap sheet is irrelevant," and, if the Government wanted to limit a plea agreement to matters

of which it had subjective knowledge, it was obligated to disclose that. *Id.* at 767.[1] (emphasis added).

The district court relied on one inapplicable case applying New York State rules for construing civil contracts. The Opinion cites no case supporting its clear but unspoken insertion of "subjectively" into "known." The Opinion accepts the Government's assertion that, even though it admitted the video was labeled CP in the forensic review, (Government's district court brief, Dkt. 29 ("Govt.Br."), pp. 4, n. 1; 8) and was therefore "known to" it; had physically watched this video, (Report, Dkt. 18-9, 38/41: all videos physically watched); and though both courts held the Government was free to search for the file's GPS, it should not be held to have known of the potential charge based on the GPS.

The Opinion conflicts with multiple appellate opinions holding the Government to knowledge of information in its possession at the time of a plea, even when its import was not realized until after the plea. Doing so reflects the Government's "awesome advantages" in bargaining power, *United States v. Palladino*, 347 F.3d 29, 33 (2d Cir. 2003); the meticulous standards of performance demanded of it in negotiating and performing plea agreements, *United States v. Feldman*, 939 F.3d 182, 189-90 (2d Cir. 2019) (performance standards); and that defendants are not aware of the Government's knowledge beyond what it tells them in advance of a plea. Those rules apply beyond *Pimental* (sentence estimate) cases. *See* Def.A.Br. pp. 38-39. Cir.Dkt. 47.

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1. While the *Rodriguez* opinion is unpublished and not precedential, Fed. R. App. P. 32.1 permits it to be submitted for its persuasive value.

The Opinion conflicts with the legal concept of constructive knowledge, holding the Government to knowledge of matters it "should have known" due to its awareness of "certain subsidiary facts" (its possession and physical review of the video) or "could have found out" (its possession of the GPS metadata and, if not free to search it, its ability to seek a new warrant to do so). The performance standards above amplify its constructive knowledge.

The Opinion was required to, but did not, interpret the agreement by examining "the reasonable understandings and expectations of the defendant." *United States v. Palladino*, supra, 347 F.3d at 33. How Defendant and counsel were to have concluded "known" meant "subjectively known" when no court had held that to be the case is unclear. The Government's statements heralding its digital search prowess and describing its thorough search of the digital files led to the reasonable understanding that, if there was any other potential charge in the files, the Government would have known of it and elected to forego it in exchange for Defendant's waiver of his Constitutional rights.

The Opinion conflicts with *Cuero v. Cate*, 850 F.3d 1019 (9th Cir. 2017) wherein the Ninth Circuit held that the foundation of a charge bargain is the parties' agreement as to "what the prosecution will and will not charge and to what the defendant will plead. By definition, a charge bargain means that the prosecution will not later add charges or strikes, just as the defendant will not plead to less than the agreed-upon charges and strikes." *Id.* at 1024. On point, *Cuero* held amending the complaint after the plea agreement to add a new charge

premised on information in its possession at the time of the plea "unequivocally breached its central promise to [defendant]." *Id.*

The Opinion ignores that ambiguities must be interpreted against the Government. *See*, *e.g.*, *Palladino, supra*, 347 F.3d at 33. Confirming the ambiguity of reading "subjectively" into "known to": a) no court had ever held that "known" meant "subjectively known" as opposed to the Government being held to have knowledge of information in its possession; b) the Government's search prowess/execution statements led to the understanding it would have known of any other potential charge in the files; c) Agreement ¶5, confirming the case's termination, did not contain an exception for matters for which the Government lacked subjective knowledge; d) Agreement ¶6, reserving its future rights, did not reserve the right to continue searching the files for evidence of charges not subjectively known; e) doing so was contradictory to the fundamental promise underlying the charge bargain plea; and f) "known to" can alternatively be read as ensuring the Release did not extend to charges based on *future* criminal conduct, the most logical reading of the clause in a charge bargain.

The Opinion conflicts with *Santobello v. New York*, 404 U.S. 257, 260 (1971), explaining that even an innocent mistake by a prosecutor does not justify a plea agreement breach. The Agent's undisclosed failure to follow the search protocols employed in her 100+ prior CP investigations is the only thing precluding the Government from having actual knowledge of the GPS. That mistake cannot override the import of the Agreement's provisions and/or the Government's pre-plea statements.

The Ninth Circuit rejected the same claim of mistake during plea negotiations: "It is equally likely that the prosecution forewent additional legal research and investigation in order to secure a quick, favorable resolution of this case" and "[t]he Government had access to all the information necessary to conclude that Cuero's second conviction constituted a strike, and its failure to do so before entering the plea agreement was exclusively the result of it own negligence at best or a calculated, though incorrect, decision at worst." *Cuero, supra*, 850 F.3d at 1024, n. 3. Both lower court opinions held that the Government had full access to the GPS. In any event, it could and should have sought a warrant.

QUESTION 3

This question provides the Court with the opportunity to determine the constitutional parameters of Fed. R. Crim. P. 41(e) digital searches. Rule 41(e)(2)(B) authorizes the Government to over seize digital information and subsequently review it "consistent with the warrant." Rule 41(e)'s 2009 Committee Notes make clear that, while a presumptive uniform time period for completing the subsequent analysis was considered, it was rejected given the differences between digital searches. Those Notes explain that the open-ended period for the subsequent review was to ensure the Government had time to complete that review. The forensic review was completed by, and summarized in, the 6/5/2018 Report.

When the Government searched the file, it was *eighteen months* since its seizure; *fifteen months* since the forensic review was completed; *ten months* since the Agreement was executed; *eight months* since Defendant,

in reliance on the Agreement, waived his Constitutional rights, pleaded guilty and was incarcerated; and *four months* after sentencing. The unfairness of doing so is palpable.

Various courts have analyzed the constitutional acceptability of delays in *completing* the forensic review. Those accepting delays for any significant length of time have done so because there was an ongoing investigation or to preserve the files for an upcoming trial. *United States v. Ganias*, 824 F.3d 199, 216 (2d Cir. 2016). Both justifications were extinguished by the plea Agreement, occurring ten months prior to the GPS search.

The delay here occurred *after the completion* of the forensic review. The constitutional unreasonableness of this delay must consider two matters. First, in the interim, Defendant waived his Constitutional rights after the Government informed him the CP files had been thoroughly searched and the Agreement confirmed it terminated the case (¶5) and the Government had no intent to further search the seized evidence (¶6). Second, there is no acceptable excuse for the delay as it was the product of the Agent's undisclosed failure to follow established protocols for searching CP. *See Santobello*, *supra*, 404 U.S. at 260.

ALL THREE QUESTIONS

The Opinion will undermine the public's confidence in the fair administration of justice and defendants' willingness to enter into plea agreements.

The Government may now bring charges falling squarely within the Release's terms by asserting it did not subjectively know about it, even if it had all the information to bring it prior to the plea and led the defendant to understand it had thoroughly searched all evidence. The Government can now make no effort to "know" information in its possession until after an agreement becomes final or, worse, ignore information it becomes aware of, later asserting it did not have subjective knowledge of it.

It is hard to understand why any defendant would accept a plea understanding the Government remains free to thereafter send evidentiary files' metadata to another Governmental agency/agent for a search for evidence of a charge beyond the warrant or why counsel would recommend it.

Defendants will "lose faith in the plea-bargaining system by rendering such bargains illusory and untrustworthy" and cause defendants to "rationally require more substantial promises from the prosecution before entering in a plea." *Cuero, supra*, 850 F.3d at 1026

ARGUMENT

QUESTION 1

I. NCMEC acted as a Governmental Agent.

All facets of NCMEC's CVIP (Child Victim Identification Program), which encompasses CRIS, are done at the request of, in combination with, and/or to assist law-enforcement. 81-82a. In CRIS, files are examined through "an electronic evaluation . . . to determine whether

it depicts an identified child." If CRIS does not, the file is "closely" examined, including "location" determination. *Id.*

Accepting Defendant's position will have a limited effect on NCMEC's activities. It only applies when NCMEC reviews files seized by the Government pursuant to a warrant not extending to production and NCMEC seeks to extract GPS. Then, NCMEC would call the submitting agent so that person could, if appropriate, obtain a warrant approving the GPS search.

NCMEC would remain free to "run" submitted files through CRIS. Here, only because CRIS did NOT produce an identification did NCMEC move to its second activity, examining the file for "location" information. NCMEC could unimpededly take all steps not involving a search for a file's GPS, such as facial recognition or analysis of things shown in a video.

II. The GPS search violated the Fourth Amendment's particularity and probable cause requirements.

"The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n. 5 (1984). To avoid "indiscriminate searches and seizures", particularity requires the warrant to 1) specify the offense for which probable cause was found; 2) describe the place to be searched; and 3) specify the items to be seized in relation to the designated crimes. *United States v. Galpin*, 720 F.3d 436, 445-46 (2d Cir. 2013). "Where the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance." *Id.* at 446.

Authorization to search for "general criminal activity" or "'evidence of a crime,' that is to say, any crime, . . . constitute(s) a general warrant." *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992) (citations omitted). Reading the warrant to permit a search for evidence of a non-specified warrant charge, production, for which there was no probable cause, converted the warrant into a search for evidence of "a crime" or "general criminal activity," even if there was probable cause to search for the warrant specified charges of possession/distribution. *See Walter v. United States*, 447 U.S. 649, 656-57 (1980) (scope of search limited by the warrant's authorization).

Ganias found digital files may be fragmented and stored in multiple locations, not that metadata is indistinguishable from the file it describes. To the contrary, "as a *corollary* to this fragmentation, the computer stores unseen information **about** any given file," including metadata. *Ganias, supra*, 824 F.3d at 213. (emphasis added). Metadata is not the same as a digital video. It adjoins it, containing information "about" it. *Ganias* held that, notwithstanding fragmentation, it is still necessary to "segregate responsive data from non-responsive data." *Ganias* further stated: "[forensic examiners] may seek ***responsive*** metadata. . . ." *Id.* at 214 (emphasis added). The Report did not designate GPS or metadata responsive to the warrant.

There was no probable cause to search for GPS/metadata. Neither the warrant Affidavit nor warrant mentioned GPS or metadata. Neither established probable cause to search for it. Dkt. 30. None of the Government's protocols for searching the evidence seized pursuant to the warrant related to where a video was recorded or

mentioned GPS or metadata. Govt.Br., pp. 5-6. Instead, they focused on identifying CP and determining whether it had been on the internet. The Opinion's statement that "the 2018 search warrant authorized a search for the GPS location data at issue" is simply incorrect. 19a.

Agent McCullagh testified that ***the purpose of a GPS search in a CSAM case is to prove who produced it.***[2] Dkt 53: p. 95. Agent Moynihan testified that the file's GPS was not discovered during the forensic review, because the files were only looked at as CP videos. *Id.*, p. 21. The district court's Order held: "The comparison of defendant's images against known collections and the search for information about the location of previously unknown child victims was unnecessary to the proof of the charge of possession." 61-62a.

More directly, the Government admitted the absence of probable cause to search for GPS: "***Lacking reason to review such [location] data*** associated with any specific video or image, ***agents identified files as CSAM without noting the production location of each file***" and "***Absent probable cause*** to believe the lawfully seized CSAM contained evidence of further crimes – a likely situation where law enforcement, ***as in this case,*** had no evidence of hands-on abuse at the time of the initial investigation – law enforcement would not be able to obtain a warrant to share its seized images with NCMEC." Govt.A.Br., pp. 5, 27, n. 7 (emphases added).

Prior to this case, no court had held that GPS metadata to a file labeled contraband loses its right to

2. The Government refers to child pornography as child sexual abuse material or CSAM.

privacy absent probable cause to search for GPS in the pending charge, even before factoring in that the GPS was searched for use in a charge not specified in the warrant. *Riley's* prohibition against searching for GPS without a warrant supported by probable cause combined with *Carpenter's* holding that metadata requires a warrant to search for location information if it raises questions of the right to privacy leads to the conclusion that a search for a file's GPS metadata should require an applicable warrant stating probable cause. *Ganias, supra*, 824 F.3d at 214, found that, to search metadata, it must be responsive to the warrant.

In finding the Government's ability to search for the file's GPS, the district court relied on *Illinois v. Andreas*, 463 U.S. 765 (1983). In *Andreas*, the border patrol legally inspected a container and discovered it contained marijuana. Authorities did a controlled delivery of the resealed container and reseized the marijuana, without a warrant. *Andreas* held that the marijuana was no longer privacy protected because it was deemed contraband in the preceding private search. *Id.* at 771. *Andreas* demonstrates that NCMEC was entitled to rewatch the contraband video, not that the privacy protected GPS information in the video's metadata is transformed into contraband or that privacy protected GPS metadata loses that protection if the file it describes is found to be contraband. The search for GPS in the metadata is akin to searching a separately sealed box inside the *Andreas* container whose contents was not visible, with knowledge that what was sought from the box was privacy protected, for evidence of a crime other than possession of marijuana. Moreover, in *Andreas*, the Government merely duplicated the private search. Here, the warrant did not extend to

evidence of production and the Government, prior to the termination of the case by the plea agreement, had not searched the nonresponsive GPS metadata. Both *Andreas* searches were for the same contraband, for the same crime. Here, the search was for unsearched GPS metadata for a non-warrant specified charge.

United States v. Jacobsen, 466 U.S. 109 (1984), wherein the Government conducted a further search of white powder discovered by the private party, held that "governmental conduct that can reveal whether a substance is cocaine, **and no other arguably 'private' fact,** compromises no legitimate privacy interest," *Id.* at 123 (emphasis added). *Jacobsen* establishes that the Government was *not* entitled to look for the GPS simply because the file was determined to be contraband as its search was performed to reveal privacy protected GPS information.

The Opinion's conclusion that the Government's search was the same as performing lab tests on a blood-stained jacket or examining ledgers in a drug case ignores that the GPS was privacy protected; was not visible when the video is viewed, Dkt. 53: p. 85 (McCullagh); viewing it required a separate search using separate software, Dkt. 53: pp.70; 77 (McCullagh); and NCMEC's GPS search was for potential use in a new charge, unsupported by probable cause.

The Circuit leapfrogged the issue of whether metadata becomes contraband when the file it describes is labeled contraband by finding NCMEC did not conduct a search since it only reexamined "information" that had already been determined to be responsive to the warrant.

Contradicting that position: while the Report designated the video responsive, neither GPS nor metadata were even mentioned in the Report, let alone deemed responsive; neither were mentioned in the warrant Affidavit; the warrant did not grant authority to search for metadata or GPS; none of the Government's protocols for searching the possession/distribution evidence pertained to where a video was recorded or mention GPS or metadata; and the Government admitted it had not searched and had no probable cause to search for GPS. The Circuit's conclusion can only be accurate if one concludes that metadata has no separate existence, rendering it free to be searched if the file it describes is labeled contraband.

Leading to the same conclusion, the Opinion holds that the GPS search was authorized by warrant ¶5a (user or control information); 5¶g (Contextual information) or ¶2b (using the word "production"). *See* Dkt. 30, pp. 5, 7/35. These clauses may only be employed to search for evidence of the warrant-specified charges, possession or distribution. Reading them to confer the right to search for evidence of "production" is to unconstitutionally interpret the warrant.

Nor can they be read to encompass the search. The prelude to ¶2b, "books, ledgers, and records bearing on the production, reproduction . . . ", specifies this paragraph pertains to *interstate commerce*. Dkt 30, p. 6/35. The Opinion failed to explain how GPS is evidence of whether a file was received through interstate commerce. GPS matching the GPS of the computer where the file was found would negate interstate commerce. Even if the file's GPS did not match the computer's, this says nothing about how the file found its way into the computer.

¶5a was expressly limited to "who used, owned or controlled" the computer "*at the time the things described in this warrant* were created, edited, or deleted." On its face this clause is inapplicable since the "things described in this warrant" did **not** include metadata or GPS. Furthermore, ¶5a gave guidance of its intended scope: "such as logs, registry entries, saved usernames and passwords, documents and browsing history." These discrete examples negate the Opinion's broad-brush conclusion that it conferred the right to search for GPS/ metadata for use in a charge not specified in the warrant.

¶5g allows the amorphous seizure of "[c]ontextual information necessary to understand the evidence in this attachment." As established herein, the Government did not search the GPS for contextual information and admitted it had no reason or probable cause to search for it in the pending charges. Govt.A.Br., pp. 5; 27, n. 7. NCMEC performed the search pursuant to CRIS, not pursuant to any of these clauses.

The Government admitted that, **during the forensic review**, prosecutors searched for "information about the user of the tower [computer]", Govt.Br., p. 6, where the video was found, *Id.*, n. 1, and reviewed the seized data for "communications or means of communication that might demonstrate the transfer of [CP]." *Id.*, pp. 5-6. The search for user, contextual and distribution information for this file and the computer where it was found, as related to the warrant's charges, was completed during the forensic review, before NCMEC was sent the files.

The forty-one-page Report, Dkt. 18-9, vividly confirms the same, detailing how searches were undertaken. By

example, p. 13 describes how files' paths indicate if they were likely downloaded from an external source. Page 14 describes the search for computers' "shortcut" files and their relevance to possession or distribution. Page 16 describes the search of computers' windows registry for information on the computer's users. Page 17 describes the search for CP related keywords as well as the search for "bookmarks, downloads, and web history." At odds with the Opinion's suggestion of the need to examine metadata to determine when files were created or modified, pp. 18-19 discuss searching the "*windows based computer*" for "file name, file path, file size, *the date/time the file was created and the date/time the file was modified*." *Id.* (emphasis added). Page after page, the Report documents searches to determine which files were CP; where files were found in the computer; and whether the files had been distributed. These determinations, *made prior to NCMEC's search*, were based on the *computer's content*, including its documentation of internet usage pertaining to files labeled CP, **not** metadata of files labeled CP, particularly for privacy protected GPS.

The Opinion, 14a, correctly notes that digital warrants may lead to seizure of "a vast trove of personal information . . . much of which may be entirely irrelevant to the criminal investigation that led to the seizure." citing *Ganias, supra*, 824 F.3d at 217. Dismissing those concerns, the Opinion states:

> That said, the general principle that law enforcement can reexamine lawfully seized material during the course of an investigation without engaging in a new search has clear application in a case like this, where stored

> data responsive to a search warrant has been separated out from nonresponsive data, and investigators return to reexamine only the responsive material in pursuit of law enforcement ends.

Id. This statement is incorrect in multiple regards. First, whether the GPS was "lawfully seized" depends on whether metadata has an existence separate from the file it describes, requiring probable cause to search for it. If so, there was no warrant or probable cause, rendering NCMEC's search per se unconstitutional. *Horton v. California*, 496 U.S. 128, 140 (2014) (search exceeding the terms of a validly issued warrant is unconstitutional without more). Second, the forensic review found the video, but **not** the video's GPS/metadata, responsive to the warrant. Third, NCMEC's search was *not* conducted "during the course of the investigation." The Opinion acknowledges the forensic review was completed in June 2018. 4-5a. The Agreement's preamble states that it provided for "the disposition of the pending criminal charges." 69a. The Agreement ¶5, 70-71a, confirmed the case was terminated upon sentencing, which occurred prior to the files being sent to NCMEC and its search, precluding an assertion that it was done as part of an ongoing investigation or due to the prospect of trial. *See Ganias*, *supra*, 824 F.3d at 215-16. NCMEC was not repeating what had already been done, pursuant to charges already "dispos[ed]" of. Nor was NCMEC's search for "potentially relevant material" of the two then **non-existent** charges. 18a.

The Opinion's reliance on *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) is misplaced. 19a. *Stuart* examined

the reasonableness of the Government's conduct in a *warrantless* exigent search. *See also Horton*, *supra*, 496 at 136 ("plain view" exception); *Whren v. United States*, 517 U.S. 806, 814 (1996) (traffic stops). The issue here is whether the warrant authorized the Government to conduct a search for GPS, an item not specified as searchable in the warrant, for evidence of production, a charge not specified in the warrant, extracted from metadata, a place not identified in the warrant as a place to be searched, without probable cause to do so, after the warrant specified charges were terminated pursuant to a plea agreement, rendering the case moot and eliminating the court's Article III jurisdiction. Def.A.Br., n. 5.

III. The right to privacy applicable to the video's GPS was undisturbed when NCMEC searched for the GPS.

Confirming the video's GPS remained privacy protected when NCMEC searched for it: a) This file was not in NCMEC's database. Dkt 49: Ex. F (NCMEC emails); Govt.Br., p. 9 (video previously unseen); b) The Government admitted it did not search GPS in the CP files. Dkt. 53: p. 21; c) Agent McCullagh testified that, after receiving NCMEC's GPS email, Analyst Wrisley showed him how *Griffeye*, the Government's GPS software search program, had not flagged this GPS information. *Id.*, p. 75; d) Agent McCullagh admitted the purpose of a GPS search in a child exploitation case is to prove who produced it. *Id.*, p. 95. In contrast, this file was only looked at as a CP video. *Id.*; and e) Agent McCullagh admitted the metadata was not visible when one looks at the video and must be separately searched for. *Id.*, pp. 85-86.

QUESTION 2

I. Setting aside the "known to" clause, the production charge was expressly barred by the Release.

The Agreement precluded the Government from prosecuting Defendant " . . . for any other criminal offenses known to the United States . . . , relative to his knowing possession or distribution of child pornography." 77a.

While production is not identified as a released charge, "any other" is defined as "used to refer to a person or thing that is not particular or specific *but is **NOT** the one named or referred to.*" Def.A.Br. p. 24. Consequently, the Release was not limited to another charge of possession/distribution. Offsetting the Opinion's conclusion that the absence of the word "production" is evidence it did not know of the potential charge, *United States v. Gonzales*, 520 U.S. 1, 5 (1997) held "any other term of imprisonment" means what it says, rather than being limited "to some subset of prison sentences, . . . namely, only federal sentences." and *United States v. Barrow*, 400 F.3d 109, 117 (2d Cir. 2005) held the agreement "unambiguously expresses the parties' intent to create an expansive waiver, applying to 'any evidence,' whether offered directly or elicited on cross-examination."

"Relative to" is defined as "in connection with" or "concerning." Def.A.Br., p. 21. The district court ignored the word "his" in analyzing differences between the possession and production statutes and the conduct underlying those two charges. 60-62a. The comparison demanded by the Release was whether the new charge was in connection with Defendant's possession of CP.

Applying dictionary definitions, any other charge in connection with any videos labeled CP was barred by the Release as they were all possessed by Defendant. This video was labeled CP in the forensic review. Govt.Br, pp. 4, 8.

Defendant's reliance on the term's definitions was reasonable. *United States v. Warren*, 8 F. 4th 444, 450-51 (6th Cir. 2021) (dictionary definitions dictated the scope of the agreement and confirmed the government's plea breach, "strictly" holding the government to its "broad promise").

II. The Government should be held to knowledge of the file's metadata because it was in its possession at the time of the Agreement.

Multiple appellate decisions have found breaches when, post-plea, the Government uses information it possessed pre-plea, even if its significance was not recognized. In *Palladino*, the Government had listened to an audio tape, but failed to recognize its full import. *Palladino, supra*, 347 F.3d at 31. After the PSR noted an enhancement for evidence of intent, the Government re-listened to the tape, realized it could be used to show intent, and sought enhancement. Focusing on an objective analysis of the Release's "known to" clause, the court held the Defendant would have understood the Government to have known information in its possession at the time of the plea. *Id.* at 32. Defendant's and Palladino's Releases are virtually identical.

The Government's statements of search prowess/ execution led to the same conclusion: the Government

would have known of information in its possession. The Opinion's attempt to distinguish *Palladino* by noting that prosecutors had listened to the tape while, here, prosecutors watched the video but did not exercise their right to review its GPS, does not change Defendant's reasonable understanding of the Release. Defendant was not privy to the Government's knowledge. His understanding of the Government's knowledge was defined by the Agreement's provisions and the Government's statements. In hindsight, the Government may well have elected to forego bringing a charge based on a ninety-seven second video not showing the face of either person in it.

The Agreement's terms also supported the reasonable understanding the Government would have known of information in its possession. The Release covered any other charge in connection with the CP files; the preamble stated it was in "disposition of the pending charges"; (¶5) confirmed sentencing terminated the case; and (¶6) reserved the right to take five future actions, but not to continue searching the files. *See Cuero v. Cate*, *supra*, 850 F.3d at 1025 (Government's responsibility to reserve such a right); United *States v. Transfiguracion*, 442 F.3d 1222, 1232 (9th Cir. 2006) (same, as the Government is the repeat player in plea agreements).

Critically, the Opinion's holding that the Government did not engage in a new search because it only re-examined "information" found to be responsive to the warrant attributes knowledge of the metadata's GPS to the Government. Its failure to attribute knowledge of the same "information" to the Government for purposes of determining what "known to" meant in the Release is

contradictory. Either it is held to have knowledge of the metadata's GPS and violated the Agreement, or it is not and violated the Fourth Amendment.

United States v. Habbas, 527 F.3d 266 (2d Cir. 2008), cited as allowing a subsequent search of known information is distinguishable. In *Habbas*, the agreement revealed: a) its sentence recommendation was based on "the likely adjusted offense level"; b) its "estimate . . . was not binding" and c) "the government reserves the right to argue for a sentence beyond that called for by the Guidelines." *Id.* at 270. Had Defendant's Agreement contained a Release limited to "a further charge of possession/distribution"; disclosed "known" meant "subjectively known"; revealed the Government was not finished searching the files; and reserved the right to send the files to NCMEC for a further analysis, *Habbas* would be on point. It did none of these.

United States v. Wilson, 920 F.3d 155 (2d Cir. 2019) held the Government to knowledge of *new* information acquired at a subsequent trial because it had sufficient information prior to the plea agreement to have been aware of the basis for the conduct later relied on. The new information, that the defendant sold 800 grams more of crack cocaine than previously known; used a gun during the conspiracy; and threatened gun violence, increased the defendant's exposure from 108-135 months to 360 months to life.

Equally applicable here, *Wilson* held that, because the Government's conduct changed the defendant's "exposure so dramatically," he could not reasonably be seen to have understood the risks of the agreement. *Id.* at 165. While

the Government in *Wilson* pointed to additional facts learned at the trial, when the instant Agreement was entered, the Government possessed all facts pertaining to the new charge. While the Government retained the ability to seek sentencing enhancements based on "new" information in *Wilson*, *Id.* at 158, here, the Government did not reserve *any* right to continue to search the files labeled CP or bring additional charges. While the *Wilson* defendant understood the future trial of his co-conspirator might reveal harmful evidence, here, Defendant understood that the Government had completed its search of the seized files. While the *Wilson* defendant faced an additional 265 months, Defendant received an additional 240 months, *on top of* 45 months from the prior sentence.

United States v. Edgell, 914 F.3d 281 (4th Cir. 2019) held the Government breached the plea by attempting to use a post-plea lab analysis of the drug because it was in the Government's possession at the time of the plea. Equally applicable here, *Edgell* held "[t]he government's apparent misjudgment about the importance of the lab report is not grounds for relieving the government of its obligations under the plea agreement" and:

> . . . each [party] assume[d] the risk of future changes in circumstances in light of which [their] bargain may prove to have been a bad one. Just as we often enforce plea agreements against criminal defendants even in the face of subsequent, favorable changes in the law, so, too, must we enforce plea agreements that may later prove less advantageous than the government had anticipated.

Id. at 289. *Edgell* imposed the risk of what the subsequent analysis would reveal on the Government. *Id*. Here, the Government assumed the risk of what NCMEC's analysis might reveal by failing to have the analysis performed prior to the plea and/or including provisions in the Agreement to protect itself.

Cuero, *supra*, 850 F.3d at 1022 held the attempt to use the post-agreement realization of a prior conviction which the state was aware of, but had not realized its import, violated the plea agreement and the defendant's due process as it violated the fundamental promise underlying the agreement: based on the evidence in the Government's possession at the time of the agreement, he would be charged only with the stated offense.

Palladio; *Walker*; *Edgell*; and *Cuero* examined what defendants' reasonable understanding would have been based on the courts' objective analyses of the Government's statements. None denied the import of the Government's statements by concluding the defendant was aware of the information or conduct relied on by the Government to deviate from the agreement. Had it done so, each of their holdings would have been in favor of the Government. Palladino's voice was on the tape; Walker engaged in the conduct; it was Edgell's drug; and the rap sheet was Cuero's. Noting the importance of defendants' constitutional waivers, the Ninth Circuit held that the reasonableness of a defendant's understandings should be determined based on "objective standards." *United States v. De La Fuente*, 8 F.3d 1333, 1337 & n. 7 (9th Cir. 1993); *Rodriguez-Garcia, supra*, 497 F. App'x. at 767 (unpublished) (same).

The Opinion wholly ignored the Government's statements and their import to the reasonable understanding of the Agreement. It apparently concluded Defendant did not rely on those statements because he and his daughter are in video. Thus, it repeatedly incorporated the *Government's briefs'* adverb/adjective ladened descriptions of the video's content and its *unproven* attributions of it to Defendant. 2a (Johnson "sexually assaulted his . . daughter and filmed the abuse."); 12a (. . . video of his daughter's abuse . . . "); 26a (" . . . no proof the "Government was aware of Johnson's sexual abuse of his daughter . . . "). The Opinion states that its recitation of the facts was taken from, *inter alia*, *pleadings*. 3a, n. 1. In contrast, the lower court stated the file "depicted possible sexual abuse . . . " 57a.; " . . . defendant's alleged abuse. . . ." 62a.; and "The file appeared to depict. . . ." 35a.

Failing to consider the import of the Government's statements and the contents of the Agreement by concluding the existence of an unproven fact was clear error. Governmental argumentative characterizations do not constitute evidence of guilt or findings of fact. No hearings were held on the issue of who is in the video. Admitting guilt does not establish facts not litigated and decided. *Haring v. Prosise*, 462 U.S. 306, 321 (1983). In the November 2021 Plea Agreement, Defendant did not admit to producing *this* video, or that it depicts him and his daughter. Who is in this video is the subject of the pending State charge denied by Defendant.

QUESTION 3

I. The search was constitutionally unreasonable under the Fourth Amendment.

The touchstone of the Fourth Amendment, including the manner searches are carried out, is reasonableness. 20a. The GPS search occurred fifteen months after the *completion* of the forensic review. Defendant found no court addressing, let alone accepting, this type of post-review search delay. The Government advanced no acceptable excuse for the delay. It was based on the Agent's undisclosed failure to follow standard search procedures. *See Santobello*, *supra*, 404 U.S. at 260. *See also Cuero*, *supra*, 850 F.3d at 1019, n. 3 (rejecting the same claim of mistake in failing to realize the importance of information in the Government's possession at the time of a plea agreement because its failure to do so was attributable to either the Government's negligence or intentional conduct).

The Opinion's reasonableness analysis is premised on the same inaccurate assertion that NCMEC was merely re-examining digital material timely identified as responsive to the warrant. Neither metadata nor GPS were deemed responsive. The Opinion cites no support for the Government's ability to continue to "reexamine" evidence, 14a (three times), 20a (NCMEC's "reexamination" of previously identified "responsive information"), after the charge justifying its seizure was "dispos[ed]" of by a plea Agreement. 69a (preamble). Even had the GPS/

metadata been deemed responsive, which it was not, this does not demonstrate the reasonableness of waiting fifteen months after the responsiveness review to search for it, particularly given the intervening events.

In *Ganias*, the district court's sole case argued to support the delay, there was no guilty plea, the Government was moving toward trial and, once prosecutors found probable cause to allege a crime against the accountant, it obtained a *new* warrant to search for evidence of the accountant's involvement, as it was beyond the seizure warrant. *Ganias, supra*, 824 F.3d at 216. These factors are the opposite here. The guilty plea terminated the prior case, eliminating any prospect of trial, and the Government did not seek a new warrant to search for evidence beyond the seizure warrant.

United States v. Jarman, 847 F.3d 259 (5th Cir. 2017), relied on by the Circuit, does not demonstrate the Government's search was constitutionally timely. *Jarman* explained that nineteen of the twenty-three-month delay in completing the forensic review was spent conducting a "taint" analysis to eliminate potential attorney privileged materials, finding reasonable four months to complete the responsiveness review. *Id*. at 263; 266. The instant delay occurred after the forensic review was completed and the case was terminated by the Agreement.

While NCMEC's goals of locating children and seeking their restitution are laudable, when it functions

as a government agent, it nonetheless must comply with applicable Constitutional limitations. Just as NCMEC is not constitutionally permitted to exceed the scope of a private search, *see*, *e.g.*, *United States v. Ackerman*, 831 F.3d 1292, 1296-1301; 1306 (10th Cir. 2016), it is not allowed to conduct a search for privacy protected evidence of a charge not identified in the seizure warrant for which there was no probable cause. *Walter*, *supra*, 447 U.S. at 656-57. Nor was the Government allowed to use NCMEC to conduct a constitutionally untimely search.

II. The Government's NCMEC search violated Defendant's Fifth Amendment due process protections.

A valid plea must be entered into voluntarily and knowingly. *See Mabry v. Johnson*, 467 U.S. 504, 509 (1984). ("[W]aivers of constitutional rights . . . must be . . . done with sufficient awareness of the relevant circumstances and likely consequences," otherwise it is inconsistent with due process); *Brady v. United States*, 397 U.S. 742, 748 (1970) ("[When] a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); *Santobello*, *supra*, 404 U.S. at 262. (1971).

Defendant was led to understand the Agreement would result in three benefits. First, the prior case would be terminated. Agreement ¶5 so stated.

Second, the Government was finished with the CP files used to convict him. Agreement ¶6 demonstrated the Government's understanding of its obligation to anticipate future contingencies and include provisions in the Agreement to protect itself if it sought such protections and its intent not to further search the files by reserving the right to take five future actions, but not the right to further search the files.

Third, the premise of the charge bargain was the Government's agreement that, based on the seized evidence, Defendant would only be charged with possession.

The Government's actions denying Defendant any or all of these benefits vitiated the voluntary and knowing nature of his entry into the Agreement. Just as *Mabry*, *Brady* and *Santobello* dictate that a defendant's entry into an agreement without these prerequisites being satisfied violates due process, a post-plea extraction of those prerequisites must also be held to violate due process.

When the Government breaches the plea agreement itself, the defendant is entitled to choose between voiding the agreement or requiring specific performance. *Santobello, supra*, 404 U.S. 257 at 262-63. Logically, the same should be true when the Government violates a defendant's due process protections by actively precluding the fulfillment of the benefits it promised him upon entering into the agreement. Having fully served the incarceration portion of the 2019 sentence, Defendant requests specific performance.

CONCLUSION

For the foregoing reasons, Defendant's petition for a writ of certiorari should be granted.

DATED: July 25, 2024.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED FEBRUARY 27, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 22-1086

UNITED STATES OF AMERICA,

Appellee,

-v.-

CORY JOHNSON,

Defendant-Appellant.

February 17, 2023, Argued; February 27, 2024, Decided

Before: LIVINGSTON, Chief Judge, CARNEY, and BIANCO, Circuit Judges.

DEBRA ANN LIVINGSTON, *Chief Judge*:

Defendant-Appellant Cory Johnson ("Johnson") appeals from a May 12, 2022, judgment of the United States District Court for the District of Vermont (Crawford, *C.J.*), convicting him of a single count of the knowing production of child pornography in violation of 18 U.S.C. § 2251(a), and sentencing him to a term of imprisonment of 240 months, to be followed by a 15-year term of supervised release. When Johnson was first

identified by federal authorities as trading child sexual abuse material ("CSAM") within an Internet chat group in 2018, the execution of a search warrant at his South Burlington, Vermont home resulted in the seizure of electronic media containing over 8,000 videos and over 6,000 images of such material. Johnson was first indicted for the distribution of child pornography but as the result of a plea agreement pled guilty to a superseding information charging him only with the possession of child pornography. For that crime, he was sentenced principally to a 45-month term of imprisonment. A later review of previously seized and segregated digital data responsive to the original warrant produced evidence that Johnson had not only possessed child pornography in 2018 but had sexually assaulted his then two-and-a-half-year-old daughter and filmed the abuse. Johnson was indicted on the present production charge in 2019 and again pled guilty, this time reserving the right to appeal the denial of his motions to suppress evidence and to dismiss the 2019 charge as precluded by his 2018 plea agreement. As explained below, we conclude that Johnson's arguments on appeal are without merit. Accordingly, we affirm the district court judgment.

Appendix A

I. Factual Background[1]

A. The 2018 Investigation

In March 2018, a North Carolina-based Homeland Security Investigations ("HSI") Special Agent infiltrated a chat group on Kik, a smartphone messaging app, and obtained several videos of CSAM from a user named "textiles."[2] Upon consulting subscriber information subpoenaed from Kik and Comcast and matching that information to a public Facebook page, the special agent came to suspect that "textiles" was Johnson. Because Johnson lived in South Burlington, Vermont, the information developed in North Carolina was forwarded for further investigation to Vermont-based HSI Special Agent Caitlin Moynihan ("SA Moynihan").

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1. The factual background presented here is taken principally from the complaints, indictments, and warrant applications in the two prosecutions of Johnson, as well as the parties' filings, testimony and evidence before the district court at evidentiary hearings on the combined motions, and the district court's pertinent opinions. *See United States v. Johnson*, No. 18-CR-41 (D. Vt.) ("2018 District Court Docket"), 2018 District Court Docket No. 1-3; 2018 District Court Docket No. 5-1; *see also United States v. Johnson*, No. 19-CR-140 (D. Vt.) ("2019 District Court Docket"), 2019 District Court Docket No. 29-8.

2. HSI is the primary investigative division of the U.S. Department of Homeland Security. *See* Homeland Security Investigations, ICE.gov, https://www.ice.gov/about-ice/homeland-security-investigations.

After further querying a Vermont state law enforcement database, conducting surveillance outside Johnson's house, inspecting license plate registrations, and verifying Johnson's identity by tracking him down at his job behind a Costco deli counter, SA Moynihan sought and obtained a warrant to search Johnson's home for CSAM and evidence of crimes involving child pornography. *See* Supp. App'x 5-6. The warrant authorized the seizure of any "records, documents, and items," including any electronic devices, constituting, in relevant part, "evidence, contraband . . . and property . . . used in violations of Title 18 U.S.C. § 2252A, relating to material involving the receipt, distribution, transportation and possession of child pornography." Supp. App'x 5. Records "bearing on the production . . . of any visual depictions of minors engaged in sexually explicit conduct as defined in 18 U.S.C. § 2256" were also subject to seizure. Supp. App'x 7. As for any electronic device found to contain CSAM, the warrant authorized, *inter alia*, seizure of evidence "of who used, owned or controlled" the device at the time such material was created, edited, or deleted; evidence of the times the device was used; and "[c]ontextual information necessary to understand" the material subject to seizure. Supp. App'x 8.

The search warrant was executed on March 20, 2018. HSI special agents seized "multiple computers, cell phones, tablets, cameras, thumb drives, and other electronic devices," and Johnson was charged with distributing child pornography the same day. App'x 27. A subsequent forensic review of the seized material, completed in June 2018, revealed approximately 8,816

videos and 6,931 images of CSAM on multiple devices, as well as other digital evidence falling within the search warrant's scope.

Originally charged with the distribution of child pornography, Johnson entered into a written plea agreement with the Government in November 2018 pursuant to which he ultimately pled guilty to a single count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The agreement included the following provision:

> 12. The United States agrees that in the event that CORY JOHNSON fully and completely abides by all conditions of this agreement, the United States will:
>
> a. not prosecute him in the District of Vermont for any other criminal offenses known to the United States as of the date it signs this plea agreement, committed by him in the District of Vermont relative to his knowing possession or distribution of child pornography. . . .

App'x 69. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the parties stipulated to a term of imprisonment of 45 months. Johnson entered his plea on January 4, 2019. The United States District Court for the District of Vermont (Crawford, *C.J.*) imposed the 45-month sentence in May of 2019.

B. The 2019 Investigation

About a month later, SA Moynihan sent the National Center for Missing and Exploited Children ("NCMEC") copies of the contraband video and image files - the CSAM - provided to her by the HSI forensic analyst who had located this material on Johnson's devices and flagged it as responsive to the search warrant.[3] This segregated material constituted a subset of the much larger body of digital data on his various devices. Law enforcement agencies like HSI regularly submit such material to NCMEC, which is organized as a private nonprofit but established by Congress,[4] so that newly seized CSAM can be compared with material in the NCMEC database in order to identify children not previously known to law enforcement who might be at risk and to assist in obtaining restitution for victims.[5] Ordinarily this review would have been conducted during the investigatory phase of

3. HSI submitted 3,761 images and 3,653 video files to NCMEC after removing various duplicate CSAM files found on the multiple devices.

4. *See* Missing Children's Assistance Act, Pub. L. No. 98-473, div. II, § 660, 98 Stat. 2125 (1984) (codified as amended at 34 U.S.C. §§ 11291 *et seq.*).

5. NCMEC "maintain[s] a database of known collections of child pornography." App'x 27. Its Child Victim Identification Program is used to compare investigative files with already-known CSAM images and videos in order to identify at-risk children and assist in providing restitution to victims by identifying the actual children depicted.

Johnson's original prosecution, but SA Moynihan forgot to send NCMEC the files until June.[6]

After conducting its review over the summer, NCMEC notified SA Moynihan that it had identified a video that was not already in its CSAM database. In an email on September 4, 2019, NCMEC informed SA Moynihan that the video, which depicted the sexual abuse of a toddler by an adult, appeared to have been created near Burlington, Vermont. NCMEC based this determination on the video's metadata, which included GPS coordinates indicating that the video may have been produced in South Burlington.[7] SA Moynihan retrieved and reviewed the video file, which

6. Based principally on SA Moynihan's testimony at the suppression hearing, the district court found that this deviation from normal procedure was an oversight and that "[t]here is no basis for concluding that SA Moynihan intentionally postponed the submission of the file to NCMEC until the Government had secured a guilty plea and a conviction." *See* App'x 28. Johnson does not challenge this factual finding on appeal.

7. "Metadata" refers generally to digital information about other digital files including, e.g., a file's author, the times it was modified, or - as is often the case for images and videos - the GPS coordinates where it was created. *See* 1 JAY E. GRENIG & WILLIAM C. GLEISNER, III, EDISCOVERY & DIGITAL EVIDENCE § 4:13 Metadata types (2023); Sharon D. Nelson & John W. Simek, *Metadata in Digital Photos - Should You Care*?, 87 WIS. LAW. 43 (2014). The video at issue had been identified as CSAM during HSI's forensic analysis, but the GPS metadata had not previously been reviewed. At the time of HSI's analysis, the forensic examiner could not have ascertained whether GPS data was embedded in the many videos identified as CSAM other than by going through them one at a time and using a different software than the software used to locate the contraband videos.

was originally located among the digital files on a cell phone seized from Johnson. The video depicted an adult male abusing a young girl "by rubbing his penis against her buttocks and ejaculating." App'x 28. SA Moynihan recognized Johnson's voice in the video and believed the young child to be about the age of Johnson's daughter at the time the video was created. After matching the GPS longitude and latitude coordinates provided by NCMEC to the approximate location of Johnson's house, SA Moynihan sought a second warrant to again search Johnson's home, this time looking for distinctive bedding that appeared in the background of the video: a white and pink blanket; a yellow, pink, and blue-flowered sheet; a pink pillow with flowers and butterflies; and fabric decorated with a green elephant.[8]

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8. Johnson had moved from one house to another since the first search, and since the video was apparently produced. The warrant application, which was for the new residence, stated that "it is common for individuals to move their belongings from one residence to a new residence" such that it remained probable Johnson still possessed the bedding. 2019 District Court Docket No. 29-8 at 9.

As later conceded by the Government, the warrant application contained an error regarding the GPS coordinates. SA Moynihan attested that upon entering the coordinates into a Google Maps program, they "resolved back to a residence located at 7 Kingfisher Court in South Burlington," which was Johnson's former residence. App'x 28. In fact, the "pin" location in the Google Maps program was 1 Kingfisher Court, a nearby location. The district court determined that SA Moynihan had made an honest mistake and that "[a] search warrant application showing that the video found on Mr. Johnson's cell phone was produced in the immediate vicinity of his prior address - but at 1 Kingfisher rather than 7 Kingfisher - would have been sufficient to support probable cause." App'x 29-30.

The second warrant issued in September 2019. When the execution of that warrant turned up the bedding seen on video, the Government sought and obtained an indictment from the Grand Jury charging Johnson with production of child pornography in violation of 18 U.S.C. § 2251(a). The present prosecution ensued.

II. Procedural History

Before the district court, Johnson sought to suppress the digital data seized during the 2018 search and reviewed by NCMEC in 2019 (*i.e.*, the CSAM video of his daughter and its associated metadata), as well as the fruits of the 2019 search of Johnson's home, including the seized bedding. As relevant to this appeal, Johnson argued that NCMEC, acting as a Government agent, violated the Fourth Amendment by searching data beyond the scope of the 2018 warrant for evidence of a new crime (*i.e.*, production of child pornography, rather than distribution and possession). Even if NCMEC's search was within the scope of the initial warrant, Johnson further urged, it still violated the Fourth Amendment because it was not conducted within a reasonable time.

Johnson also sought dismissal of the 2019 indictment, arguing that the production charge was precluded by his 2018 plea agreement and that the Government had breached the agreement by prosecuting him again. Johnson argued that the new charge ran afoul of the Government's promise not to prosecute him in the District of Vermont "for any other criminal offenses known to the United States" as of the date it signed the plea agreement "committed by

him in the District of Vermont relative to his knowing possession or distribution of child pornography." *United States v. Johnson*, No. 19-CR-140 (D. Vt.) ("2019 District Court Docket"), Docket No. 20 at 9-12. He contended that even if the production offense was not actually known to the Government, he nonetheless reasonably expected that it was, and that the plea agreement should be interpreted so as to uphold his reasonable expectation.

The district court denied the motions in October 2020 and June 2021 orders. *See* 2019 District Court Docket No. 41 (the motion to dismiss); *United States v. Johnson*, No. 19-CR-140, 2021 U.S. Dist. LEXIS 122802, 2021 WL 2667168 (D. Vt. June 29, 2021) (the motion to suppress).

As to the suppression motion, the district court concluded that even assuming *arguendo* that NCMEC acted as an agent of law enforcement in reviewing the CSAM in 2019, the Fourth Amendment was not violated. NCMEC reviewed only known contraband, the district court concluded, in which Johnson had no Fourth Amendment interest that could be infringed by the search, its timing, or by any subsequent review of the same digital material by SA Moynihan. The district court thus denied Johnson's motion to suppress the video of his daughter and its GPS metadata. The court also declined to suppress the items recovered from Johnson's home in the 2019 search pursuant to the second warrant, concluding that no Fourth Amendment violation had occurred.

As to the motion to dismiss, the district court declined to dismiss the indictment, holding that Johnson's 2018 plea

agreement did not preclude the subsequent production charge for two independent reasons. First, the court determined that the plea agreement excluded future prosecution only for crimes "relative to knowing possession or distribution of child pornography" and that "the new charges," for production of child pornography, did not fall within this prohibition. App'x 19, 23. The court reasoned that production of child pornography is a fundamentally different crime than possession or distribution of it, both in its legal elements and its ordinary understanding. *See* App'x 19 (comparing statutory elements and observing, "[m]aking a movie is fundamentally different from going to the theatre"). Second, concluding that the plea agreement prohibited the Government from prosecuting Johnson only for "any other criminal offenses known to the United States as of the date it sign[ed] [the] plea agreement," the district court held that the new charges were "based on new information which arrived after final judgment issued in the first case." App'x 18, 23. "Either reason," the district court concluded, "is sufficient to defeat [the] motion to enforce" the agreement. App'x 23.

The district court accepted Johnson's conditional guilty plea on the production charge and sentenced him to 240 months of imprisonment for that crime, to be followed by a term of 15 years of supervised release. This appeal followed.

DISCUSSION

Johnson contends on appeal that (1) the district court erred in denying his motion to suppress because NCMEC's review of the metadata associated with the

CSAM video of his daughter's abuse, which prompted SA Moynihan's review of the video and her subsequent investigation, violated the Fourth Amendment; and (2) the district court erred in denying his motion to dismiss the production indictment because this second prosecution was barred by his earlier 2018 plea agreement. Johnson argues that this Court should reverse the denial of his suppression motion, order specific performance of the 2018 plea agreement, and dismiss the second indictment with prejudice. For the following reasons, we disagree.

I. The Suppression Motion

As to the suppression motion, Johnson argues that NCMEC acted as a Government agent when reviewing his digital data and that the Government violated the Fourth Amendment in conducting this review by searching for evidence—namely, the GPS metadata—beyond the scope of the 2018 warrant, and in order to investigate a crime not specified in that warrant.[9] Johnson further contends that even if the examination of the metadata was within the scope of the 2018 warrant, the review of that data in September 2019 did not occur within a constitutionally reasonable time after the issuance of the warrant in April 2018. The district court thus erred, according to Johnson, in concluding that no Fourth Amendment violation occurred, and that suppression was not warranted.

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9. Because his conditional plea agreement does not permit it, Johnson does not challenge the denial of his motion to suppress evidence seized pursuant to the 2019 search warrant (*i.e.*, the bedding found in his home) except insofar as such evidence can be characterized as a fruit of the NCMEC search.

These claims are without merit. Assuming *arguendo* that NCMEC acted as a Government agent in reviewing the CSAM files located on Johnson's digital devices and identified pursuant to the 2018 search warrant, it in no way violated the Fourth Amendment in conducting this review. NCMEC examined digital material that was responsive to the 2018 search warrant and that had already been segregated from Johnson's other digital information as falling within the warrant's scope. Neither NCMEC nor SA Moynihan violated the Fourth Amendment by examining this previously-segregated, responsive digital information, nor, contrary to Johnson's claim, was this examination constitutionally unreasonable because of its timing. Accordingly, we affirm the order of the district court denying Johnson's motion to suppress.

* * *

As an initial matter, NCMEC's review of the digital information provided to it by SA Moynihan did not constitute a search for Fourth Amendment purposes, even assuming *arguendo* that NCMEC acted as a Government agent in reviewing this material. Pursuant to Federal Rule of Criminal Procedure 41(e)(2)(B), the 2018 search warrant authorized the seizure of electronic storage media for later review "to determine what electronically stored information [fell] within the scope of the warrant." Fed. R. Crim. P. 41 Advisory Committee's Note (2009) (noting that Rule 41 "acknowledges the need for a two-step process" in which officers may seize or copy a storage medium for later off-site review, given the large amounts of information often contained in electronic storage media).

After the seizure of Johnson's electronic storage devices, material responsive to the warrant was identified during a forensic review that was completed in June 2018. The CSAM examined by NCMEC in 2019 had thus already been identified as responsive and segregated from the remainder of Johnson's digital information.

When criminal investigators reexamine evidence that has lawfully been seized pursuant to a warrant - returning to look again at a drug ledger, for instance, or to perform lab tests on a blood-stained jacket - we do not ordinarily view such investigative steps as constituting a new Fourth Amendment event. To be sure, as this Court has said before, the seizure of electronic devices, which "can give the government possession of a vast trove of personal information about the person to whom [the devices] belong[], much of which may be entirely irrelevant to the criminal investigation that led to the seizure," is very different from the seizure of a drug ledger or an item of clothing. *United States v. Ganias*, 824 F.3d 199, 217 (2d Cir. 2016). For this reason, the mere fact that digital material has been lawfully collected does not in all circumstances permit the future review of stored information. *See United States v. Hasbajrami*, 945 F.3d 641, 670 (2d Cir. 2019). That said, the general principle that law enforcement can reexamine lawfully seized material during the course of an investigation without engaging in a new search has clear application in a case like this, where stored data responsive to a search warrant has been separated out from nonresponsive data, and investigators return to reexamine only the responsive material in pursuit of law enforcement ends.

Johnson argues that this case falls outside the general rule on the theory that the 2018 search warrant did not, in fact, authorize the search for and seizure of the metadata—including GPS information—associated with his CSAM. He asserts that "[n]either the 2018 Affidavit nor warrant mention GPS," and that "[n]either GPS nor metadata were designated responsive to the warrant." Appellant's Br. at 46, 48-49; Reply Br. at 26. Further, he says that NCMEC accessed his GPS data only to prove that Johnson *produced* the CSAM video of his daughter and that such a search necessarily exceeded the scope of the 2018 warrant, which was limited to the search for evidence of possession or distribution of child pornography. Both of these arguments are without merit.

We "look directly to the text of the search warrant to determine the permissible scope of an authorized search." *United States v. Bershchansky*, 788 F.3d 102, 111 (2d Cir. 2015). Here, the 2018 search warrant provides for the seizure of

> records, documents, and items that constitute evidence, contraband, fruits of crime, other items illegally possessed, and property designed for use, intended for use, or used in violations of Title 18 U.S.C. § 2252A, relating to material involving the receipt, distribution, transportation and possession of child pornography, in any form wherever it may be stored or found . . .

Supp. App'x 5. The warrant goes on to list a wide variety of electronic data storage devices, making clear that both

the devices and "any visual depictions of child erotica and obscene visual representations of the sexual abuse of children in any of the above"—*i.e.*, the electronic CSAM files themselves - are subject to seizure. Supp. App'x 6. The warrant also expressly authorizes the seizure of "records bearing on the production" and "reproduction" of such depictions, not only records reflecting transactions in visual depictions of minors engaged in sexually explicit conduct. Supp. App'x 7. Finally, the warrant explicitly provides for the seizure and search of,

> [f]or any computer hard drive or other electronic media (hereinafter, COMPUTER") found to contain information otherwise called for by this warrant . . . [e]vidence of who used, owned or controlled the COMPUTER at the time the things described in this warrant were created, edited, or deleted, such as logs, registry entries, saved usernames and passwords, documents, and browsing history . . . ; [e]vidence of the times the COMPUTER was used . . . ; [and] [c] ontextual information necessary to understand the evidence in this attachment[.]

Supp. App'x 8.

Together, these provisions in the 2018 search warrant can only be read to authorize a search for the metadata embedded in files containing CSAM, even if neither the terms "GPS" nor "metadata" themselves appear in the warrant. As we have repeatedly observed in the context of digital searches, "[t]he Fourth Amendment does not

require a perfect description of the data to be searched and seized," and "it will often be impossible to identify in advance the words or phrases that will separate relevant files or documents before [a] search takes place."[10] *United States v. Ulbricht*, 858 F.3d 71, 100, 102 (2d Cir. 2017), *abrogated on other grounds by Carpenter v. United States*, 585 U.S. 296 (2018). Metadata is, by definition, data about other data: it may reveal who "created, edited, or deleted" digital data; identify when other data was accessed; and provide necessary "[c]ontextual information . . . to understand" digital files. Supp. App'x 8. Such evidence is expressly sought in the 2018 search warrant—and indeed defined more carefully than a simple reference to metadata would have achieved.

Johnson's response—that "*[w]here* a video is recorded has nothing to do with whether it is [CSAM] or was received or transferred on the internet," Appellant's Br. at 46 (emphasis added)—gives us no reason to distinguish between GPS location information and metadata more generally. The warrant specifically authorizes the seizure, among other things, of "[e]vidence of who used, owned or controlled" any electronic storage device "found to contain information otherwise called for by this warrant," at the

10. Indeed, we have long recognized the same principle outside the digital context. *See, e.g., United States v. Riley*, 906 F.2d 841, 845 (2d Cir. 1990) ("It is true that a warrant authorizing seizure of records of criminal activity permits officers to examine many papers in a suspect's possession to determine if they are within the described category. But allowing some latitude in this regard simply recognizes the reality that few people keep documents of their criminal transactions in a folder marked 'drug records.'").

time such information—including CSAM—was "*created*, edited, or deleted." Supp. App'x 8 (emphasis added). And contrary to Johnson's claim, information as to the location at which child pornography is produced *is* potentially relevant to identifying those who possess or distribute it, as well as to establishing the requisite nexus to interstate or foreign commerce that 18 U.S.C. § 2252A, referenced in the 2018 search warrant, requires. More generally, so long as a warrant seeking digital evidence is sufficiently particular—as this one is—it may *properly* "be broad, in that it authorizes the government to search . . . for a wide range of potentially relevant material." *Ulbricht*, 858 F.3d at 102; *see also United States v. Purcell*, 967 F.3d 159, 181 (2d Cir. 2020) (affirming Fourth Amendment reasonableness of warrants authorizing broad searches of both digital and non-digital locations "so long as probable cause supports the belief that the location to be searched—be it a drug dealer's home, an office's file cabinets, or an individual's laptop—contains extensive evidence of suspected crimes"). The GPS location data here thus falls comfortably within the search warrant's language, just as surely as does information regarding the dates the CSAM video was modified or accessed.[11]

Johnson's remaining challenges to NCMEC's retrieval of the GPS information are similarly deficient. To the

11. Because we conclude that NCMEC's search was authorized by the terms of the 2018 search warrant, we need not reach the district court's conclusion that the GPS metadata, because associated with a digital file that is itself contraband, was also contraband, defeating Johnson's claim to retaining any Fourth Amendment interest in this information.

extent he argues that the NCMEC review was infirm because it was *motivated* by the objective of finding evidence of production of child pornography, rather than the possession or distribution of it, this argument is foreclosed by the general Fourth Amendment principle that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) (quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978)). Here, the 2018 search warrant authorized a search for the GPS location data at issue. In such circumstances, and assuming *arguendo* that NCMEC acted as a Government agent in reexamining the material earlier deemed responsive to that 2018 search warrant, the motivations of its personnel are not relevant. *See Horton v. California*, 496 U.S. 128, 138, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement."); *cf. Whren v. United States*, 517 U.S. 806, 814, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* [an officer's] subjective intent.").

Johnson next argues that even assuming the GPS metadata fell within the scope of the 2018 warrant, NCMEC's retrieval of this information in 2019 violated

the Fourth Amendment because it was untimely, as "judged not just by the passage of time, but also by the significance of the intervening events," including Johnson's prosecution, guilty plea, and sentencing. Appellant's Br. at 58. We again disagree. Assuming *arguendo* that delays in the forensic examination of digital material seized pursuant to a warrant might in some circumstances implicate the Fourth Amendment, that is not the case here.

"The touchstone of the Fourth Amendment," as we have said before, "is reasonableness." *United States v. Miller*, 430 F.3d 93, 97 (2d Cir. 2005) (alteration omitted) (quoting *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001)). To be sure, "the Fourth Amendment's proscription of unreasonable searches and seizures 'not only . . . prevent[s] searches and seizures that would be unreasonable if conducted at all, but also . . . ensure[s] reasonableness in the manner and scope of searches and seizures that are carried out.'" *Lauro v. Charles*, 219 F.3d 202, 209 (2d Cir. 2000) (alterations in original) (quoting *Ayeni v. Mottola*, 35 F.3d 680, 684 (2d Cir. 1994), *abrogated on other grounds by Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)). Here, however, NCMEC's reexamination of digital material that had been timely identified as responsive to the 2018 search warrant was not rendered constitutionally infirm simply because Johnson's prosecution, guilty plea, and sentencing had already occurred.[12] The Government's

12. Moreover, even if NCMEC's examination of the responsive material had been part of the original forensic review, the eighteen months between the seizure of Johnson's devices and NCMEC's review falls well within time periods courts have deemed

interest in locating child victims and securing restitution for them was not extinguished at the conclusion of Johnson's prosecution. Nor was the Government's ability to re-examine lawfully seized digital information that had already been identified as responsive to the 2018 search warrant.

III. The Plea Agreement

As to the motion to dismiss, Johnson argues that the Government was precluded by the 2018 plea agreement from bringing the subsequent prosecution for producing child pornography because this charge constitutes another offense "relative to his knowing possession or distribution" of CSAM that was "known to the United States as of the date it signed the plea agreement."[13] We review such

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constitutionally reasonable based on the circumstances in individual cases. *See, e.g., United States v. Jarman*, 847 F.3d 259, 266 (5th Cir. 2017) (holding a 23-month-long review reasonable under the circumstances).

13. Paragraph 12(a) of the 2018 plea agreement provides in relevant part as follows:

> The United States agrees that in the event that CORY JOHNSON fully and completely abides by all conditions of this agreement, the United States will[] not prosecute him in the District of Vermont for any other criminal offenses known to the United States as of the date it signs this plea agreement, committed by him in the District of Vermont relative to his knowing possession or distribution of child pornography . . .

App'x 69.

a claim *de novo*, interpreting the plea agreement in accordance with principles of contract law. *United States v. Wilson*, 920 F.3d 155, 162 (2d Cir. 2019) (citing *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002)). Factual findings are reviewed for clear error. *United States v. Yousef*, 327 F.3d 56, 137 (2d Cir. 2003). To determine whether the Government is in breach of the agreement, "we look both to the precise terms of the plea agreement[ ] and to the parties' behavior" and "seek to determine what 'the reasonable understanding and expectations of the defendant [were] as to the sentence for which he had bargained.'" *Wilson*, 920 F.3d at 163 (quoting *Paradiso v. United States*, 689 F.2d 28, 31 (2d Cir. 1982)). In keeping with the "delicate private and public interests that are implicated in plea agreements," we construe them "strictly against the Government." *United States v. Padilla*, 186 F.3d 136, 140 (2d Cir. 1999) (quoting *United States v. Ready*, 82 F.3d 551, 558-59 (2d Cir. 1996)).

Applying these principles, we agree with the district court that Johnson's 2018 plea agreement, pursuant to which he pled guilty to one count of knowing possession of child pornography in violation of 18 U.S.C. § 2252, did not preclude his subsequent prosecution for the production of child pornography, in violation of 18 U.S.C. § 2251. Johnson's claim to the contrary fails because the agreement's prohibition on further prosecution is limited to offenses "known to the United States as of the date it sign[ed] th[e] agreement."[14]

14. Given this conclusion, we need not address the district court's alternative finding that the 2018 plea agreement does not exclude prosecution for production of child pornography because

At the start, as the district court observed, "[t]he evidence is undisputed" that the Government learned of Johnson's abuse of his toddler and his production of child pornography only in September 2019, when SA Moynihan was notified by NCMEC of the video Johnson had made. App'x 20. SA Moynihan testified at the suppression hearing that on March 20, 2018, the day on which Johnson's devices were seized from his home, Johnson admitted to using Kik and looking at child pornography from the age of 14 but denied that he had ever taken "inappropriate pictures of children" or "inappropriately touched children." 2019 District Court Docket, Mot. to Suppress Hr'g Tr., Dkt. No. 53 at 12. The presentence report ("PSR"), prepared in connection with Johnson's sentencing for possession of child pornography, describes his conduct as encompassing possession and distribution of CSAM, but not production. And consistent with the PSR, the Government informed the district court in its sentencing memorandum that it was "not aware of any allegations of abuse within the defendant's home."[15] Supp. App'x 16.

Johnson argues that the Government is properly held to have had constructive knowledge of the abuse, as well as the video's production, because the video was among

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production is not an offense "relative to knowing possession or distribution of child pornography." App'x 19.

15. In his own sentencing memorandum, Johnson admitted only "to having engaged in the surreptitious trading of [the] images and videos," and urged imposition of the 45-month term contained in the plea agreement in light of the fact that, *inter alia*, he was the father of three small children who had provided him with a new purpose in life. Supp. App'x 10-11.

the vast collection of CSAM images and videos located on his many devices. He relies principally on this Court's cases addressing the question whether the Government breaches a plea agreement when it advocates for a sentence above the so-called *Pimentel* estimate in the agreement, "based on information that the Government knew about at the time the plea was negotiated."[16] *Wilson*, 920 F.3d at 163. But in the *Pimentel* context itself, these cases do not stand for the proposition that knowledge of facts germane to a *Pimentel* estimate should be imputed to the Government based on digital material in its possession that has not been reviewed.[17] Indeed, deviation from a

16. A *Pimentel* estimate is an estimate of a defendant's likely sentencing range under the United States Sentencing Guidelines and is included in plea agreements at our suggestion, to avoid a defendant's unfair surprise at the Guidelines range. *See United States v. Pimentel*, 932 F.2d 1029, 1034 (2d Cir. 1991) (suggesting that the Government "inform defendants, prior to accepting plea agreements, as to the likely range of sentences that their pleas will authorize under the Guidelines").

17. Johnson relies principally on *Wilson* and *United States v. Palladino*, 347 F.3d 29 (2d Cir. 2003). In these cases, the Government was held to have breached a plea agreement by urging a sentence above the estimate, but in a context in which it relied on information that it not only possessed but had taken fully into account when the plea agreement was negotiated. *Wilson*, 920 F.3d at 166-67 ("the Government knew about [Defendant's] activities and, based on that, made the conscious choice to exclude certain enhancements in the Government's Guidelines estimate"); *Palladino*, 347 F.3d at 34 ("According to the Government, the information on the tape that served as the basis for the disputed enhancement was known to the Government at the time the plea agreement was signed."). There was thus "little daylight," as *Wilson* put it, between the information adduced at sentencing and that considered at the time of the plea

Pimentel estimate may not constitute a breach of the plea agreement even when a change in position is based on information about which the Government *was fully aware* at the time the agreement was negotiated. *United States v. Habbas*, 527 F.3d 266, 272 (2d Cir. 2008). "As with other questions of breached plea agreements," as the *Wilson* court put it, we look to "the precise terms of the plea agreements and to the parties' behavior," seeking to determine "'the reasonable understanding and expectations of the defendant'" as to the bargained-for sentence, and with an eye to avoiding unfairness and rectifying any bad faith act on the Government's part. *Wilson*, 920 F.3d at 163 (quoting *Paradiso*, 689 F.2d at 31).

Here, such considerations do not cut in favor of Johnson's position. The language of the plea agreement is clear: the Government's commitment is to not prosecute Johnson in the District of Vermont "for any other criminal offenses *known to the United States*" as of the date it entered into the agreement and "committed by him in the District of Vermont relative to his knowing possession or distribution of child pornography." App'x 69 (emphasis added). The plea agreement itself, as already made clear,

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negotiation. 920 F.3d at 165-66 (noting that the Government's argument to sentence above the *Pimentel* estimate was "on the basis of information . . . well-known to the Government at the time it negotiated [the defendant's] plea"). *See also* P*alladino*, 347 F.3d at 34 (noting that "the information on the tape" used by a "different Assistant United States Attorney" to urge sentencing above the *Pimentel* estimate was "known to the Government at the time the plea agreement was signed.")

does not reference the production of child pornography.[18] As to the record, it is not only devoid of any indication that the Government was aware of Johnson's sexual abuse of his daughter and his production of CSAM: it affirmatively reflects the Government's understanding that Johnson had *not* engaged in the abuse of children. In such circumstances, Johnson could not harbor the reasonable expectation that the plea agreement absolved him of future prosecution for the as-yet undiscovered crime of producing CSAM. Johnson's argument to the contrary is without foundation in our precedent or in the factual circumstances of this case.

CONCLUSION

We have considered Johnson's remaining arguments and conclude that they are without merit. Accordingly, discerning no error in the district court's orders denying Johnson's motions to suppress and to dismiss the indictment, we AFFIRM the judgment of the district court.

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18. Indeed, its favorable terms further evidence the Government's lack of knowledge of Johnson's more serious production offense. Johnson, initially charged with distribution of child pornography and facing a five-year mandatory minimum sentence and up to 20 years of imprisonment, pled guilty to a lesser-included possession offense and received a negotiated below-Guidelines sentence of 45 months, notwithstanding the immense trove of CSAM that he possessed.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED FEBRUARY 27, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 22-1086

UNITED STATES OF AMERICA,

Appellee,

v.

CORY JOHNSON,

Defendant-Appellant.

Before: Debra Ann Livingston,
Chief Judge,
Susan L. Carney,
Joseph F. Bianco,
Circuit Judges.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of February, two thousand twenty-four.

Appendix B

JUDGMENT

The appeal in the above captioned case from a judgment of the United States District Court for the District of Vermont was argued on the district court's record and the parties' briefs.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT, FILED JUNE 29, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Case No. 5:19-cr-140

UNITED STATES OF AMERICA

v.

CORY JOHNSON,

Defendant.

June 29, 2021, Decided
June 29, 2021, Filed

Geoffrey W. Crawford, Chief United States District Judge.

ORDER ON MOTIONS TO SUPPRESS

(Docs. 18, 19)

Following a search of his residence in March 2018, defendant Cory Johnson pled guilty to possession of child pornography. Plea Agreement, *United States v. Johnson*, No. 5:18-cr-41 (D. Vt. Dec. 17, 2018), ECF No. 28. The search occurred pursuant to a federal search warrant. Mr. Johnson received a 45-month sentence under a plea

agreement in May 2019. Judgment, *United States v. Johnson*, (D. Vt. May 9, 2019), ECF No. 39. He is now serving this sentence.

In September 2019, the Government learned from the National Center for Missing and Exploited Children ("NCMEC") that a video seized in the original search in 2018 contained GPS metadata consistent with an address near Burlington, Vermont. This court issued a second search warrant for the residence where Mr. Johnson's wife now lives. A second search resulted in the discovery of bedding that resembled bedding seen in the video. In October 2019, the grand jury returned an Indictment charging Mr. Johnson with producing child pornography in violation of 18 U.S.C. § 2251(a). *(See* Doc. 1.)

The court has previously denied Defendant's motion to enforce the plea agreement in his 2018 case and to dismiss the Indictment in this 2019 case. *(See* Doc. 41.)

Defendant has filed motions to suppress addressed to the 2018 search (Doc. 18) and the 2019 search (Doc. 19). With respect to the 2018 search warrant, he contends:

- The search warrant was overly broad because it permitted a search of the seized electronic devices without any limitation based on the date of receipt of the files or messages contained in his phones and computers.

- The warrant impermissibly allowed the seizure and search of every electronic device in the Johnson

residence and allowed a comprehensive search of the contents.

- NCMEC's search of files forwarded by the Government during the summer of 2019 exceeded the scope of the 2018 warrant.

- The 2018 warrant was "extinguished" by the plea agreement and could not provide a basis for NCMEC's search after Defendant's conviction.

- NCMEC's search for GPS data was untimely.

- Federal law enforcement's search in September 2019 of the files seized pursuant to the 2018 warrant was unconstitutional because it came too late.

- The search of the marijuana video exceeded the scope of the 2018 warrant.

With respect to the 2019 search warrant, he first contends:

- The warrant issued without probable cause.

- The warrant issued on the basis of stale information since the Johnson family had relocated to a new address.

- The good faith exception to the exclusionary rule does not apply to the 2019 search.

- Statements made by Defendant's wife and child must be suppressed as "fruits" of an unconstitutional search.

On December 2, 2020, the court held an evidentiary hearing. *(See* Doc. 53 (transcript).) The court heard additional argument on the motions at a hearing on January 26, 2021. At that hearing, the defendant supplied an important new basis for suppression. Through counsel he identified what both sides agree is an error in the affidavit submitted in support of the 2019 warrant. The court conducted a *Franks* hearing concerning the error on June 1, 2021.

FACTS

In March 2018, a Homeland Security Investigations ("HSI") special agent in North Carolina posed as a member of a group of KIK users in order to investigate the exchange of child pornography. KIK is an online chat platform. The investigator learned that a member of the group had posted four videos and a Dropbox link to the other members of the KIK group. All contained child pornography. The member used the name "textile." Through administrative subpoenas issued to KIK and to Comcast, the investigator identified Cory Johnson as the individual likely to be the subscriber making use of the IP address used by "textile." Because Mr. Johnson lived on Mountain View Boulevard in South Burlington, Vermont, the tip was forwarded to HSI special agent Caitlin Moynihan for further investigation in Vermont.

Appendix C

SA Moynihan conducted surveillance of the Johnson residence and Mr. Johnson. She reviewed publicly available Facebook pages showing members of the Johnson family. On March 19, 2018, SA Moynihan submitted a search warrant application to United States Magistrate Judge Conroy. She sought to seize all computers and other electronic devices within the home. The list was comprehensive and included phones, computers, disk drives, and peripheral devices such as monitors and printers. The application was supported by an affidavit describing the child pornography discovered on the KIK site and the subsequent course of the investigation in Vermont.

Judge Conroy issued the search warrant. It was executed on March 20, 2018, and resulted in the seizure of multiple computers, cell phones, tablets, cameras, thumb drives, and other electronic devices. Mr. Johnson was charged with distribution of child pornography the same day.

In June 2018, a forensic analyst employed by HSI completed a forensic review of the seized devices. The review identified child pornography on multiple devices.

On January 4, 2019, Mr. Johnson pled guilty to a superseding information charging him with possession of child pornography. *See* Superseding Information, *United States v. Johnson*, No. 5:18-cr-41 (D. Vt. Jan. 4, 2019), ECF No. 30; *see also* Minute Entry, *id.*, ECF No. 31 (noting entry of guilty plea). The plea agreement provided for an agreed term of 45 months pursuant to Fed. R. Crim. P.

11(c)(1)(C). Plea Agreement, *United States v. Johnson*, No. 5:18-cr-41 (D. Vt. Dec. 17, 2018), ECF No. 28. On May 9, 2019, the court sentenced him to 45 months. Judgment, *United States v. Johnson*, No. 5:18-cr-41 (D. Vt. May 9, 2019), ECF No. 39.

In June 2019, SA Moynihan submitted the contraband materials seized in the 2018 search to NCMEC for a review to determine whether the videos and other computer files contained images of children not previously known to NCMEC. NCMEC has long maintained a database of known collections of child pornography. NCMEC has the computer tools needed to compare newly seized materials against these known collections in order to identify children who might be at risk of abuse and to assist in obtaining restitution for other victims.

At the hearing on the suppression motion, SA Moynihan was candid with the court in stating that she had forgotten to submit the files to NCMEC while Mr. Johnson's case was pending. Normally she would do so. She thought she had, but when she checked, the review by NCMEC had not occurred. The court finds her testimony credible on this point. There is no basis for concluding that SA Moynihan intentionally postponed the submission of the file to NCMEC until the Government had secured a guilty plea and a conviction. The court believes SA Moynihan's explanation that submitting the files in June 2019 was due to an oversight.

The NCMEC review occurred during the summer of 2019. On September 4, 2019, a NCMEC representative sent

SA Moynihan an email stating that one of the computer files contained information showing that it "resolve[d] near Burlington VT." Gov't Ex. 6. The file appeared to depict sexual abuse of a child. It came from a cell phone seized from the Johnson residence. SA Moynihan reviewed the file herself. It showed an adult male abusing a two-year old child by rubbing his penis against her buttocks and ejaculating. The child was lying on a bed. The bedding included a white blanket with pink edging, a sheet with yellow, pink, and blue flowers, a pink pillow with flowers and butterflies, and fabric with a green elephant.

The September 4 email from NCMEC included GPS longitude and latitude coordinates found within the data associated with the cell phone video. Agent Moynihan entered these coordinates into the Google Maps program. She stated in her affidavit in support of the application for a search warrant that "the coordinates resolved back to a residence located at 7 Kingfisher Court in South Burlington, Vermont" which she recognized on the Google Maps photo as "the residence and the address from my previous investigation involving Cory Johnson."

This statement contained two mistakes which the Government concedes. First, the initial response from the Google Maps program known as "Street view" identified the address as "1 Hermit Thrush Lane," not 1 Kingfisher Court. This response was due to an error in the Google Maps program. The Government has supplied an affidavit from a Google employee who identifies the correct name of the street as "Kingfisher Court"—both in 2019 and currently. (Doc. 81-1.) When a user examines the Google

Maps response to the GPS coordinates more closely, the overhead "Map" view makes it clear that the coordinates resolve to a residence on Kingfisher Court, not Hermit Thrush Lane.

The same close examination reveals a second error: the "pin" or location where the cell phone video was created is 1 Kingfisher Court, not 7 Kingfisher Court where the Johnson family once lived. Kingfisher Court is a development of duplex residences, all with odd-numbered addresses. 1 and 3 Kingfisher Court comprise the most easterly building. 5 and 7 Kingfisher Court are located in the next building to the west. The Johnson family residence at 7 Kingfisher Court was three doors away from the "pin" location identified in the Google Maps program.

After examining the coordinates, SA Moynihan determined that Cory Johnson resided at 7 Kingfisher Court from September 2008 until July 2017. SA Moynihan recognized the voice of the male on the video as Cory Johnson. She believed that the child—who is unrecognizable in the video—was the approximate age of the Johnsons' young daughter in 2016.

On September 19, 2019, SA Moynihan submitted a second search warrant request to Judge Conroy. The application seeks a warrant to search for the bedding shown in the video file at the Johnsons' current address at 21 Mountain View Boulevard. The affidavit in support of the application states that the GPS coordinates resolve to 7 Kingfisher Court. In fact, they resolve to 1 Kingfisher Court.

SA Moynihan testified that she believes she saw 7 Kingfisher Court when she used the Google Maps program to determine the address where the video was produced. The court finds her to be credible on this issue. A search warrant application showing that the video found on Mr. Johnson's cell phone was produced in the immediate vicinity of his prior address - but at 1 Kingfisher rather than 7 Kingfisher - would have been sufficient to support probable cause. SA Moynihan would have no reason or motive to make a false statement about this issue. And the mistake was easily identifiable since anyone, including Mr. Johnson's counsel, can access the Google Maps program and check the address. The court finds that SA Moynihan was mistaken about the address to which the coordinates resolved but that the mistake was unintentional and does not reflect any intent to mislead the court.

There is one more factual issue to discuss. After the September 4 email from NCMEC concerning the location of the creation of the cell phone video, other agents at the Homeland Security office where SA Moynihan worked at the time in South Burlington examined another cell phone video on Mr. Johnson's phone. This video was not contraband. It was not sent to NCMEC for review. It showed a man identifiable as Mr. Johnson smoking marijuana by himself. The GPS coordinates resolved to a location close to the common wall separating number 5 and number 7 Kingfisher Court. SA Moynihan learned about these coordinates and the close match to the former Johnson residence before she applied for the September 2019 warrant. She did not include information about the "marijuana video" in the application or affidavit she prepared in support of her warrant request.

Appendix C

ANALYSIS

I. Motion to Suppress the 2018 Warrant (Doc. 18)

As a preliminary matter, the defendant asserts that he has the right to move to suppress a warrant issued in a prior prosecution. The Government does not oppose the motion on these grounds. The court agrees that the constitutionality of the warrant may be challenged for the first time in a subsequent prosecution. *United States v. Gregg*, 463 F.3d 160 (2d Cir. 2006).

The defense also contends that individuals have a privacy interest in the contents of their cell phones. The Government does not oppose this proposition either. The court agrees that in the absence of consent or some other exception to the warrant requirement, the Government could not search the defendant's cell phone without a warrant. *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). The expectation of privacy extends to GPS location information. *Carpenter v. United States*, 138 S. Ct. 2206, 201 L. Ed. 2d 507(2018).

A. Claims that the 2018 Warrant was Overly Broad

The parties' disagreement over the issue of overbreadth concerns the time period to be covered by the search and the broad range of devices to be searched. The defendant seeks to suppress files such as the video at issue in this case, which was created before the two-month period when he was known to be active on KIK. He contends that "[t]he Affidavit presented no probable cause to

search for evidence prior to that period." (Doc. 18 at 15.) The defendant also argues that the seizure of all of his electronic devices was too broad.

The Government responds that SA Moynihan acted correctly in seeking a warrant to seize all electronic devices, including all computers and computer media, because electronic information can be stored in multiple ways and a single device may have multiple users. Seizure of all devices was necessary to determine which, if any, were used in the crime she suspected Defendant of committing. The Government also opposes the argument that probable cause was limited to the period of Defendant's activity on KIK. According to the Government, "[b]ecause . . . individuals involved with child pornography often build collections of images over time, the date an image was received or transferred would have little bearing on whether it might now provide evidence of the defendant's trading or collecting habits." (Doc. 29 at 18.)

In permitting a comprehensive search of Defendant's electronic devices without a time restriction, the search warrant did not violate the requirement of the Fourth Amendment that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const, amend. IV. The warrant contained two important restrictions. Attachment A identified the place as 21 Mountain View Boulevard. Attachment B identified the property to be seized as "material involving the receipt, distribution, transportation and possession of child pornography."

(Gov't Ex. 2.) With the location and the offense conduct clearly identified, there is no constitutional requirement that the time of possession be limited to the two months when defendant was known to participate in the KIK chat space.

The crimes specified in the warrant application were "possessing, distributing and receiving child pornography." (Gov't Ex. 1.) These offenses were not limited to child pornography downloaded through KIK. The KIK tip provided a basis for a finding of probable cause to believe that defendant possessed child pornography. The investigation, however, was not limited to that conduct. S.A. Moynihan's affidavit described how "collections [of child pornography] are often maintained for several years and are kept close by, usually at the individual's residence, to enable the collector to view the collection, which is valued highly." (Gov't Ex. 1, ¶ 10(d).)

The cases cited by Defendant in support of a temporal limitation concern crimes which occur at a specific time. These include violations of state sex offender registration requirements, *United States v. Irving*, 347 F. Supp. 3d 615 (D. Kan. 2018), and public indecency, *United States v. Winn*, 79 F. Supp. 3d 904 (S.D. 111. 2015). A search of all computer records, including dates prior to the charged offense, could reveal little or no relevant information and was consequently too broad. But possession of child pornography is conduct of a different stripe altogether. It has a beginning and an end, but these may be years apart. Probable cause to search or otherwise investigate the defendant may arise at any time during possession and

frequently concerns only a small portion of the contraband in a defendant's collection.

The search limits proposed by Defendant—restricting the search to files created within a period of two months—would miss evidence of a file previously acquired. The Government was under no constitutional requirement to limit the search to images downloaded during any particular period of time. The protection against an overly broad search was met in this case by the requirement that the Government search only for evidence of child pornography crimes, not the date of the conduct giving rise to probable cause. *See United States v. Trader*, 981 F.3d 961, 969(11th Cir. 2020).

Similarly, the Government was under no constitutional requirement to identify a small number of electronic devices to search. The warrant application and affidavit were comprehensive in their identification of every conceivable type of electronic device as potential sources of evidence. That is because electronic files appear on many types of devices. Televisions connect to the internet; cell phones have some of the same capabilities as laptops; and electronic traces of communication and use may be found on virtually any device with a memory chip or card.

Agent Moynihan's affidavit supporting the 2018 warrant application explained the need to seize many types of electronic devices:

> I know that data in digital form can be stored on a variety of systems and storage devices

> .... Some of these devices can be smaller than a thumbnail and can take several forms, including thumb drives, secure digital media cards used in phones and cameras, personal music devices, and similar items.

(Gov't Ex. 1, ¶ 32.) Courts have recognized the difficulty of specifying the precise form in which evidence may be found in a search, particularly in the case of electronic devices. *See United States v. Reyes*, 798 F.2d 380, 383 (10th Cir. 1986) ("[T]he seizure of a specific item characteristic of a generic class of items defined in the warrant did not constitute an impermissible general search."). In authorizing the seizure of many types of electronic devices, the warrant was not overly broad.

B. Claims that NCMEC Violated Defendant's Privacy Rights by Reviewing the Seized Files

Following Defendant's sentencing hearing, Agent Moynihan forwarded a hard drive containing 3,761 images and 3,653 videos to NCMEC. These were contraband images copied from Defendant's electronic devices. In her testimony, Agent Moynihan explained that she requested the NCMEC review even though the 2018 federal criminal case was closed to determine if there were images or videos of children previously unknown to NCMEC. Such cases could involve child victims in need of protection. She did not request expedited treatment and did not indicate a suspicion that Cory Johnson was involved in hands-on production of child pornography. (Gov't Ex 4.)

Appendix C

NCMEC processed the images and videos through its Child Recognition and Identification System ("CRIS"). The CRIS program compares certain characteristics of the images known as "hash values" against the hash values for previously identified images of child pornography. It was this comparison search which identified the video at issue in this case as previously unknown and gave rise to the closer search for GPS coordinates and other information embedded in the video.

Defendant argues that NCMEC's review exceeded the scope of the 2018 warrant and that the warrant was "extinguished" by the plea agreement and subsequent conviction. The Government responds that NCMEC did not act as a government agent when it conducted the CRIS review. In support of that contention, the Government offers the following propositions:

- NCMEC conducted the review in furtherance of its mission of protecting children from future abuse.

- The criminal prosecution had already taken place.

- NCMEC was not partnering with law enforcement to develop a case as occurs when it reviews tips from internet service providers and forwards these to law enforcement for investigation.

- In addition, the images which HSI sent to NCMEC were copies of contraband to which Defendant had no further claim or interest.

The court begins with the final proposition. There is no privacy interest in contraband following its lawful detection. *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983) ("No protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal"). Agent Moynihan forwarded only images of child pornography, not the entire contents of the Johnson family's computers and cell phones. Since the original search of the home and seizure of the electronic devices was legal, HSI was free to review contraband material itself or to enlist the aid of NCMEC to conduct a further review.

Defendant cites no authority for his position that the Government's right to search and examine the contraband files was "extinguished" by his conviction. Rule 41(e) of the Federal Rules of Criminal Procedure was amended in 2009 to address the necessary delay between the date of seizure of electronic media and the subsequent search of its contents. The rule now provides:

> Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

Fed. R. Crim. P. 41(e)(2)(B).

In this case, the warrant contained no explicit deadline for the later review. After Defendant's conviction, Agent Moynihan continued to investigate aspects of the possession offense. These were the identities and locations of the child victims. Their protection was a legitimate goal of the prosecution which was not removed by Defendant's conviction. The plea agreement foreclosed additional charges of possession of child pornography "known to the United States as of the date it signs this plea agreement, committed by him in the District of Vermont relative to his knowing possession or distribution of child pornography." Plea Agreement, *United States v. Johnson*, No. 5:18-cr-41, ¶ 12(a) (D. Vt. Dec. 17, 2018), ECF No. 28. But it did not provide any assurance that HSI would stop its investigation or destroy the seized images.

Because the court concludes that forwarding the contraband images to NCMEC did not violate the Fourth Amendment, there is no need in this case to determine whether NCMEC acted as an agent of law enforcement when it reviewed the files. HSI could have forwarded the contraband images to another federal agency or continued to examine the files in-house.

Upon receiving the report from NCMEC about the contraband video, Agent Moynihan renewed her examination of the video. With assistance from other agents, she confirmed the location information. She recognized Defendant's voice. And she identified the distinctive bedding. Her re-examination of legally seized contraband did not violate the Fourth Amendment.

Appendix C

Defendant argues that the Government took too long to reexamine the contraband video. A defendant convicted of child pornography has no right to the return or the destruction of the contraband images. Similarly, he has no reasonable expectation of privacy in the seized images. In the absence of a privacy interest in the contraband, there is no time limit on when the Government can renew its examination of the seized materials.

One aspect of the investigation which led up to the issuance of the second search warrant does present a potential violation. After receiving the NCMEC report, other HSI agents returned to the mirror image of Defendant's electronic devices created at the time of seizure and examined these again to determine if there were other images created at the same time which might confirm Defendant's identity. They located a "selfie" video, created by defendant about 30 minutes after the contraband video, showing him smoking marijuana. By the time of this second search, the focus of the investigation had moved to the offense of production of child pornography—an offense not identified in the original search warrant application. It no longer concerned the offense of possession for which Defendant had already been convicted. It was not part of HSI's search for unknown child victims. It related to the investigation of new charges against Defendant.

The leading case in the Second Circuit on the issue of delay in searching an individual's computer files is *United States v. Ganias*, 824 F.3d 199 (2d Cir. 2016) (en banc). In that case, the court considered the effect of a two-and-a-half-year delay in obtaining a second warrant to search

previously seized hard drives. *Ganias* concerned a long-running investigation which started as a false claims investigation into certain government contractors and, three years later, resulted in the indictment of Ganias for tax evasion. Ganias sought to suppress the results of a second search warrant issued after the Government had held a mirror copy of his computer for three years.

In *Ganias*, the court noted that

> [t]he seizure of a computer hard drive, and its subsequent retention by the government, can give the government possession of a vast trove of personal information about the person to whom the drive belongs, much of which may be entirely irrelevant to the criminal investigation that led to the seizure.

Id. at 217. The court ruled that it was unnecessary to resolve the issue of whether a new warrant was required in *Ganias* because any violation of the Fourth Amendment was subject to the good faith exception to the exclusionary rule. "At the time of the retention, no court in this Circuit had held that retention of a mirrored hard drive during the pendency of an investigation could violate the Fourth Amendment. . . ." *Id.* at 225. For this reason among others, the court held that suppression was not appropriate. Since *Ganias*, no Second Circuit decision has provided further guidance on how long electronic media subject to an expectation of privacy may be retained by the Government.

In the present case, it is unnecessary to answer the retention question directly. The Government concedes that it will offer the video only in rebuttal:

> In this case, if Johnson falsely denied that he was the individual in the video with the child who calls him "Daddy," the government should be able to rebut that information with the marijuana video, regardless of whether or not it would be subject to suppression if offered in the case in chief.

(Doc. 29 at 26.) Information about the marijuana video does not appear in the application for the second search warrant. Agent Moynihan had ample reason to suspect that Defendant appeared in the contraband video based on the address location, the GPS address location, her familiarity with his voice, and the approximate age of the child victim. As a practical matter, the marijuana video was excluded from the search warrant process and, prospectively, from use at trial except as rebuttal. There is no need to issue a further ruling on whether the court would also exclude it from evidence.

II. Motion to Suppress the 2019 Warrant (Doc. 19)

Defendant argues that the 2019 warrant issued without probable cause because the Johnson had family had previously moved away from their home on Kingfisher Court. He contends:

> Probable cause to believe that particular items of bed clothing in a video *taken three years before* were not only still in existence, but were still in the family's possession and at the family's new residence at the time the warrant was to be served, was clearly absent from the 2019 Affidavit.

(Doc. 19 at 3.) The Government responds that "[presuming the family, like most, moved their bedding to their new home, only a short time had passed since the bedding arrived at the house before Johnson's arrest." (Doc. 29 at 28.)

The court determines whether probable cause was present through application of a totality of the circumstances test. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Here both Agent Moynihan's affidavit and the experience of anyone who has moved from one home to another support the conclusion that the distinctive bedding seen in the contraband video was likely still present at the new address. Defendant has offered no evidence that many people purchase new soft goods when they move to a new residence. Defendant cites cases in which law enforcement based a search for drugs or other evidence of crime on the previous seizure of evidence. It is fair to observe that possession of cocaine in your pocket may not justify the search of your bedroom or office. But the search in this case was not an unfocused search for evidence of additional criminal behavior in general. Rather, it was a search for particular household goods in the possession of the only people known to

possess them. Searching for the distinctive bedding at the Johnsons' new address was entirely reasonable.

Because the court concludes that HSI had probable cause to seek the second warrant, there is no need to consider the issue of the good faith exception or suppression of the statements made by Ms. Johnson and her daughter.

III. Franks Issues

In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the Supreme Court recognized the right of criminal defendants to challenge the veracity of an affidavit supplied in support of a request for a search warrant. To succeed in his challenge, a defendant must make two showings:

- Proof by a preponderance that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit; and

- The remaining content of the affidavit is insufficient to establish probable cause.

In this case, the defendant cannot meet his burden of proof on the criterion of intentional falsity or materiality.

Appendix C

A. Intentional Falsity or Reckless Disregard for the truth

The court has already determined that SA Moynihan had no intention of misleading the magistrate concerning the strength of the Government's application. The GPS coordinates demonstrated a strong connection between Mr. Johnson and the location where the cell phone video was created—even if the coordinates resolved to a neighbor's residence. This made any prevarication unnecessary. The GPS coordinates became a permanent part of the investigation file and could be used by anyone familiar with Google Maps to check the location. That made any false statement open to easy detection—exactly as happened here. It is highly probable that SA Moynihan mixed up the two addresses: 1 Kingfisher Court and 7 Kingfisher Court. It is extremely unlikely that she did so on purpose. *See United States v. Toney*, 819 F. App'x 107, 110 (3d Cir. 2020) (defendant failed to demonstrate that inconsistencies between "4181 Leidy Avenue" and "4179 Leidy Avenue" in a warrant application "were anything more than typographical error").

There is similarly no evidence of reckless disregard for the truth of the statement. Recklessness requires a showing of something greater than an error. In this case, the only additional information available to SA Moynihan after making the initial mistake in the address was the marijuana video. Those coordinates resolved closer to 7 Kingfisher Court—giving the agent no reason to question her original conclusion. The other information available to her, such as the sound of Mr. Johnson's voice and the

age of his daughter, also confirmed that he was the man depicted in the video. Had SA Moynihan ignored evidence that the video was not produced at 7 Kingfisher Court, she might be accused of reckless disregard. Instead, all other information available to her supported her mistaken belief that the GPS coordinates resolved to 7 Kingfisher Court. These provide evidence that her mistake was reasonable.

B. Materiality

Even if we remove the mistake in the address and correct the GPS information to reflect the resolution of the coordinates to the neighbor's residence, there remains the striking coincidence of a cell phone video recovered from Mr. Johnson's home, showing a man and a child generally consistent in age with him and his daughter, including a voice similar to his voice, and produced in his immediate neighborhood. Of all the places in the world covered by GPS—everywhere—the GPS coordinates resolved to Mr. Johnson's immediate neighborhood. This GPS information was embedded in media previously taken off a phone known to belong to him. Had the agent brought this information to the magistrate judge, excluding any reference to 7 Kingfisher Court, the information would have supported a finding of probable cause for a warrant. *See United States v. Aguiar*, 737 F.3d 251, 263 (2d Cir. 2013) (holding that affidavit contained sufficient information to support issuance of hybrid order notwithstanding agent's false statement of a phone number).

In reaching this conclusion, the court starts with the objective standard described in *Terry v. Ohio*: "in making

that assessment [of probable cause] it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate.'" 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (quoting *Beck v. State of Ohio*, 379 U.S. 89, 96-97, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)). *Terry* concerned probable cause for a seizure of the person, but as the decision explains, the test is the same for the issuance of a warrant. This standard requires "less than evidence which would justify . . . conviction" but yet "more than bare suspicion." *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). Information relevant to this inquiry is generally of three types: evidence that a crime was committed, the identity of the suspect, and information about where the evidence might be located. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (6th Ed.) § 3.2(e) (2020).

Here there can be no doubt that there was strong evidence that a crime had occurred. The video shows the sexual abuse of a small child by an adult. Setting aside the mistake over the address for the GPS coordinates, there was also strong evidence of the identity of the suspect. This includes the discovery of the video on the defendant's cell phone, the GPS evidence that the video was created within the neighborhood where he and his family lived previously, and the general correlation of the age, voice and gender of the individuals shown with the suspect and his daughter. The video could, of course, have shown an entirely different pair of people living or visiting the area

of Kingfisher Court, but that is not particularly probable. Finally, the information about where the evidence might be located—the Johnson family's current residence—was present as well.

Because the court concludes that the error was not intentional or reckless and that it was not sufficiently material to the magistrate judge's decision to issue the warrant, the court concludes that suppression under the *Franks* doctrine is not appropriate.

CONCLUSION

Defendant's Motions to Suppress (Docs. 18, 19) are DENIED.

Dated at Rutland, in the District of Vermont, this 29th day of June, 2021.

/s/ Geoffrey W. Crawford
Geoffrey W. Crawford, Chief Judge
United States District Court

APPENDIX D — ORDER OF THE UNITED STATES DISTRJCT COURT FOR THE DISTRICT OF VERMONT, FILED OCTOBER 6, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Case No. 5:19-cr-140

UNITED STATES OF AMERICA

v.

CORY JOHNSON,

Defendant.

ORDER ON MOTION TO ENFORCE PLEA AGREEMENT AND MOTION TO DISMISS INDICTMENT (Doc. 20)

Defendant is charged with distribution of child pornography. He has filed a motion to enforce his prior plea agreement and to dismiss the indictment. (Doc. 20.) He has also filed two motions to suppress evidence (Doc. 18 and 19). Following a hearing on August 20, 2020, the court expressed its intention to rule first on the motion to enforce the plea agreement and to dismiss. This ruling addresses that motion only. The court will rule separately on the suppression motions after hearing from the parties about whether an evidentiary hearing is necessary.

Appendix D

FACTS

On March 20, 2018, the Government filed a criminal complaint charging defendant with distribution of child pornography under docket no. 5: l 8-cr-41. The complaint followed the execution of a search warrant earlier in the day. The warrant application and supporting affidavit describe an undercover online investigation of defendant's participation in a "KIK." chat group. The investigation yielded evidence that defendant had uploaded video files depicting child pornography onto the KIK platform.

The search of defendant's residence resulted in the discovery of multiple images of child pornography stored on his electronic devices.

In November 2018, defendant and the Government entered into a plea agreement. Defendant agreed to plead guilty to the lesser charge of possession of child pornography. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the agreement proposed a sentence of 45 months and a 10-year term of supervised release. The plea agreement also contained the following provision:

> 12. The United States agrees that in the event that CORY JOHNSON fully and completely abides by all conditions of this agreement, the United States will:
>
> a. not prosecute him in the District of Vermont for any other criminal offenses known to the United States as of the date it signs this plea

> agreement, committed by him in the District of Vermont relative to his knowing possession or distribution of child pornography. .. .

At the sentencing hearing, the court accepted the 11(c)(1)(C) plea agreement and imposed the 45-month sentence.

Following defendant's conviction, the lead FBI agent submitted the electronic images seized in the course of the investigation to the National Center for Missing and Exploited Children ("NCMEC") to be reviewed for identified child victims. In contrast to some other child pornography prosecutions, this case did not originate with a referral from NCMEC based on a tip supplied by an internet service provider. NCMEC had not played a role in originating or supporting the prosecution. An analyst at NCMEC reviewed the 8,816 video files and 6,931 image files containing suspected child pornography. Although many files could be traced to previously identified collections of child pornography, one video file - not previously known to NCMEC through its collection of contraband images - depicted possible sexual abuse of a toddler by an adult. OPS information embedded in the file linked it to an address near Burlington, Vermont where defendant and his family had lived previously.

On the basis of the information provided by NCMEC, the Government obtained a search warrant for defendant's family's home. Additional evidence seized through execution of the warrant resulted in the current charge of production of child pornography. In January 2019, defendant pled guilty to a violation of 18 U.S.C. § 2252(a)

(4)(B). The superseding information charged him with possession of child pornography. The information reduced the seriousness of the original charge which was for distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2)(A) and carried a five-year mandatory minimum sentence.

ANALYSIS

I. Motion to enforce plea agreement and to dismiss indictment

Defendant seeks dismissal of the pending indictment on the ground that the plea agreement in the 2018 case prevents further prosecution of offenses related to child pornography. He argues that principles of contract law prevent the Government from filing a second charge related to the evidence seized in the course of the original investigation. "Defendant was reasonably entitled to conclude that the Prosecutors had complied with any mandatory directives applicable to them; that seized devices/files had been searched completely; and that, if there was further evidence of criminal activity in the devices seized, the Government would have found it and, if it intended to bring the charge, would have alleged it." (Doc. 20 at 31.)

The Government responds that it has charged defendant with a new crime not addressed in the original plea agreement. The plea agreement by its terms ruled out a second prosecution within the District for possession or distribution of child pornography known to

the Government when the plea agreement was executed. In the Government's view, it had no knowledge of the "contact" offense of production of child pornography and that offense is different from the crimes of possession and distribution addressed by the plea agreement.

The general principles governing the construction and enforcement of plea agreements are well-settled. Plea agreements are interpreted in accordance with principles of contract law. *United States v. Padilla,* 186 F.3d 136, 139 (2d Cir. 1999). Ambiguities are generally resolved in favor of the defendant because the Government has far greater bargaining power and as in this case is the party that drafts the agreement. *Padilla,* 186 F.3d at 140; *United States v. Riera,* 298 F.3d 128 (2d Cir. 2002). Whether the Government has breached the plea agreement depends upon the reasonable understanding and expectation of the defendant. *United States v. Palladino,* 347 F.3d 29, 33 (2d Cir. 2003).[1]

The dispute between the parties is not complicated. The phrase "any other criminal offenses known to the United States as of the date it signs this plea agreement, committed by him in the District of Vermont relative to his knowing possession or distribution of child pornography"

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1. *United States v. Palladino,* 347 F.3d 29 (2d Cir. 2003), concerned a claim that the Government's position at sentencing violated the plea agreement. In this case, the defendant asserts that the new charge violated the plea agreement. The court applies the same principles of construction, including the standard of reasonable expectation of the defendant, to the alleged violation in this case.

is not ambiguous. Possession and distribution of child pornography are crimes defined at 18 U.S.C. § 2252. Production of child pornography is defined at 18 U.S.C. § 2251.

As a consequence of additional investigation, defendant - already serving a sentence for possession - has now been charged with production. The two offenses have different elements. As a 'hands-on' offense, production is a more serious violation and carries a fifteen-year mandatory minimum sentence for the first offense.

Little in the language of the plea agreement supports a reasonable interpretation that the agreement covers crimes against children beyond possession or distribution of child pornography. The plea agreement is clear on this point. It excludes future prosecution for crimes "relative to knowing possession or distribution of child pornography." Such conduct most commonly involves downloading and trading contraband images over the internet. The extensive collection of images seized through the search of defendant's electronic devices provided evidence that he was engaged in such activities.

The plea agreement does not address or exclude future prosecution for other crimes related to the sexual exploitation of children. A reasonable interpretation of the plea agreement would not include such crimes because the meaning of the phrase "relative to knowing possession or distribution" is not ambiguous. The plea agreement covers a particular type of offense which does not include the production of child pornography. Although possession and

production share the element of conduct involving child pornography, the crimes are very different.

Production requires evidence of the use of a child to produce the depiction. 18 U.S.C. § 2252(a) addresses the conduct of a person who "employs, uses, persuades, induces, entices, or coerces any minor" to engage in sexually explicit conduct with the intent to produce a live visual depiction. Such conduct is different in kind from receiving, distributing or possessing the same images. Making a movie is fundamentally different from going to the theatre. In the context of child pornography, both share the element of an explicit depiction, but the offense conduct – and the potential penalties - differ greatly.

The Government's position on this point is strengthened by the evidence it has submitted concerning its investigation and discovery of the alleged hands-on conduct months after the conclusion of the original prosecution. The plea agreement excludes a second prosecution for specific offenses known to the Government when the parties formed their agreement.

There is no evidence that the Government learned about the alleged production in the course of the first prosecution. At least from the Government's perspective, there was little doubt about the pornographic content of the thousands of images seized in the search of defendant's computers and phones. The comparison of defendant's images against known collections and the search for information about the location of previously unknown child victims was unnecessary to the proof of the charge of

possession. Although the review ultimately conducted by NCMEC could have been conducted before the guilty plea, it was not. The evidence is undisputed that the discovery of defendant's alleged abuse of his own child was unknown to the Government until it received the NCMEC report in September 2019 and for that reason also the alleged conduct falls outside of the scope of the plea agreement.

The cases relied upon by defendant do not support the dismissal of the indictment. In *Palladino,* 347 F.3d at 29, the plea agreement contained a commitment from the Government that "[b]ased on information known to [the prosecution] at this time, the Office estimates the likely adjusted offense level under the Sentencing Guidelines to be level 10 . . . " *Id.* at 31. Prior to sentencing, the Government changed its position and advocated for a level 16. The Government based its new position on information in its possession when it entered into the plea agreement. The Second Circuit determined that the Government had breached the plea agreement because it was "logical for defendant to believe that the [original] estimate, and the Government's stance at the sentencing hearing, would not be altered in the absence of new information or, for that matter, simply because a new Assistant United States Attorney had taken over the case and adopted a different view of the matter." *Id* at 34.

This case presents the reverse of the facts in *Palladino.* The information which gave rise to the second charge was *not* known to the Government when it entered into the plea agreement. There was no change in position on the basis of information previously known

to the prosecution. Instead, new information provided by NCMEC months after the conclusion of the first case gave rise to a second charge.

In considering the precedent set by *Palladino,* this court rejects the defense argument that "known to the United States" includes information not actually known but which could have been discovered through further investigation. "Known" is not an ambiguous word. Standing alone without expansive language such as "known or could have known," it means actually known in the sense of recognized or appreciated. It does not cover the universe of facts which could be known but were unrecognized at the time of the plea agreement. *See Elbit Systems Ltd. v. Credit Suisse Grp,* 842 F. Supp. 2d 733, 743 (S.D.N.Y. 2012) (applying dictionary definitions of "known" as "familiar; perceived; recognized .. .").

United States v. Wilson, 920 F.3d 155 (2d Cir. 2019), also concerns the enforcement of a promise by the Government about the Guideline calculation. The plea agreement contained a *Pimentel* estimate of the sentencing range. The Government promised that "based upon information now known to the Office, it will . . . take no position concerning where within the Guidelines range determined by the Court the sentence should fall." *Id* at 159. Prior to the sentencing hearing, the Government advocated an increase in the base offense level in violation of its prior commitment. The court held that the Government's conduct violated the defendant's reasonable expectations that it would not seek a sentence higher than the original estimate. Like *Palladino,* the *Wilson* decision

enforced the Government's promise about its position at sentencing. It does not concern a new charge arising from newly discovered evidence.

The defendant also directs the court's attention to the decision of the Fourth Circuit in *United States v. Edgell,* 914 F.3d 281 (4th Cir. 2019). In *Edgell,* the parities entered into a plea agreement stipulating to "less than five grams of substances containing a detectable amount of methamphetamine." *Id.* at 285. Between the date of the plea agreement and sentencing, the Government received a lab report that greatly increased the estimated quantity due to the unusual purity of the sample. The court remanded the case for resentencing because the Government had failed to honor its contractual commitment.

The Ninth Circuit reached a similar conclusion in *Cuero v. Cate,* 827 F.3d 879 (9th Cir. 2016), *reh 'g denied,* 850 F.3d 1019 (9th Cir. 2017), *rev'd on other grounds,* 138 S. Ct. 4 (2017). In the course of a state prosecution, the parties entered into a plea agreement which contemplated a maximum sentence of 14 years and 4 months. The agreement rests upon an understanding that only one of defendant's prior convictions counted as a "strike" for purposes of California's sentencing statute. The prosecution subsequently changed its position when further research identified a second, qualifying conviction. The Ninth Circuit ordered remand for resentencing consistent with the plea agreement. The decision was reversed by the Supreme Court because federal habeas relief was not warranted under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1).

These cases stand for the unsurprising proposition that when the prosecution extends a promise about its position at sentencing, it must fulfill the promise. This principle has long been recognized by the Supreme Court. *See Santobello v. New York,* 404 U.S. 257, 262 (1971) ("[W] hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled); *Bordenkircher v. Hayes,* 434 U.S. 357, 362 (1978) (prosecutor's plea-bargain promise must be kept).

In this case, there is no claim that the Government violated the plea agreement at sentencing. The defendant received the agreed-upon sentence. Instead, the defendant argues something quite different: that the Government agreed not to file new charges on the basis of new information. That is a far broader proposition supported neither by the cases cited by defendant nor by the factual record. The new charges were not barred by the plea agreement which is unambiguous about which charges it covers. They were also based on new information which arrived after final judgment issued in the first case. Either reason is sufficient to defeat defendant's motion to enforce.

CONCLUSION

The court DENIES the Motion to Enforce the Plea Agreement and Motion to Dismiss (Doc. 20). The parties shall confer and advise within 14 days whether either side requests an evidentiary hearing concerning the issues raised in defendant's suppression motions.

Appendix D

Dated at Rutland, in the District of Vermont, this 6th of October, 2020.

/s/
Geoffrey W. Crawford, Chief Judge
United States District Court

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of May, two thousand twenty-four.

Docket No: 22-1086

UNITED STATES OF AMERICA,

Appellee,

v.

CORY JOHNSON,

Defendant - Appellant.

ORDER

Appellant, Cory Johnson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix E

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX F — PLEA AGREEMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT, FILED DECEMBER 17, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Docket No. 5: 18-cr-41

UNITED STATES OF AMERICA,

v.

CORY JOHNSON,

Defendant.

PLEA AGREEMENT

The United States of America, by and through the United States Attorney for the District of Vermont (hereafter "the United States"), and the defendant, CORY JOHNSON, agree to the following in regard to the disposition of pending criminal charges.

1. CORY JOHNSON agrees to waive Indictment and plead guilty to Count One of the Superseding Information charging him with knowing possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252 (b)(2).

2. CORY JOHNSON understands, agrees and has had explained to him by counsel that the Court may

impose the following sentence on his plea: up to 10 years of imprisonment, pursuant to 18 U.S.C. § 2252(b)(2); up to lifetime supervised release with a mandatory minimum of five years, pursuant to 18 U.S.C. § 3583(k); up to a $250,000.00 fine, pursuant to 18 U.S.C. § 3571 (b)(3); and a $100.00 special assessment and an additional $5,000 assessment (unless the Court finds the defendant to be indigent), pursuant to Pub. L. No. 114-22, the Justice for Victims of Trafficking Act of 2015. CORY JOHNSON further understands that the Court may order full restitution to the victims of the offense in an amount determined by the Court, pursuant to 18 U.S.C. § 3663.

3. CORY JOHNSON agrees to plead guilty because he is, in fact, guilty of the above crime.

4. CORY JOHNSON understands that it is a condition of this agreement that he refrain from committing any further crimes, whether federal, state or local, and that if on release he will abide by all conditions of release.

5. CORY JOHNSON acknowledges that he understands the nature of the charges to which he will plead guilty and the possible penalties. He also acknowledges that he has the following rights: the right to persist in a plea of not guilty; the right to a jury trial; the right to be represented by counsel - and if necessary have the court appoint counsel - at trial and at every other stage of the proceeding; the right at trial to confront and cross-examine adverse witnesses; the right to be protected from compelled self-incrimination; and the right to testify and present evidence and to compel the attendance of

witnesses. He understands that by pleading guilty, he will waive these rights. He also understands that if his guilty plea is accepted by the Court, there will be no trial and the question of guilt will be resolved; all that will remain will be the Court's imposition of sentence.

6. CORY JOHNSON fully understands that he may not withdraw his plea because the Court declines to follow any recommendation, motion or stipulation of the parties to this agreement, other than an agreement between the parties pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). The United States specifically reserves the right to allocute at sentencing. There shall be no limit on the information the United States may present to the Court and the Probation Office relevant to sentencing and the positions the United States may take regarding sentencing (except as specifically provided elsewhere in this agreement). The United States also reserves the right to correct any misstatement of fact made during the sentencing process, to oppose any motion to withdraw a plea of guilty, and to support on appeal any decisions of the sentencing Court whether in agreement or in conflict with recommendations and stipulations of the parties.

7. CORY JOHNSON fully understands that any estimates or predictions relative to the Guidelines calculations are not binding upon the Court. He fully understands that the Guidelines are advisory and that the Court can consider any and all information that it deems relevant to the sentencing determination. He acknowledges that in the event that any estimates or predictions by his attorney (or anyone else) are erroneous,

those erroneous predictions will not provide grounds for withdrawal of his plea of guilty, modification of his sentence, or for appellate or postconviction relief.

8. Upon demand, CORY JOHNSON shall furnish the United States Attorney's Office a personal financial statement and supporting documents relevant to the ability to satisfy any fine or restitution that may be imposed in this case. CORY JOHNSON expressly authorizes the United States Attorney's Office to obtain a credit report on him at any time before or after sentencing in order to evaluate his ability to satisfy any financial obligation imposed by the court. If the court. orders restitution and/or a fine due and payable immediately, CORY JOHNSON agrees that the U.S. Attorney's Office is not precluded from pursuing any other means by which to satisfy his full and immediately enforceable financial obligation. CORY JOHNSON understands that he has a continuing obligation to pay in full as soon as possible any financial obligation imposed by the court.

9. CORY JOHNSON agrees to provide the Clerk's office, at the time this plea agreement is executed, a bank cashier's check, certified check, or postal money order payable to the Clerk, United States District Court, in payment for the mandatory special assessment of $100.00 for which he will be responsible when sentenced. He understands and agrees that, if he fails to pay the special assessment in full prior to sentencing, the sentencing recommendation obligations of the United States under this plea agreement will be terminated, and the United States will have the right to recommend that the Court

impose any lawful sentence. Under such circumstances, he will have no right to withdraw his plea of guilty.

10. CORY JOHNSON understands that by pleading guilty, he will be required to register as a sex offender upon his release from prison as a condition of supervised release pursuant to 18 U.S.C. § 3583(d). CORY JOHNSON also understands that independent of supervised release, he will be subject to federal and state sex offender registration requirements, and that those requirements may apply throughout his life. He understands that he will be required to keep his registration current, notify the state sex offender registration agency or agencies of any changes in his name, place of residence, employment, or student status, or other relevant information. CORY JOHNSON understands that he will be subject to possible federal and state penalties for failure to comply with any such sex offender registration requirements.

11. The parties jointly recommend that the Court impose the following terms as conditions of CORY JOHNSON's Supervised Release:

a. The defendant shall participate in an approved program of sex offender evaluation and treatment, which may include polygraph examinations, as directed by the probation officer. Any refusal to submit to such assessment or tests as scheduled is a violation of the conditions of supervision. The defendant will be required to pay the cost of treatment as directed by the probation officer. The court authorizes the probation officer

to release psychological reports and/or the presentence report to the treatment agency for continuity of treatment.

b. The defendant shall register as a sex offender in any state where the defendant resides, is employed, performs volunteer service, carries on a vocation, or is a student, as required by law.

c. The defendant shall provide the probation officer with access to any requested records, such as bills or invoices for credit cards, telephone and wireless communication services, television provider services, and Internet service providers.

d. The defendant shall provide the probation officer with a complete and current inventory of the number of computers used by the defendant along with a monthly log of computer access.

e. The defendant shall not use a computer device that has Internet access until a Computer Use Plan is developed and approved by his treatment provider and/or probation officer. Such plan, at a minimum, must require the defendant to submit a monthly record of Internet use, online screen names, encryption methods, and passwords utilized by the defendant.

f. The defendant shall not access any computer that utilizes any "cleaning" or "wiping" software programs.

g. The defendant shall consent to third-party disclosure to any employer, potential employer, community service site, or other interested party, as determined by the probation officer, of any computer-related restrictions that are imposed.

h. The defendant shall not possess images or videos depicting sexually explicit conduct involving adults, as defined in 18 U.S.C. § 2256(2)(A); child pornography, as defined in 18 U.S.C. § 2256(8); or visual or text content involving minors which has sexual, prurient or violent interests as an inherent purpose.

i. The defendant shall not associate or have contact, directly or through a third party, with persons under the age of 18, except in the presence of a responsible adult who is aware of the nature of the defendant's background, and who has been approved in advance by the probation officer. Such prohibited conduct shall include the use of electronic communication, telephone, or written correspondence. Any contact with his biological children shall be in accordance with Family Court Order(s) and a copy of any such Order(s), including any subsequent modifications and amendments, shall be provided to the probation officer.

j. The defendant shall avoid and is prohibited from being in any areas or locations where children are likely to congregate, such as schools, daycare

facilities, playgrounds, theme parks, arcades, unless prior approval has been obtained from the probation office.

k. The defendant shall allow, at the direction of the probation officer and at the defendant's expense, the installation of monitoring hardware or software to monitor the defendant's use of computer systems, internet-capable devices and/or similar electronic devices under the defendant's control.

l. The defendant may not use sexually oriented telephone numbers or services.

m. The defendant shall have no contact, directly or through a third party, with the victim(s) in this case. Such prohibited conduct shall include the use of electronic communication, telephone, or written correspondence.

n. The defendant shall submit their person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data 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 functions. Such searches may include

the removal of such items for the purpose of conducting a more thorough inspection. The defendant shall inform other residents of this condition. Failure to submit to a search may be grounds for revocation.

12. The United States agrees that in the event that CORY JOHNSON fully and completely abides by all conditions of this agreement, the United States will:

a. not prosecute him in the District of Vermont for any other criminal offenses known to the United States as of the date it signs this plea agreement, committed by him in the District of Vermont relative to his knowing possession or distribution of child pornography;

b. recommend that he receive a two-point credit for acceptance of responsibility under Guideline§ 3E1.1(a), provided that (1) he cooperates truthfully and completely with the Probation Office during the presentence investigation, including truthfully admitting the conduct comprising the offense(s) of conviction and not falsely denying any relevant conduct for which he is accountable under U.S.S.G. § 1B1.3, (2) he abides by the conditions of his release, and (3) provided that no new information comes to the attention of the United States relative to the issue of his receiving credit for acceptance of responsibility; and

c. move for an additional one-point credit for timely acceptance of responsibility, if the offense level

(before acceptance) is 16 or greater and he meets the conditions in the subparagraph above.

13. If the United States determines, in its sole discretion, that CORY JOHNSON has committed any offense after the date of this agreement, has violated any condition of release, or has provided any intentionally false information to Probation, the obligations of the United States in this agreement will be void. The United States will have the right to recommend that the Court impose any sentence authorized by law and he will have the right to prosecute him for any other offenses he may have committed in the District of Vermont. CORY JOHNSON understands and agrees that, under such circumstances, he will have no right to withdraw his previously entered plea of guilty.

14. CORY JOHNSON and the United States agree, pursuant to Fed. R. Crim. P. 11(c)(1)(C), that the appropriate term of imprisonment the Court should impose is 45 months, to be followed by a 10 year term of supervised release. Under this agreement, the Court retains discretion with all other aspects of the sentence, including the fine and the restitution. The defendant further understands that if the court rejects the plea agreement on the agreed upon sentencing stipulation, the United States may deem the plea agreement null and void.

15. It is understood and agreed by the parties that should CORY JOHNSON's plea not be accepted by the Court for whatever reason, or later be withdrawn or vacated, this agreement may be voided at the option of

the United States and he may be prosecuted for any and all offenses otherwise permissible. CORY JOHNSON also agrees that the statute of limitations for all uncharged criminal offenses known to the United States as of the date it signs this plea agreement will be tolled for the entire period of time that elapses between the signing of this agreement and the completion of the period for timely filing a petition under 28 U.S.C. § 2255, or if such petition is filed, the date of any decision by a court to vacate the plea or the conviction.

16. It is further understood that this agreement is limited to the Office of the United States Attorney for the District of Vermont and cannot bind other federal, state or local prosecuting authorities.

17. CORY JOHNSON expressly states that he makes this agreement of his own free will, with full knowledge and understanding of the agreement and with the advice and assistance of his counsel, FRANK TWAROG, Esq. CORY JOHNSON further states that his plea of guilty is not the result of any threats or of any promises beyond the provisions of this agreement. Furthermore, CORY JOHNSON expressly states that he is fully satisfied with the representation provided by his attorney, FRANK TWAROG, Esq., and has had full opportunity to consult with his attorney concerning this agreement, concerning the applicability and impact of the Sentencing Guidelines (including, but not limited to, the relevant conduct provisions of Guideline Section 1B1.3), and concerning the potential terms and conditions of supervised release.

18. No agreements have been made by the parties or their counsel other than those contained herein or in any written agreement supplementing this agreement.

UNITED STATES OF AMERICA

CHRISTINA E. NOLAN
United States Attorney

11/6/18 — /s/ Eugenia A. P. Cowles
Date — Eugenia A. P. Cowles
Assistant U.S. Attorney

11/15/18 — /s/Cory Johnson
Date — CORY JOHNSON
Defendant

I have read, fully reviewed and explained this agreement to my client, CORY JOHNSON. I believe that he understands the agreement and is entering into the agreement voluntarily and knowingly.

11/15/18 — /s/ Frank Twarog
Date — FRANK TWAROG
Counsel for the Defendant

APPENDIX G — NCMEC CHILD VICTIM IDENTIFICATION PROGRAM PUBLICATION

Exploited Children Division Resources

* * *

Child Victim Indentification Program

The Child Victim Identification Program (CVIP) serves as the clearinghouse in the United States for child-pornography cases and the main point of contact to international agencies for victim identification. Since 2002, NCMEC has operated CVIP, which has a dual mission: (1) to assist federal and state law enforcement agencies and prosecutors with child-pornography investigations and prosecutions; and (2) to assist law enforcement in identifying unknown child victims featured in pornographic images. CVIP Analysts

- Conduct reviews of images and videos using NCMEC's Child Recognition and Identification System (CRIS). Local and federal law-enforcement agencies may submit a written request for a CRIS review, along with the copies of seized child pornography to the federal law-enforcement agents assigned to NCMEC. Each submitted image and/or video file is run through CRIS and/or visually reviewed by an analyst to determine whether it depicts an identified child. Once it is determined that a child in a particular file appears to have been identified, a *Child Identification Report* is generated. This report includes the contact information for an investigator who can confirm the identification of the child.

- Examine images and videos of child sexual exploitation in an attempt to help law enforcement identify the children depicted in those files. During these reviews, NCMEC analysts closely examine the images and videos, documenting all investigative clues that could potentially lead to the location of a child victim. Once a possible location has been determined, NCMEC works with the appropriate law-enforcement agency to help locate and assist the child victim(s).

- Compile limited case information when a child-pornography victim is identified. With the assistance of federal law-enforcement agencies, information about newly-identified series is collected to assist in future investigations and prosecutions.

- Offer image and video analysis assistance to law enforcement working child sexual exploitation cases. The Forensic Imaging Analyst offers advanced and specialized examination of image and video files.

CVIP Evidence Submission Guidelines Highlights:

- **Please only submit copies of your evidence.**
- **Please zip images and do not zip evidence.**
- **Please send the copy of your evidence to our Postal Inspector at:**
  U.S. Postal Inspector Liaison, USPIS/NCMEC
  Post Office Box 320401, Alexandria, VA 22320-4401

For more information about any of the CVIP's resources, please e-mail cvip@ncmec.org or call our CVIP Analysts at 1-877-446-2632, ext 6705.

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