

# APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

SEP 8 2017

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PATRICK JONES,

Defendant-Appellant.

No. 15-55003

D.C. Nos. 3:14-cv-00082-W  
3:09-cr-01250

Southern District of California,  
San Diego

ORDER

Before: REINHARDT, TASHIMA, and NGUYEN, Circuit Judges.

Judge Tashima and Judge Nguyen voted to deny the petition for rehearing.

Judge Reinhardt voted to grant the petition for rehearing.

Judge Reinhardt and Judge Nguyen voted to deny the petition for rehearing en banc, and Judge Tashima has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are  
DENIED.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 7 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 15-55003

Plaintiff-Appellee,

D.C. Nos. 3:14-cv-00082-W  
3:09-cr-01250

v.

PATRICK JONES,

MEMORANDUM \*

Defendant-Appellant.

Appeal from the United States District Court  
for the Southern District of California  
Thomas J. Whelan, District Judge, Presiding

Argued and Submitted March 8, 2017  
Pasadena, California

Before: REINHARDT, TASHIMA, and NGUYEN, Circuit Judges.

Patrick Jones was convicted following a jury trial of sexual exploitation of a child in violation of 18 U.S.C. § 2251(a) and sex trafficking of children in violation of 18 U.S.C. § 1591(a). Jones now appeals the district court's denial of his habeas petition under 28 U.S.C. § 2255.<sup>1</sup> We have jurisdiction under 28 U.S.C. § 2253,

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

<sup>1</sup> We granted Jones' request for a certificate of appealability on the issue of "whether trial counsel was ineffective for failing to file a motion to suppress." We

and we affirm.

1. Jones argues that his trial counsel was ineffective for failing to move to suppress evidence on the ground that the warrantless entry into his motel room was unconstitutional. Under *Strickland v. Washington*, Jones must show that counsel's performance was deficient and that prejudice resulted from the deficiency. 466 U.S. 668, 687 (1984). Where counsel's alleged ineffectiveness came from his failure to litigate a Fourth Amendment issue, Jones "must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

Because we conclude that the warrantless entry was justified by exigent circumstances, Jones' challenge fails. See *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010) (requiring the government to show both probable cause to search the location and exigent circumstances to justify the intrusion). The officers here had sufficient probable cause to enter the room. The minor victim, who was distraught and crying, reported that she had just escaped from the motel room with several adults who had forced her to pose for nude photographs that they intended to use to sell her into prostitution. The victim reported that she was punched twice

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deny the motion to expand the certificate of appealability. See 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104–05 (9th Cir. 1999).

by one of the adults when she was crying. The officers responded to the motel, where they were able to corroborate with the clerk some details about the perpetrators and their car, and, as the victim reported, the door to the room was slightly ajar. These circumstances are sufficient to establish probable cause to believe that a crime had been committed in the motel room. The officers also had exigent circumstances to justify immediate entry. The victim reported that there was a small child still in the room, and while the officers could see feet on the bed, they could not see any of the defendants' heads or hands. Thus, the officers were reasonably concerned for the child's safety as well as possible destruction of electronic evidence.

2. Jones argues that his trial counsel's performance was constitutionally deficient because he failed to move to suppress the search of Jones' cell phone. He relies heavily on *Riley v. California*, 134 S. Ct. 2473, 2485 (2014), which held that the search incident to arrest doctrine does not permit warrantless searches of the contents of cellular phones. On habeas, however, Jones must prove that his motion to suppress would have been meritorious *at the time of his trial*, which significantly pre-dates *Riley*. See *Belmontes v. Brown*, 414 F.3d 1094, 1121 (9th Cir. 2005) (stating that under *Strickland*, "counsel's performance is evaluated from counsel's perspective at the time of the alleged error") *rev'd on other grounds*, *Ayers v. Belmontes*, 549 U.S. 7 (2006). Jones' argument that pre-*Riley* case law

already established the illegality of the search such that counsel's failure to move to suppress would be constitutionally deficient is unconvincing.

Jones next argues, without a supporting record citation, that a search incident to arrest is invalid if the search took place prior to his arrest. This argument fails because the case law does not mandate a strict sequence of events. *See United States v. Turner*, 926 F.2d 883, 887 (9th Cir. 1991) (“[A] search incident to arrest must be conducted at about the same time as the arrest.” (internal quotation marks omitted)). Therefore, whether the search occurred shortly prior to or shortly after the arrest is not determinative of its legality.

Finally, Jones argues that the search was not incident to arrest because his cell phone was no longer within his immediate area of control. *See Arizona v. Gant*, 556 U.S. 332, 343 (2009); *United States v. Cook*, 808 F.3d 1195, 1199 (9th Cir. 2015). There is no evidence in the record as to Jones' location when the search was conducted, but we nonetheless see no need to remand for further factual development for two reasons. First, even assuming the search of Jones' cell phone was not valid incident to arrest, the nude photographs of the victim still would have been admitted at trial under the independent source doctrine because the officers in no way relied on the earlier search in later obtaining a warrant to search the phone. *See Murray v. United States*, 487 U.S. 533, 535 (1988). The warrant therefore was an independent source that would have supported the introduction of the

photographs at trial.

Second, Jones cannot show a reasonable probability that the verdict would have been different even had the photographs been excluded. The evidence against him was overwhelming, including his own testimony that he committed the crime and the detailed testimony of his accomplice, Shawndrea Dorrough. At trial, Jones admitted the alleged conduct and chose to rely on the affirmative defense that he was reasonably mistaken as to the victim's age. Therefore, he fails to establish a reasonable probability that, had the jury not seen the photographs, it would have found, pursuant to the jury instructions, "by clear and convincing evidence that [Jones] did not know, and could not reasonably have learned that the child was under 18 years of age."

**AFFIRMED.**

REINHARDT, Circuit Judge, dissenting:

JUN 7 2017

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

I would remand Jones’s case for an evidentiary hearing. A petitioner seeking relief under 28 U.S.C. § 2255 is entitled to an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003). Here, the district court rejected Jones’s request for an evidentiary hearing and “decide[d] the matter on the papers submitted and without oral argument.” Moreover, no record pertaining to the Fourth Amendment issue was developed at trial because Jones’s lawyer never moved to suppress the evidence obtained in the search – exactly what Jones contends constitutes ineffective assistance of counsel. In its current form, the record does not provide a sufficient basis on which to determine whether the search violated the Fourth Amendment.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

PATRICK JONES

Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE No. 09-CR-1250 W  
14-CV-0082 W

**ORDER DENYING PETITIONER'S  
28 U.S.C § 2255 MOTION [DOC.  
202], AND DENYING  
CERTIFICATE OF  
APPEALABILITY**

On January 8, 2014, Petitioner Patrick Jones ("Petitioner"), a federal prisoner proceeding *pro se*, commenced proceedings for habeas corpus relief under 28 U.S.C. § 2255. (*Pet.* [Doc 202].) Respondent United States of America ("Respondent") opposes. (*Gov't Opp'n* [Doc. 207].) The Court decides the matter on the papers submitted and without oral argument. See Civil Local Rule 7.1(d.1). For the reasons stated below, the Court **DENIES** Petitioner's request for habeas relief.

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1 **I. BACKGROUND**

2 On April 1, 2009, a federal grand jury returned an indictment charging Petitioner  
3 and three accomplices with sexual exploitation of a child in violation of 18 U.S.C. §  
4 2251. (*Indictment* [Doc. 1].) The indictment also charged Petitioner and his three  
5 accomplices with aiding and abetting under 18 U.S.C. § 2. (*Id.*) Thereafter, on October  
6 30, 2009, another federal grand jury returned a superseding indictment charging  
7 Petitioner and the same three co-defendants with sex trafficking by force, fraud and  
8 coercion in violation of 18 U.S.C. § 1591 and 18 U.S.C. § 2. (*See Superseding Indictment*  
9 [Doc.54].) Petitioner's co-defendants pled guilty, while Petitioner opted to go to trial.  
10 (*E.g., Pet'r's Suppl. Mem.* [Doc. 206] 2:4-6.) After a three-day trial in May 2010, a jury  
11 convicted Petitioner of both counts. (*Jury Verdict* [Doc. 115].) This Court sentenced  
12 Petitioner to 180 months custody on each count, to run concurrently, and 10 years of  
13 supervised release as to both counts. (*Sentencing Hr'g* [Doc. 148]; *Judgment* [Doc. 149]  
14 2-3.) One-hundred and eighty months represents the mandatory minimum sentence  
15 under § 2251. 18 U.S.C. § 2251(e).

16 The relevant facts of the case, as established during trial, are as follows. On the  
17 night of September 29, 2008, Mr. Jones and his three co-defendants picked up a 14-year  
18 old girl ("S.P.") from a Church's Chicken on El Cajon Boulevard in San Diego,  
19 California. (*Trial Tr. May 6, 2010* [Doc. 174], 167:13-169:3.) According to the trial  
20 testimony of Petitioner's co-defendant Shawndrea Dorrough, the group's purpose in  
21 picking up S.P. was to make money by forcing her prostitute for them. (*Id.* at  
22 165:3-167:12, 172:3-9, 176:1-14, 199:13-21.) The group of four drove S.P. to a motel  
23 room at the Oceanside Inn & Suites in Oceanside, California. (*Id.* at 171:4-24.) Once  
24 there, Dorrough used Petitioner's cell phone to take photos of S.P. while Petitioner and  
25 another co-defendant, Dywane Tousant, posed her. (*Id.* at 172:23-176:10.) The  
26 evidence at trial established that S.P. was clothed in this initial set of photos. (*Id.* at  
27 172:23-174:19.)

28 //

1 Once equipped with the photos from Petitioner's cell phone, Dorrough used  
2 Tousant's laptop computer to create a Craigslist ad, the purpose of which was to offer  
3 S.P. for prostitution. (*Trial Tr. May 6, 2010*, 176:1–182:18.) Sometime after midnight,  
4 Dorrough received a response via text message inquiring about the Craigslist ad. The  
5 person responding to the ad inquired if Dorrough had "any nude pics" of S.P. (*Id.* at  
6 184:2–185:4.) At that time, or shortly thereafter, Petitioner and his co-defendants  
7 resolved to take nude photos of S.P. Dorrough testified at trial that another of  
8 Petitioner's co-defendants, Dominique Willis, "socked" S.P. in the face multiple times  
9 while instructing S.P. to disrobe. (*Id.* at 185:5–196:24.) S.P. complied with Willis's  
10 instructions. Once S.P. had disrobed, Petitioner and Tousant posed her, while Dorrough  
11 took nude photos of her with Petitioner's cell phone. (*Id.*)

12 At approximately four o'clock in the morning, S.P. departed from the motel room  
13 while Petitioner and his co-defendants were asleep. (*See Trial Tr. May 4, 2010* [Doc. 173],  
14 135:15–139:4.) S.P. fled to a nearby 7-11 store on the 1700 block of South Coast  
15 Highway in Oceanside where she called 9-1-1 to report what happened to her. (*See id.* at  
16 130:9–132:15, 135:15–139:4.) Officer Jose Perez of the Oceanside Police Department  
17 responded to the call. (*Id.* at 135:15–139:4.) Officer Perez testified that upon his arrival  
18 at the 7-11, S.P. ran toward his vehicle. (*Id.* at 135:20–135:24, 136:13–15.) He  
19 explained that S.P.'s frantic disposition initially made it difficult for him to communicate  
20 with her. (*Id.* at 136:13–20.) However, communication with S.P. became "a lot easier"  
21 once a second officer—Officer Guerra—joined Officer Perez at the 7-11. (*Id.* at  
22 136:21–137:5.)

23 Shortly after Officer Guerra's arrival, the officers were able to gather additional  
24 information from S.P. about her ordeal. (*Trial Tr. May 4, 2010*, 137:12–141:5.) First,  
25 S.P. directed the officers to the Oceanside Inn & Suites. (*Id.* at 137:12–24, 139:2–11.)  
26 Next, S.P. informed the officers that Petitioner and his accomplices were located in room  
27 117 of the motel. (*Id.* at 137:18–139:11.) Then, Officer Perez called for additional  
28 officers to respond to the scene so that the officers could make contact with Petitioner

1 and his co-defendants. (*Id.* at 139:14–140:1.) However, before the officers made contact  
2 with the suspects, they contacted the motel’s night clerk and inquired about the  
3 occupants of room 117. According to Officer Perez’s testimony, the night clerk  
4 corroborated the information that S.P. had provided about the suspects. (*Id.* at  
5 140:2–11.) That information included details about “an Impala, four-door vehicle,  
6 which had a break in the rear window that was very noticeable.” (*Id.* at 140:17–20.)  
7 Finally, the officers arrived at room 117, noticed the Impala parked nearby,  
8 and—consistent with information they had received during their investigation—discovered  
9 that the door to room 117 was slightly ajar. (*Id.* at 139:15–140:8.)

10 The officers then made contact with the occupants of the motel room by  
11 conducting a “knock and notice,” whereby they knocked on the motel door and  
12 announced themselves as the Oceanside Police. (*Trial Tr. May 4, 2010*, 141:12–22.)  
13 Once inside the room, the officers observed the four subjects and three cell phones. (*See*  
14 *id.* at 144:17–149:8; *Perez Report* [Doc. 207-6] 3:15-19.) The officers also observed  
15 Willis’s infant child on one of the beds in the motel room. (*Trial Tr. May 4, 2010*,  
16 145:25–146:1; *Trial Tr. May 6, 2010*, 168:6–17.) One of the phones discovered in the  
17 room—a green Samsung phone equipped with a camera—was found on the floor in close  
18 proximity to Petitioner. (*Trial Tr. May 4, 2010*, 147:22–149:8). Trial testimony  
19 demonstrated that the cell phone belonged to Petitioner and that it had been used to  
20 take clothed and nude photos of S.P. on the night in question. (*Trial Tr. May 4, 2010*,  
21 172:23–175:25, 187:16–196:5.) The officers searched the motel room—including all of  
22 the cell phones—and found the sexually explicit photos of S.P. on Petitioner’s phone.

23 After the jury convicted Petitioner, he appealed, contending that this Court erred  
24 in its jury instruction as to the *mens rea* requirement of 18 U.S.C. § 2251(a). (*See*  
25 *Mandate* [Doc. 190].) Petitioner also argued in the alternative that if the instructions  
26 were correct, his sentence should be vacated under the Fifth Amendment. (*Pet’r’s Suppl.*  
27 *Mem.* 4:8-11.) Additionally, Petitioner appealed his § 1591 conviction on the basis that  
28 the jury was instructed pursuant to a post-offense amendment to the statute in violation

of the *Ex Post Facto* Clause. (*Id.* 4:7-8.) The Ninth Circuit reversed the § 1591 conviction and affirmed the § 2251 conviction. United States v. Jones, 459 F. App'x 616, 617 (9th Cir. 2011). On remand, the Government conceded its error regarding the § 1591 count and dismissed it. (*Pet'r's Suppl. Mem.* 4:12-13.) This Court then re-imposed the 180-month sentence and found that it did not have jurisdiction to entertain Petitioner's constitutional challenges to his sentence. (*See Remand Hr'g Tr.* [Doc. 196].)

Petitioner then filed a second appeal contending that this Court should have entertained his constitutional challenges. (*Pet'r's Suppl. Mem.* 4:17-18.) The Ninth Circuit held that this Court erred in determining that it lacked jurisdiction to entertain Petitioner's sentencing claims, but that the error was harmless because (1) Petitioner's Fifth amendment claim was barred by law of the case, and (2) Petitioner's Eighth Amendment claim was not raised earlier in the proceedings. United States v. Jones, 532 F. App'x 769, 770 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 834 (2013).

## II. DISCUSSION

On January 8, 2014, Petitioner commenced the present proceeding under 28 U.S.C. § 2255 claiming: (1) ineffective assistance of counsel due to trial counsel's failure to file a motion to suppress evidence for a purported Fourth Amendment violation; (2) ineffective assistance of counsel due to trial counsel's failure to argue an Eighth Amendment violation as to the sentence imposed; (3) a Fifth Amendment claim that the mandatory minimum sentence for §2251 is unconstitutional; and (4) an Eighth Amendment claim as to the 180-month sentence imposed. (*Pet.* at 6-7. *See generally* *Pet'r's Suppl. Mem.*) Respondent opposes. (*See Gov't Opp'n.*)

### A. Trial Counsel's Failure to File a Motion to Suppress Did Not Constitute Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim ("IAC"), a petitioner must demonstrate that the performance of his attorney was grossly deficient, and that the

petitioner's defense was prejudiced by his attorney's deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). The petitioner bears the burden of establishing both elements. United States v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995) (citations omitted). Additionally, the Supreme Court has held that "[w]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness," it is incumbent upon the defendant to also establish "that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." Kimmelman v. Morrison, 477 U.S. 365, 375 (1986); see Strickland, 466 U.S. at 694.

Given the "distorting effects of hindsight" in evaluating an IAC claim, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Accordingly, the standard set forth in Strickland is "highly demanding." Kimmelman, 477 U.S. at 382. The petitioner may establish prejudice only by demonstrating a reasonable probability that but for his attorney's error, the outcome of his trial would have been different. Strickland 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Petitioner sets out two IAC claims. (See, e.g., *Pet.*) His first IAC claim is based on the contention that his trial attorney "fail[ed] to file an obvious and winning suppression motion." (*Pet'r's Suppl. Mem.* 5:3-9 (citing Kimmelman, 477 U.S. at 383).) Respondent argues that Petitioner's counsel did not render IAC because a motion to suppress the evidence discovered on Petitioner's cell phone would have been fruitless. (*Gov't Opp'n* 5:13-11:2.) For the following reasons, the Court agrees with Respondent.

### 1. Probable Cause

The foundation of Petitioner's first IAC claim is that the officers' entry into the motel room constituted a warrantless entry, and that absent some justification, there was

1 no lawful basis for the officers' "warrantless intrusion." (*Pet'r's Suppl. Mem.* 5:10–24.)  
2 That is, Petitioner argues that the officers lacked the requisite probable cause to make  
3 entry. (*Id.* at 5:10–16.) In support his argument, Petitioner claims that Officer Perez  
4 himself "testified that he did not even have 'enough information that a crime had been  
5 committed' before entering the [motel] room." (*Id.* at 5:16–17 (citing *Trial Tr. May 4,*  
6 *2010*, 139:14–17).) According to Petitioner, Officer Perez's testimony demonstrates that  
7 the officers not only lacked a warrant, "but they also lacked sufficient cause" to enter into  
8 the motel room. (*Id.* at 5:17–18.) The Court disagrees.

9 Under the Fourth Amendment, individuals are protected from "unreasonable  
10 searches and seizures." U.S. Const. amend. IV. These Fourth Amendment protections  
11 are "not limited to one's home, but also extend[] to such places as hotel or motel rooms."  
12 See, e.g., United States v. Cormier, 220 F.3d 1103, 1108–09 (2000) (citing Stoner v.  
13 California, 376 U.S. 483, 490 (1964)). As the Supreme Court has made clear, "police  
14 officers need either a warrant or probable cause plus exigent circumstance in order to  
15 make a lawful entry into a home." Kirk v. Louisiana, 536 U.S. 635, 638 (2002) (citing  
16 Payton v. New York, 445 U.S. 573 (1980)). Probable cause is said to exist "where 'the  
17 facts and circumstances within . . . [the officers'] knowledge and of which they had  
18 reasonably trustworthy information [are] sufficient in themselves to warrant a man of  
19 reasonable caution in the belief that' an offense has been or is being committed."  
20 Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (quoting Carroll v. United  
21 States, 267 U.S. 132, 162 (1925)). Accordingly, "sufficient probability, not certainty, is  
22 the touchstone of reasonableness under the Fourth Amendment." Hill v. California, 401  
23 U.S. 797, 804 (1971).

24 Notwithstanding Petitioner's averments, it is clear from the record that the officers  
25 did in fact have probable cause to believe that a crime had been committed. The  
26 underlying fallacy of Petitioner's argument is that it mischaracterizes Officer Perez's  
27 testimony. Petitioner claims that according to that testimony, Officer Perez had not  
28 obtained sufficient information to believe a crime had been committed. However, the

1 facts, as well as Officer Perez's subsequent investigation, prove otherwise. As Respondent  
2 points out, S.P. provided the officers with a disturbing account about what happened to  
3 her. (*See Perez Report* 6:27–7:1.) The testimony at trial established that when Officer  
4 Perez *initially* encountered S.P., he had considerable difficulty communicating with her.  
5 (*Trial Tr. May 4, 2010*, 136:13–20.) Yet, after Officer Guerra arrived on scene,  
6 communication with S.P. became “a lot easier.” (*Id.* at 136:21–137:5.)

7       Once S.P.'s “desperate mood” had abated, she directed the police to the motel  
8 where the acts perpetrated against her had occurred. (*Trial Tr. May 10, 2014*,  
9 137:12–139:11.) S.P. even provided the officers with the specific motel room—room  
10 117—in which Petitioner and his co-defendants were located. (*Id.*) Soon after, the  
11 motel's night clerk corroborated the information that S.P. provided as to the presence  
12 of Petitioner and his co-defendants in room 117. (*Id.* at 140:2–11.) S.P. also provided  
13 the officers with information about the Impala that the group used to transport S.P. from  
14 San Diego to Oceanside. The officers further corroborated that information upon  
15 observing the vehicle parked in close proximity to room 117. (*Id.* at 140:12–25.) Finally,  
16 once the officers reached the door of the motel room, they substantiated S.P.'s statement  
17 that the door to the room had been left slightly ajar. (*Id.* at 141:1–12.)

18       Based on the record, it is clear that Officer Perez and his fellow officers, through  
19 the course of their investigation, obtained facts and acquired knowledge about  
20 circumstances that had been based on trustworthy information. The officers' step-by-step  
21 inquiry into S.P.'s claims led them to the reasonable conclusion that S.P.'s account was  
22 genuine. It follows that the officers *did* in fact have sufficient probable cause to believe,  
23 at the very least, that Petitioner and his co-defendants had conspired to solicit  
24 prostitution. Additionally, the facts further evince that S.P.'s allegations—and the  
25 subsequent corroboration of them—were sufficient to supply the officers with probable  
26 cause as to the sexual exploitation of S.P. at the hands of Petitioner and his co-  
27 defendants. (*See Perez Report* 1:9–18.) Moreover, it is evident that the officers had  
28

1 probable cause to believe that the perpetrators of the acts against S.P. were occupying  
2 room 117 of the Oceanside Inn & Suites.

## 3 4 2. *Exigent Circumstances*

5 In its opposition, Respondent argues that exigent circumstances existed to justify  
6 the officers' warrantless entry into the motel room. (*Gov't Opp'n* 6:21–7:8.) Specifically,  
7 Respondent asserts that the warrantless entry was justified based on “the disturbing  
8 report provided by S.P. about what had occurred to her, her demeanor at the time of the  
9 report, the fact that another child was in the room that could have faced the same  
10 abuse,” and the “concern of destruction of evidence.” (*Id.* at 6:27–7:5.) Petitioner, on  
11 the other hand, contends that Respondent's exigent circumstances analysis “is based on  
12 ‘speculation’ rather than particularized facts demonstrating exigency.” (*Traverse* [Doc.  
13 208] 2:26–28.)

14 As previously noted, “police officers need either a warrant or probable cause *plus*  
15 *exigent circumstances* in order to make a lawful entry into a home.” Kirk, 536 U.S. at 638  
16 (emphasis added) (citing Payton, 445 U.S. at 573 (“Absent exigent circumstances, [the  
17 threshold of a home] may not reasonably be crossed without a warrant.”)). “Exigent  
18 circumstances include ‘those circumstances that would cause a reasonable person to  
19 believe that entry . . . was necessary to prevent physical harm to the officers or other  
20 persons, the destruction of relevant evidence, the escape of the suspect, or some other  
21 consequence improperly frustrating legitimate law enforcement efforts.” Sheehan v. City  
22 & Cnty. of S.F., 743 F.3d 1211, 1221 (9th Cir. 2014) (alteration in original) (citing  
23 United States v. McConney, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc), *overruled on*  
24 *other grounds by* Estate of Merchant v. Comm'r, 947 F.2d 1390, 1392–93 (9th Cir. 1991)).  
25 Exigent circumstances also exist “when police are in hot pursuit of a suspect.” *Id.* (citing  
26 United States v. Johnson, 256 F.3d 895, 907 (9th Cir. 2001) (en banc) (per curiam)).

27 The Ninth Circuit has explained that “[e]xigent circumstances justify a warrantless  
28 entry, search, or seizure when ‘police officers, acting on probable cause and in good faith,

1 reasonably believe from the totality of the circumstances that (a) evidence or contraband  
2 will imminently be destroyed or (b) the nature of the crime or character of the suspect(s)  
3 pose a risk of danger to the arresting officers or third persons.” United States v. Ojeda,  
4 276 F.3d 486, 488 (2002) (quoting United States v. Kunkler, 679 F.2d 187, 191–92 (9th  
5 Cir. 1982)). “The government bears the burden of showing specific and articulable facts  
6 to justify the finding of exigent circumstances.” Id. (citations omitted). “Whether the  
7 actions of the police are objectively reasonable is to be judged by the circumstances  
8 known to them.” United States v. Black, 482 F.3d 1035, 1038 (9th Cir. 2007).

9  
10 *i. Physical harm to the child*

11 In support of its argument that another child’s presence in the motel room created  
12 exigent circumstances to enter the room, Respondent relies on Black, 482 F.3d at 1035.  
13 In Black, the defendant’s ex-girlfriend called 9-1-1 to report that the defendant had  
14 beaten her up and was in possession of a gun. Id. at 1139. Before hanging up with the  
15 9-1-1 dispatcher, she stated that she would wait outside of the defendant’s apartment  
16 until the police arrived; however, upon arriving at the apartment, the responding officers  
17 did not encounter the woman. Id. The Ninth Circuit ultimately held that, based on the  
18 circumstances, the officers’ subsequent warrantless entry into the defendant’s apartment  
19 was justified because the officers genuinely “feared that [the defendant’s ex-girlfriend]  
20 could have been inside the apartment, badly injured and in need of medical attention.”  
21 Id.

22 Here, as Petitioner points out, the type of ongoing threat to the defendant’s ex-  
23 girlfriend in Black that existed to create exigent circumstances did not exist in the instant  
24 case. (See *Traverse* 1:1–9.) Consistent with Petitioner’s contentions, S.P. indicated to  
25 Officer Perez that Petitioner and his co-defendants were asleep when she left the motel  
26 room. (*Perez Report* 1:23–2:2.) Furthermore, neither Officer Perez’s report or testimony  
27 provide evidence of a specific threat to Willis’s baby on the night of September 29, 2008  
28 or the morning of September 30, 2008. (See *Trial Tr. May 4, 2010*, 133:5–149:16; *Perez*

1 Report.) Even if officers had a legitimate concern for the baby's safety in light of the  
2 disturbing details of S.P.'s report, the record does not indicate that, upon arriving at  
3 room 117, particularized facts existed to justify warrantless entry in order to prevent  
4 physical harm to the child. E.g., Sheehan, 743 F.3d at 1221 (citations omitted); see  
5 United States v. Gooch, 6 F.3d 673, 679 (9th Cir. 1993) (affirming district finding that  
6 no exigent circumstances existed given the absence of an ongoing threat of present  
7 danger to persons in or around tent of defendant believed to possess a handgun). Thus,  
8 fear for the safety of Willis's child does not appear to have provided an independent  
9 justification for entry into the room based on exigent circumstances.

10  
11 *ii. Destruction of evidence*

12 Another purported exigent circumstance that Respondent provides as a  
13 justification for the officers' warrantless entry into the motel room is the officers' concern  
14 for the potential destruction of evidence. (*Gov't Opp'n* 7:3.) Petitioner, however,  
15 contends that given the circumstances, the officers would have been able to hear whether  
16 Petitioner and his co-defendants were about to destroy evidence. (*Traverse* 3:8–11.)  
17 Because the record does not establish that the officers heard any such noise, Petitioner  
18 argues that the officers could have secured the motel room from the outside and sought  
19 a search warrant, thereby obviating the potential destruction of evidence that created the  
20 alleged exigent circumstances. (*Id.* at *Traverse* 3:12–14.) The Court finds Respondent to  
21 have the better of the argument.

22 Based on Officer Perez's report and later testimony at trial, it is undisputed that  
23 S.P. communicated her ordeal to him, and she did so prior to his investigation at the  
24 motel. (*Trial Tr. May 4, 2010*, 137:3–24, 139:4; *see Perez Report*.) Part of what S.P.  
25 communicated to Officer Perez included the fact that Petitioner and his co-defendants  
26 made her take off her clothes and then took nude pictures of her with at least one cell  
27 phone—all of which had been done for the purpose of prostituting her on Craigslist.  
28 (*Perez Report*, 1:15–18.) Thus, Officer Perez and his fellow officers had a reasonable belief

1 that evidence of the suspects' crimes against S.P. existed on at least one cell phone in  
2 room 117 of the Oceanside Inn & Suites.

3 Officer Perez also testified that upon arriving at the door of room 117, the officers  
4 knocked and announced their presence. (*Trial Tr. May 4, 2010, 141:1–142:4.*) Because  
5 the door was already slightly ajar, it began to open when the officers knocked on it. (*Id.*)  
6 Notwithstanding that fact, Officer Perez explained that he was unable to fully observe the  
7 individuals occupying the room; rather, he was only able to observe two sets of feet on  
8 the motel room beds. (*Id. at 142:5–145:5.*) Therefore, until the moment the officers  
9 were able to fully observe Petitioner and his co-defendants, the evidence on Petitioner's  
10 cell phone could have easily been destroyed. That is, upon hearing the officers announce  
11 their presence, an occupant in the room could have deleted the photos, smashed the  
12 phone, or otherwise dispensed of the data within the phone (e.g. by removing and  
13 destroying the phone's data card)—all within a matter of seconds.

14 In light of the above, it is clear that a reasonable person in the position of the  
15 officers in this case would have believed that entry “was necessary to prevent the  
16 destruction of relevant evidence”—a potential consequence that would have improperly  
17 frustrated the officers' legitimate law enforcement efforts. E.g., Sheehan, 743 F.3d  
18 at1221. Thus, the potential destruction of evidence created an exigent circumstance  
19 justifying the officers' warrantless entry into the motel room. See id.

20  
21 3. *Search of the Cell Phone as a Valid Search Incident to Arrest*

22 Petitioner argues further that “even if the officers' warrantless entry into the motel  
23 room did not violate the Fourth Amendment, the officers still violated the Fourth  
24 Amendment when they arrested [Petitioner] without probable cause and searched his cell  
25 phone without a warrant.” (*Pet'r's Suppl. Mem. 5:19–21.*) As discussed above, Officer  
26 Perez and the officers accompanying him did in fact have probable cause to believe that  
27 Petitioner and his consorts had committed a crime, which, in turn, justified Petitioner's  
28 warrantless arrest. See, e.g., United States v. Brobst, 558 F.3d 982, 990 (9th Cir. 2009)

1 (“[A] warrantless arrest satisfies the Constitution so long as the officer has probable cause  
2 to believe that the suspect has committed or is committing a crime.” (citation and  
3 internal quotation marks omitted)). Therefore, the remaining issue is whether the  
4 officers violated the Fourth Amendment when they searched Petitioner’s cell phone  
5 without a warrant—a search that Respondent characterizes as a valid search incident to  
6 Petitioner’s arrest. (*Gov’t Opp’n* 10:17–22.)

7 “A search incident to lawful arrest is one of the ‘few specifically established and  
8 well-delineated exceptions’ to the warrant requirement of the Fourth Amendment.”  
9 United States v. Maddox, 614 F.3d 1046, 1048 (9th Cir. 2010) (citing Katz v. United  
10 States, 389 U.S. 347, 357 (1967)). This type of search “is conducted for the twin  
11 purposes of finding weapons the arrestee might use, or evidence the arrestee might  
12 conceal or destroy.” *Id.* (citing Chimel v. California, 395 U.S. 752, 762–63 (1969),  
13 *abrogated on other grounds by Arizona v. Gant*, 556 U.S. 332, 344 (2009)). In the Ninth  
14 Circuit, “[t]he determination of the validity of a search incident to arrest . . . is a two-fold  
15 inquiry: (1) was the searched item ‘within the arrestee’s immediate control when he was  
16 arrested’; and (2) did ‘events occurring after the arrest but before the search ma[k]e the  
17 search unreasonable’?” *Id.* (citing United States v. Turner, 926 F.2d 883, 887 (9th Cir.  
18 1991)). Accordingly, to be deemed valid, a search incident to a lawful arrest must be of  
19 “the area from within which [the arrestee] might gain possession of a weapon or  
20 destructible evidence,” Chimel, 395 U.S. at 763, and must occur “at about the same time  
21 as the arrest.” United States v. Andersson, 813 F.2d 1450, 1456 (9th Cir. 1987).

22 The facts demonstrate that the search of Petitioner’s cell phone was indeed a valid  
23 search incident to his arrest. Suffice it to say, the officers’ search of Petitioner’s cell  
24 phone was clearly not for the purpose of “finding weapons the [Petitioner] might use.”  
25 However, based on the information available to the officers at the time, it was reasonable  
26 for them to believe that the cell phone likely contained the clothed and nude photos of  
27 S.P.—evidence that Petitioner could have attempted to conceal or destroy. (*See generally*  
28 *Perez Report*.) Officer Perez’s trial testimony established that at the time the officers made

1 contact, Petitioner's green Samsung cell phone lay on the floor adjacent to Petitioner's  
2 bed in the motel room, and that Petitioner was in close proximity to it. (*Trial Tr. May 4,*  
3 *2010, 148:23–149:7.*) Thus, it appears that at the relevant time, Petitioner's cell phone  
4 and all of its contents were in an area from within which Petitioner could have readily  
5 gained possession of them. See Chimel, 395 U.S. at 763. Furthermore, the record does  
6 not demonstrate that any event occurring after the arrest, but before the search, would  
7 have rendered the search of Petitioner's cell phone unreasonable. See Maddox, 614 F.3d  
8 at 1048 (citations omitted).

9  
10 4. *Retroactivity of the Supreme Court's Decision in Riley*

11 That Petitioner's cell phone was searched incident to a valid arrest does not end  
12 the inquiry. Petitioner contends that "officers cannot search a cell phone without a  
13 warrant incident to arrest." (*Traverse* 5 fn.1 (citing United States v. Wurie, 728 F.3d 1  
14 (1st Cir. 2013), *cert. granted* 134 S. Ct. 999 (2014), and *aff'd sub. nom. Riley v. California*,  
15 134 S. Ct. 2473 (2014)); *see also Pet'r's Suppl. Mem. 5:19–24.*) Petitioner argues that as a  
16 result of the Supreme Court's recent holding in Riley v. California, "even if the entry  
17 into the hotel room were permissible . . . the Fourth Amendment was violated when  
18 [Petitioner's] cell phone was searched without a warrant." (*Pet'r's Suppl. Citation [Doc.*  
19 *209]* 1:21–23.) The Court rejects this argument.

20 In Riley, the Supreme Court held that the search incident to arrest exception does  
21 not apply to the contents of an arrestee's cell phone, and that a warrant is generally  
22 required before police officers conduct such a search. 134 S. Ct. at 2473. However,  
23 Riley was decided in June of 2014, almost six years after Petitioner's arrest and the  
24 contemporaneous search of his cell phone. See id. Moreover, Petitioner merely claims  
25 that the officers violated the Fourth Amendment when they conducted the warrantless  
26 search of his cell phone, but he does not cite any authority to support his apparent  
27 contention that he should be afforded retroactive application of Riley for the purposes  
28 of his IAC claim. Nevertheless, the Court has conducted a review of the relevant case

1 law. Based on that review, the Court has found that few courts have had the opportunity  
2 to examine the question of Riley's retroactive application. However, given the relevant  
3 post-Riley case law, it appears that Petitioner is not entitled to the retroactive relief that  
4 he seeks in the wake of Riley.

5 In United States v. Spears, 2014 WL 3407930, at \*1 (N.D. Tex. July 14, 2014), a  
6 defendant was convicted of various crimes. Id. at \*1. During the defendant's trial,  
7 several photographs obtained as a result of a warrantless search of his cell phone incident  
8 to his arrest were admitted into evidence over his objections. Id. Eight days after the  
9 conclusion of the defendant's trial, the Supreme Court decided Riley. Id. at \*3; see  
10 Riley, 134 S. Ct. at 2473. That decision prompted the defendant to file a motion for a  
11 new trial, wherein he argued that Riley applied retroactively to his case. Spears, 2014  
12 WL 3407930, at \*3.

13 In addressing the defendant's retroactivity argument, the district court cited Davis  
14 v. United States, 131 S. Ct. 2419, 2430 (2011). Spears, 2014 WL 3407930, at \*3. In  
15 Davis, the Supreme Court held that "newly announced rules of constitutional criminal  
16 procedure must apply 'retroactively to all cases, state or federal, pending on direct review  
17 or not yet final, with no exception.'" Davis, 131 S. Ct. at 2430 (quoting Griffith v.  
18 Kentucky, 479 U.S. 314, 328 (1987)). Although it ultimately denied the defendant's  
19 motion for a new trial on other grounds,<sup>1</sup> the court held that because the defendant's  
20 conviction was not final at the time the Supreme Court decided Riley, the Riley decision  
21 applied retroactively to his case. Spears, 2014 WL 3407930, at \*3 (citing Davis, 131 S.  
22 Ct. at 2431).

23 //

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25 <sup>1</sup> The court in Spears ultimately held that "the admission of the photographs from the  
26 warrantless search of [the defendant's] cell phone incident to his arrest was proper" because the  
27 officers, in good faith, relied on binding Fifth Circuit precedent in performing the search. 2014  
28 WL 3407930, at \*3-4. The court also denied the defendant's motion for a new trial, in the  
alternative, based on its finding that admission of the photographs constituted harmless error.  
Id. at \*4-5.

Here, Petitioner's conviction became "final" once the Supreme Court denied his petition for writ of certiorari on December 16, 2013.<sup>2</sup> See Jones v. United States, 134 S. Ct. 834 (2013) (denying certiorari). Petitioner's conviction, consequently, is not "pending on direct review." See Davis, 131 S. Ct. at 2430. Instead, the instant motion constitutes a collateral attack on Petitioner's sentence. See 28 U.S.C. § 2255 *et seq.* Thus, it does not appear that Petitioner's case falls within the category of cases entitled to retroactive application of "newly announced rules of constitutional criminal procedure" that the Supreme Court discussed in Davis. 131 S. Ct. at 2430.

Another post-Riley case addressing the retroactivity issue is Swagerty v. Price, 2014 WL 4163788, at \*1 (E.D. Cal, Aug. 20, 2014). In Swagerty, a state prisoner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Id. at \*1. He subsequently filed a motion requesting permission to submit a supplemental brief. Id. at \*5-6. In the motion, the petitioner proposed to argue that Riley applied retroactively to his case, and, therefore, entitled him to suppression of evidence found on his cell phone during an allegedly illegal search and later used at trial to convict him. Id. at \*5-6. The district court ultimately denied the motion and held that "Riley does not provide retroactive relief." Id. at 6. This Court agrees, and, in light of the foregoing, the Court declines to retroactively apply Riley for the purposes of Petitioner's IAC claim.

##### 5. *The Exclusionary Rule and Good Faith*

Even if Petitioner were able to avail himself of the Riley decision, he would not automatically be entitled to a suppression remedy. See Davis, 131 S. Ct. at 2431 ("[T]he retroactive application of a new rule of substantive Fourth Amendment law *raises* the question whether a suppression remedy applies; it does not answer that question."); see also United States v. Leon, 468 U.S. 897, 906 (1984) (quoting Illinois v. Gates, 462 U.S.

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<sup>2</sup> In Linkletter v. Walker, the Supreme Court explicated that the term "final" in this context applies in a case "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari [has] elapsed." 381 U.S. 618, 622 n.5 (1965), *disapproved of on other grounds by* Griffith, 479 U.S. at 314.

213, 223 (1983)) (“Whether the exclusionary sanction is appropriately imposed in a particular case . . . is ‘an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.’”). Indeed, as Respondent points out, the Supreme Court has recognized a good faith exception to the exclusionary rule. (*Gov’t Opp’n* 9:3–9 (citing Herring v. United States, 555 U.S. 135 (2009)).) And, notwithstanding Petitioner’s averments to the contrary, (*see Traverse* 8:14–28), it appears that the good faith exception would have precluded the exclusion of the cell phone evidence in the event that Petitioner’s trial counsel had moved to suppress it.

According to the Supreme Court, the “exclusionary rule” is one that “forbids the use of improperly obtained evidence at trial.” Herring, 555 U.S. at 139 (citing Weeks v. United States, 232 U.S. 383, 398 (1914)). The Court has also explained the rule to be “a prudential doctrine” created to “compel respect for the [Fourth Amendment’s] constitutional guaranty.” Davis, 131 S. Ct. at 2426 (citations and internal quotation marks omitted). However, “[e]xclusion is ‘not a personal constitutional right,’ nor is it designed to ‘redress the injury’ occasioned by an unconstitutional search.” Id. (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)). In fact, the Supreme Court has “repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.” Herring, 555 U.S. at 141 (citations omitted). Instead, “[t]he rule’s sole purpose . . . is to deter future Fourth Amendment violations.” Davis, 131 S. Ct. at 2426 (citations omitted). Furthermore, the rule “serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” Herring, 555 U.S. at 144. Therefore, if the suppression of evidence would fail to yield “appreciable deterrence” of culpable police conduct, then exclusion would not be warranted. Arizona v. Evans, 514 U.S. 1, 11 (1995) (quoting United States v. Janis, 428 U.S. 433, 454 (1976)).

In light of the foregoing, courts must be mindful that appreciable deterrence constitutes a “necessary condition for exclusion,” but not “a sufficient” one. Davis, 131

1 S. Ct. at 2427 (quoting Hudson v. Michigan, 547 U.S. 586, 596 (2006)) (internal  
2 quotation marks omitted). Because, exclusion typically requires a court to disregard  
3 “reliable, trustworthy evidence bearing on guilt or innocence,” the exclusionary rule  
4 carries with it the potential to “exact[] a heavy toll on both the judicial system and society  
5 at large.” Id. (citing Stone, 428 U.S. at 490–91). Thus, when determining whether to  
6 apply the exclusionary rule in a particular case, courts “must also account for the  
7 ‘substantial social costs’ generated by the rule,” id. (quoting Leon, 468 U.S. at 907)—the  
8 predominant social cost being “letting guilty and possibly dangerous defendants go free”  
9 without punishment. Herring, 555 U.S. at 141; see Davis, 131 S. Ct. at 2427. And,  
10 while the Supreme Court has held such costs “to be worth bearing in certain  
11 circumstances, [prior] cases have repeatedly emphasized that the rule’s ‘costly toll’ upon  
12 truth-seeking and law enforcement objectives presents a high obstacle for those urging  
13 application of the rule.” Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364–65  
14 (1998) (quoting United States v. Payner, 447 U.S. 727, 734 (1980)); see Hudson, 547  
15 U.S. at 591 (“Suppression of evidence . . . has always been our last resort, not our first  
16 impulse.”).

17 In a series of cases, the Supreme Court has expounded upon the application of the  
18 good faith exception to Fourth Amendment violations. For instance, in Leon, the Court  
19 declined to apply the exclusionary rule where evidence had been obtained based on  
20 officers’ “objectively reasonable reliance” on a warrant issued by a detached and neutral  
21 magistrate that was later found to be unsupported by probable cause. 468 U.S. at 900,  
22 922. Then, in Evans, the Court declined to suppress relevant evidence where an officer  
23 acted in reasonable reliance on a police record indicating the existence of an outstanding  
24 warrant that was later determined to be erroneous. 514 U.S. at 1. Similarly, in Herring,  
25 the Court rejected application of the exclusionary rule where an officer “reasonably  
26 believe[d] there [was] an outstanding arrest warrant, but that belief turn[ed] out to be  
27 wrong because of a negligent bookkeeping error by another police employee.” 555 U.S.  
28 at 137. Finally, in Davis, the Court explained that “when the police conduct a search in

1 objectively reasonable reliance on binding judicial precedent” that is later overturned,  
2 no culpable police conduct exists, and application of the exclusionary rule is not  
3 appropriate. 131 S. Ct. at 2428–29.

4       Petitioner contends that the facts of the instant case are not analogous to the facts  
5 of any of the aforementioned Supreme Court decisions, and he therefore would have  
6 been entitled to have the evidence excluded upon a suppression motion by trial counsel.  
7 (*Traverse* 14:20–28.) Respondent argues that the supposed inappropriate police conduct  
8 was not reckless or deliberate, and therefore not culpable. (*Gov’t Opp’n* 9:7–10:11.)  
9 Accordingly, Respondent contends that the steep social costs of granting a suppression  
10 motion—if trial counsel were to have brought one—would have outweighed the marginal  
11 deterrent effect on future Fourth Amendment violations that might have resulted if the  
12 evidence had been excluded. (*Id.* at 10:11–22.) The Court finds Respondent to have the  
13 better of the argument.

14       In the instant case, Petitioner has not adequately demonstrated—and the Court has  
15 not found—the existence of any indicia of deliberate, reckless, grossly negligent, or  
16 recurring or systemic negligent conduct on the part of the officers responding to S.P.’s  
17 9-1-1 call on the morning of September 29, 2008. Indeed, the opposite appears to be  
18 true. In July of 2008, the California Court of Appeal upheld a search of an arrestee’s cell  
19 phone incident his arrest. People v. Diaz, 165 Cal. App. 4th 732 (2008), *review granted*  
20 *and opinion superceded*, 196 P.3d 220 (Cal. 2008), *and aff’d* 51 Cal. 4th 84 (2011).  
21 Thereafter, in October of 2008, the California Supreme Court granted the  
22 arrestee–petitioner’s petition for review. Diaz, 196 P.3d at 220 (Cal. 2008). However,  
23 between the time of the California Court of Appeal’s decision and the subsequent grant  
24 of review of that decision by the California Supreme Court, the events giving rise to  
25 Petitioner’s case transpired.

26       It follows that at the time of Petitioner’s arrest, binding state appellate precedent  
27 specifically authorized the practice of searching cell phones incident to lawful arrests. See  
28 Davis, 131 S. Ct. at 2429. It further stands to reason that the officers who searched

Petitioner's cell phone had done no more than act as would any reasonable officer under the same circumstances. See id. Hence, excluding the evidence in this case upon trial counsel's motion would have done little or nothing to yield appreciable deterrence of culpable police conduct. See Herring, 555 U.S. at 144. Similar to Davis, it seems that "[a]bout all that exclusion would deter in this case is conscientious police work." 131 S. Ct. at 2429.<sup>3</sup>

In light of the above, the Court concludes that Petitioner has failed to carry his lofty burden with respect to his first IAC claim. See Strickland, 466 U.S. at 687; see also Kimmelman, 477 U.S. at 382 (noting Strickland's standard to be "highly demanding"); Quintero-Barraza, 78 F.3d at 1348. Given the officers' probable cause to believe Petitioner had committed one or more crimes, the exigent circumstances that existed based on the officers' genuine concern for the potential destruction of evidence, the valid search of Petitioner's cell phone incident to his arrest, and the good faith of the officers, Petitioner did not have a meritorious Fourth Amendment claim. Consequently, Petitioner was not prejudiced by his trial attorney's failure to file a motion to suppress the photos of S.P. Kimmelman, 477 U.S. at 375 ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious . . ."). Therefore, Petitioner's first IAC claim fails.

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<sup>3</sup> If, for some reason—of which the Court is unaware—it could be said that the decision in the first iteration of Diaz by the California Court of Appeal did not constitute "binding appellate precedent," it is still highly unlikely that the evidence in this case would have been excluded upon a motion to suppress by Petitioner's trial counsel. First, there had been no extant law or "binding judicial precedent" that would have precluded the officers from searching Petitioner's cell phone on the morning of September 30, 2008. Second, the California Supreme Court later upheld the Court of Appeal's decision with respect to searches of cell phones incident to valid arrests. See Diaz, 51 Cal. 4th at 84. Third, faced with trial counsel's suppression motion, the Court still would likely have found that the officers' conduct had not been "so objectively culpable as to require exclusion," Herring, 555 U.S. at 146, and that suppression, as a remedy that comes with substantial costs to society and one of "last resort," would not have been appropriate under the circumstances. See, e.g., Hudson, 547 U.S. at 590–91, 596.

B. Trial Counsel's Failure to Raise an Eighth Amendment Challenge at the Time of Sentencing Did Not Constitute Ineffective Assistance of Counsel

Petitioner also claims that his trial counsel rendered IAC in failing to raise an Eighth Amendment challenge to Petitioner's sentence. (*Pet.* 6; *see Pet'r's Suppl. Mem.* 6:13–10:23.) According to Petitioner, 18 U.S.C. § 2251(a) violates the Eighth Amendment's prohibition on cruel and unusual punishment because it constitutes "a strict liability offense" carrying a 15-year mandatory minimum penalty "and other sentencing exposure set forth in 18 U.S.C. § 2251(e)." (*Pet'r's Suppl. Mem.* 6:20–26.) Consequently, Petitioner avers that due to the purported unconstitutionality of his sentence, "he was prejudiced by his trial attorney's failure to raise an Eighth Amendment claim at sentencing." (*Id.* 10:19–20.)

According to Respondent, however, Ninth Circuit precedent clearly establishes that 18 U.S.C. § 2251 and its 15-year minimum sentence comport with the Eighth Amendment. (*Gov't Opp'n* 11:8–12 (citing United States v. Meiners, 485 F.3d 1211, 1212 (9th Cir. 2007); United States v. U.S. Dist. Court (Kantor II), 858 F.2d 534 (9th Cir. 1988)).) Respondent therefore contends that even if Petitioner's trial counsel had raised an Eighth Amendment challenge at the time of Petitioner's sentencing, this Court would have been bound by Ninth Circuit precedent, thereby compelling it to deem the statute and the penalties it prescribes constitutional. (*Id.* at 11:12–14.)

As noted above, Petitioner bears the burden of proving that the performance of his attorney was grossly deficient, and that he was prejudiced by such deficiency. Strickland, 466 U.S. at 687. In determining whether Petitioner's trial counsel's performance was deficient due to his failure to raise an Eighth Amendment challenge to Petitioner's sentence, Petitioner must also demonstrate that the Eighth Amendment claim had merit and that there is reason to believe that if counsel had made the claim, the sentence would have been different.<sup>4</sup> Id.

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<sup>4</sup> Below, the Court explains its finding that Petitioner procedurally defaulted on his Eighth Amendment claim. *See infra* Part II.D. However, because Petitioner has repackaged that

1 In setting out his second IAC claim, Petitioner relies heavily upon United States  
 2 v. Williams, in which the Ninth Circuit explained that “the Eighth Amendment contains  
 3 a ‘narrow proportionality principle.’” 636 F.3d 1229, 1232 (9th Cir. 2011) (quoting  
 4 Graham v. Florida, 560 U.S. 48, 59–60 (2010)). In Williams, the Ninth Circuit also  
 5 explained that one way to mount a proportionality challenge “is to show that an entire  
 6 class of sentences is unconstitutionally disproportionate given the severity of the  
 7 sentence, the gravity of the crime, and the type of offender.”<sup>5</sup> Id. at 1233. However,  
 8 “this [proportionality] principal ‘does not require strict proportionality between crime  
 9 and sentence.’” Id. at 1232 (quoting Graham, 560 U.S. at 59). “When considering  
 10 categorical challenges to classes of sentences, courts look to ‘objective indicia of society’s  
 11 standards . . . to determine whether there is a national consensus against the sentencing  
 12 practice at issue,’ and to the court’s ‘own independent judgment.’” Id. at 1233 (quoting  
 13 Graham, 560 U.S. at 48–49). In exercising its own “independent judgment,” a court  
 14 should consider: (1) “the culpability of the offenders at issue in light of their crimes and  
 15 characteristics, along with the severity of the punishment in question,” and (2) “whether  
 16 the challenged sentencing practice serves legitimate penological goals.” Graham, 560  
 17 U.S. at 67 (citations omitted).

18 As an initial matter, Petitioner fails to recognize that “it is exceptionally difficult  
 19 for a criminal to show that his sentence is unconstitutionally disproportionate.”  
 20 Williams, 636 F.3d at 1232 (citing Ewing v. California, 538 U.S. 11, 21 (2003) (noting  
 21 that successful Eighth Amendment proportionality challenges in noncapital cases are  
 22 “exceedingly rare”)). In fact, for the bulk of history, the Supreme Court had declared a

23  
 24  
 25 claim as one of IAC, the Court briefly addresses the merits of the Eighth Amendment challenge  
 within the purview of the IAC claim.

26 <sup>5</sup> In Williams, the Ninth Circuit also explained another way to mount a proportionality  
 27 challenge, which involves “challenge[ing] the sentence as disproportionate ‘given all the  
 28 circumstances in a particular case.’” 636 F.3d at 1232 (quoting Graham, 560 U.S. at 59).  
 Because Petitioner does not argue this alternate Eighth Amendment challenge as part of his IAC  
 claim, the Court does not address it.

1 sentence categorically disproportionate only where the penalty being challenged was  
2 death. See id. at 1233 (citations omitted). Recently, the Supreme Court held one other  
3 type of sentence to be categorically disproportionate: life imprisonment without parole  
4 for juvenile offenders in nonhomicide cases. Id. (citing Graham, 560 U.S. at 48.) Here,  
5 Petitioner’s sentence is not nearly as severe as the penalties involved in those cases—a  
6 robust indication that an Eighth Amendment challenge to his sentence by trial counsel  
7 would have fallen well short of the mark. See id., 636 F.3d at 1232.

8 Still, Petitioner avers that his 15-year minimum sentence is unconstitutionally  
9 disproportionate due, in large part, to § 2251(a) being a “strict liability offense.”  
10 Specifically, Petitioner characterizes § 2251(a) as such because it does not require the  
11 government to prove scienter with respect a victim’s age as an element of the offense.  
12 (*Pet’r’s’ Suppl. Mem.* 6:20–23, 7:1–5, 8:17–19, 9:11–21.) However, in light of the Ninth  
13 Circuit’s reading of § 2251(a), it appears that Petitioner has mischaracterized the statute.

14 In Kantor II, the Ninth Circuit noted that “[t]here is . . . little doubt that  
15 knowledge of the minor’s age is not necessary for conviction under section 2251(a).” 858  
16 F.2d at 538 (citations omitted). But, in an effort to narrowly construe the statute in a  
17 manner that would not offend the First Amendment, the Ninth Circuit ultimately  
18 engrafted a “reasonable mistake of age defense”—a defense that other circuit courts have  
19 declined to read into the statute.<sup>6</sup> Thus, notwithstanding Petitioner’s contentions, this  
20 Circuit does not recognize 2251(a) as being a strict liability offense. See Kantor II, 858  
21 F.2d at 538–44.

22 Moreover, in deciding Petitioner’s second direct appeal, the Ninth Circuit held  
23 as follows:

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26  
27 <sup>6</sup> See, e.g., United States v. Fletcher, 634 F.3d 395, 404–05 (7th Cir. 2011) (holding that  
28 “the First Amendment does not mandate a mistake-of-age defense to prosecutions under §  
2251(a)”; United States v. Humphrey, 608 F.3d 955 (6th Cir. 2010) (declining to engraft a  
reasonable mistake-of-age defense onto § 2251(a)).

1 “[W]e previously rejected [Petitioner’s] claim that the scienter demanded by  
 2 the statute was inadequate to support a conviction for a crime with a 15-  
 3 year mandatory minimum sentence. In doing so, we decided [his]  
 4 restatement of that argument—that his 15-year sentence offends the Fifth  
 Amendment—by necessary implication in the previous disposition.”

5 Jones, 532 F. App’x at 770 (citations and internal quotation marks omitted). That  
 6 decision, like the Ninth Circuit’s decision on Petitioner’s first appeal, relied on Kantor  
 7 II—a decision that is binding on this Court. In light of Kantor II, and to the extent that  
 8 there exists a “cross-pollenization” between the Eighth Amendment and the Fifth  
 9 Amendment in sentencing claim analyses,<sup>7</sup> the Court finds that Petitioner’s current  
 10 argument—that the statute is too harsh because it imposes “strict liability”—would have  
 11 been of little avail to Petitioner if trial counsel had raised it as part of a categorical Eighth  
 12 Amendment challenge to the 15-year mandatory minimum sentence mandated under §  
 13 2251(e).

14 Insofar as “objective indicia” of societal standards are concerned, the Court has  
 15 not found a national consensus against the sentencing practice at issue. See Williams,  
 16 636 F.3d at 1233. In fact, the opposite appears to be true. As Petitioner himself points  
 17 out, Congress has been incrementally increasing penalties for violations of § 2251(a)  
 18 over the past few decades. (See, e.g., *Pet’r’s Suppl. Mem.* 6:6–8:5 (referencing Protection  
 19 of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7  
 20 (1978) (mandatory minimum set at 2 years); Child Protection Act of 1984, Pub. L. No.  
 21 98-292, 98 Stat. 204 (1984) (raising maximum fines); Child Pornography Prevention Act  
 22 of 1996, Pub. L. No. 104-208, 110 Stat. 3009–26, 3009–30 (1996) (raising statutory  
 23 minimum to 10 years); and Prosecutorial Remedies and Other Tools to end the  
 24 Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, 653, 683  
 25 (2003) (raising statutory minimum to 15 years)). That legislative history begs the  
 26 question: what greater national consensus could there be than a consistent congressional

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 28 <sup>7</sup> See, e.g., O’Dell v. Netherland, 95 F.3d 1214, 1230 n.8 (4th Cir. 1996) (citing Simmons  
v. South Carolina, 512 U.S. 154 (1994)).

1 consensus as to the increases in the statutory minimum penalty for violations of 2251(a)?  
2 Petitioner fails to answer this question, and in the Court's view, the "objective indicia"  
3 of societal standards with respect to the sentencing practice at issue would not render  
4 Petitioner's sentences unconstitutional under the Eighth Amendment.

5 Lastly, the sentencing practice at issue does in fact serve legitimate penological  
6 goals. For some time now, the Supreme Court has recognized that "[t]he prevention of  
7 sexual exploitation and abuse of children constitutes a government objective of  
8 surpassing importance." New York v. Ferber, 458 U.S. 747, 757 (1982). In emphasizing  
9 that point, the Court also acknowledged that "a State's interest in 'safeguarding the  
10 physical and psychological well-being of a minor' is 'compelling.'" Id. at 756-57.  
11 Congress, for its part, has consistently echoed those sentiments in passing the above-  
12 mentioned legislation. And while the 15-year minimum for violations of 2251(a) is  
13 doubtless a strict penalty, it serves as a powerful deterrent against the sexual exploitation  
14 of children—an indisputably serious offense. Congress chose to implement the 15-year  
15 mandatory minimum, and that decision is to be afforded substantial deference. Solem  
16 v. Helm, 463 U.S. 277, 290 (1983) (noting that "[r]eviewing courts, of course, should  
17 grant substantial deference to the broad authority that legislatures necessarily possess in  
18 determining the types and limits of punishments for crimes").

19 In light of the discussion above, a categorical challenge to Petitioner's sentence  
20 under the Eighth Amendment, if made at the time of sentencing, would have failed.  
21 Thus, counsel's failure to raise the issue at sentencing is of no moment. Because  
22 Petitioner cannot demonstrate that an Eighth Amendment challenge would have been  
23 meritorious, trial counsel's failure to challenge the sentence on Eighth Amendment  
24 grounds does not demonstrate deficient performance or any prejudice to Petitioner based  
25 on such performance. See Strickland, 466 U.S. at 687.

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1           **C.     Petitioner’s Fifth Amendment Challenge**

2           Petitioner also claims that his 15-year mandatory minimum sentence violates the  
3 Fifth Amendment. (*Pet.* 7; *Pet’r’s Suppl. Mem.* 11:1–16:19.) Respondent, on the other  
4 hand, points out that the Ninth Circuit already ruled on this issue when it rendered  
5 decisions in Petitioner’s first and second appeals. (*Gov’t Opp’n* 3:22–4:3.) In ruling on  
6 Petitioner’s second appeal, the Ninth Circuit explained as follows:

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8           [T]he law of the case forecloses Jones’s Fifth Amendment claims. In his  
9 prior appeal, Jones challenged his conviction by contending that the  
10 government must “prove scienter as to the minor’s age in order to justify  
11 criminal penalties of the magnitude set forth in section 2251.” In the  
12 alternative, Jones argued that even if we upheld his conviction, we should  
13 still vacate his sentence. To support these claims, Jones relied on the same  
14 arguments and authorities that he now brings before us. However, we  
15 previously rejected Jones’s claim that the scienter demanded by the statute  
16 was inadequate to support a conviction for a crime with a 15-year  
17 mandatory minimum sentence. In doing so, we decided Jones’s  
18 restatement of that argument—that his 15-year sentence offends the Fifth  
19 Amendment—“by necessary implication in the previous disposition.” In  
20 other words, we disagree with Jones (and the dissent) that simply  
21 repackaging arguments already raised in a prior appeal should allow Jones  
22 a second chance to appeal the same substantive issues.

23           Jones, 532 F. App’x at 770 (citations omitted). The Ninth Circuit’s decision is clear and  
24 binding on this Court. Accordingly, the Court declines to allow Petitioner a *third* chance  
25 to appeal the same substantive issue.

26           **D.     Petitioner’s Eighth Amendment Challenge**

27           Finally, Petitioner claims that his 15-year minimum sentence violates the Eighth  
28 Amendment. (*Pet.* 6; *Pet’r’s Suppl. Mem.* 8:6–10:17.) Respondent counters that the Ninth  
Circuit previously rejected Petitioner’s Eighth Amendment challenge as untimely because  
Petitioner failed to raise it in his first direct appeal. (*Gov’t Opp’n* 3:13–15, 3:22–4:2.) To  
support its position, Respondent incorporates by reference the untimeliness argument  
it raised in response to Petitioner’s second direct appeal. (*See Gov’t Opp’n* 3:22–4:2; *Gov’t*

1 Opp'n, Ex. 3 [Doc. 207-3], 24–33 (arguing that even if deemed to be new, Petitioner's  
2 claims were nonetheless untimely and therefore waived).) Respondent also refers to the  
3 Ninth Circuit's decision on Petitioner's second direct appeal, which indeed foreclosed  
4 on Petitioner's Eighth Amendment claim. (See Gov't Opp'n 3:19–4:3.)

5 In ruling upon Petitioner's second direct appeal, the Ninth Circuit provided a  
6 concise discussion of Petitioner's Eighth Amendment claim. Specifically, the Ninth  
7 Circuit explained: "[Petitioner's] Eighth Amendment claim is not timely, because he did  
8 not raise it in his first appeal. Therefore, we decline to address it." Jones, 532 F. App'x  
9 at 770 (citing United States v. Nagra, 147 F.3d 875, 882 (9th Cir. 1998) ("When a party  
10 could have raised an issue in a prior appeal but did not, a court later hearing the same  
11 case need not consider the matter.")). Again, the Ninth Circuit's decision on Petitioner's  
12 second direct appeal is binding on this court, and Petitioner's Eighth Amendment claim  
13 is therefore procedurally barred. See United States v. Ratigan, 351 F.3d 957, 962 (9th  
14 Cir. 2003) (citations omitted) ("A § 2255 movant procedurally defaults his claims by not  
15 raising them on direct appeal and not showing cause and prejudice or actual innocence  
16 in response to the default.").<sup>8</sup>

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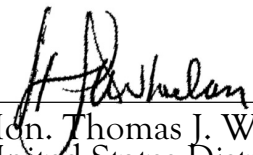
26  
27 <sup>8</sup> To the extent that Petitioner could be construed as not having defaulted on his Eighth  
28 Amendment challenge, the Court finds that such challenge—for the reasons discussed above in  
the context of Petitioner's Eighth Amendment-based IAC claim—nonetheless lacks merit.

1 **III. CONCLUSION AND ORDER**

2 In light of the foregoing, the Court **DENIES** Petitioner's § 2255 motion to vacate,  
3 set aside, or correct his sentence. (Doc. 202.) Because reasonable jurists would not find  
4 the Court's assessment of the claims debatable or wrong, the Court **DENIES** a certificate  
5 of appealability. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). The Clerk of the  
6 Court shall close the district court file.

7 **IT IS SO ORDERED.**

8  
9 DATED: December 22, 2014

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12 Hon. Thomas J. Whelan  
13 United States District Judge  
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JUL 10 2013

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PATRICK JONES,

Defendant - Appellant.

No. 12-50120

D.C. No. 3:09-cr-01250-W-2

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Thomas J. Whelan, Senior District Judge, Presiding

Argued and Submitted June 6, 2013  
Pasadena, California

Before: GOULD, N.R. SMITH, and NGUYEN, Circuit Judges.

Appellant Patrick Jones appeals the district court's imposition of a 15-year mandatory-minimum sentence for violation of 18 U.S.C. § 2251(a). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

In *United States v. Avila-Anguiano*, 609 F.3d 1046 (9th Cir. 2010), we stated:

When a defendant is sentenced to multiple counts and one of them is later vacated on appeal, the sentencing package becomes ‘unbundled.’ The district court then has the authority to put together a new package reflecting its considered judgment as to the punishment the defendant deserve[d] for the crimes of which he [wa]s still convicted.

*Id.* at 1049 (alteration in original) (internal quotation marks omitted). Thus, the district court erred in concluding that it lacked jurisdiction to reconsider Jones’s sentence on remand after we reversed Jones’s trafficking conviction in his prior appeal, *United States v. Jones*, 459 F. App’x 616, 617 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1937 (2012).

However, we conclude that the error was harmless. The district court could not have sentenced Jones to less than the 15-year mandatory minimum without a motion from the government. *United States v. Valente*, 961 F.2d 133, 134–35 (9th Cir. 1992). Because the district court could not have lowered Jones’s sentence, Jones incurred no prejudice when the district court declined to re-sentence him. *See United States v. Gunning*, 401 F.3d 1145, 1149 (9th Cir. 2005) (concluding that failure to re-sentence is prejudicial “when a district court *could have* lowered a defendant’s sentence . . . even if we doubted that the district court *would have* done so”).

Further, the law of the case forecloses Jones’s Fifth Amendment claims. *See United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995). In his prior appeal, Jones challenged his conviction by contending that the government must “prove scienter as to the minor’s age in order to justify criminal penalties of the magnitude set forth in section 2251.” In the alternative, Jones argued that even if we upheld his conviction, we should still vacate his sentence. To support these claims, Jones relied on the same arguments and authorities that he now brings before us. However, we previously rejected Jones’s claim that the scienter demanded by the statute was inadequate to support a conviction for a crime with a 15-year mandatory minimum sentence. *Jones*, 459 F. App’x at 617. In doing so, we decided Jones’s restatement of that argument—that his 15-year *sentence* offends the Fifth Amendment—“by necessary implication in the previous disposition.” *See Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012). In other words, we disagree with Jones (and the dissent) that simply repackaging arguments already raised in a prior appeal should allow Jones a second chance to appeal the same substantive issues.

Jones’s Eighth Amendment claim is not timely, because he did not raise it in his first appeal. Therefore, we decline to address it. *See United States v. Nagra*, 147 F.3d 875, 882 (9th Cir. 1998) (“When a party could have raised an issue in a

prior appeal but did not, a court later hearing the same case need not consider the matter.”).

**AFFIRMED.**

*United States v. Jones*, No. 12-50120

JUL 10 2013

N.R. SMITH, Circuit Judge, concurring:

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

I agree with the majority's disposition of this case. I write separately to address the "unbundling" issue. In my view, *United States v. Avila-Anguiano*, 609 F.3d 1046, 1048–49 (9th Cir. 2010), should not compel us to hold that Jones's sentence was "unbundled" when we vacated one count on his first appeal. *Avila-Anguiano*, broadly states that "[w]hen a defendant is sentenced to multiple counts and one of them is later vacated on appeal, the sentencing package becomes 'unbundled.'" *Id.* at 1049 (internal quotation marks omitted). "Such 'unbundling' is often warranted because conviction on the reversed counts may have affected the remaining counts." *Id.*

The *Avila-Anguiano* rationale made sense in that case. There, the district court had sentenced the defendant to 180 months imprisonment. *Id.* at 1048. The sentence consisted of a mandatory minimum of 120 months for one count to run consecutive to a 60 month sentence for five other counts, with those counts running concurrently with each other. *Id.* We later vacated three of those five counts. *Id.* On the defendant's second appeal, we concluded that the district court had jurisdiction to resentence defendant on the surviving counts on remand of the first appeal, because the sentence became unbundled. *Id.* at 1049. Given the potential interplay between the mandatory sentence and the other counts, it is clear

how the vacated counts could have “affected” the original sentencing.

Jones’s original sentence distinguishes this case from *Avila-Aguiano*. There is no indication that Jones’s sentences should have been unbundled on remand, because there is no indication that they were “bundled” in the first place. Jones received the mandatory minimum for both counts to run concurrently. The district court could not have imposed less than the mandatory minimum (without a government motion) and clearly did not wish to impose a greater sentence. Accordingly, the vacated count could not have “affected” the district court’s original sentencing on the other count.

Jones cites no authority applying the “unbundling” theory to mandatory sentences set to run concurrently, and research reveals none. When asked about the lack of supporting authority at oral argument, Jones claimed that *United States v. Bennett*, 363 F.3d 947, 955-56 (9th Cir. 2004), supports his position. However, *Bennett* is inapposite. There, “the district court did not differentiate among Bennett’s [two] counts of conviction during sentencing and ultimately sentenced Bennett to 121 months imprisonment ‘as to each count, concurrent.’” *Id.* at 956. Unlike the instant case, there was no indication that the district court meant to impose the mandatory minimum (and nothing greater). As such, Jones’s reliance on *Bennett* is misplaced. Thus, I would hold that the district court lacked jurisdiction to resentence Jones on the count surviving his first appeal.

*United States v. Jones*, No. 12-50120

JUL 10 2013

GOULD, Circuit Judge, concurring in part and dissenting in part:

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

I agree with the majority that the district court erred when it concluded that it had no discretion to reconsider Jones's sentence on remand. The error is understandable, because our prior decision was ambiguous and not clear in mandate, but as a general rule, the district court can act when not precluded by the mandate.

But I disagree that the error was harmless. In affirming Jones's 18 U.S.C. § 2251(a) conviction in his prior appeal, we relied on *United States v. U.S. District Court* ("Kantor II"). *United States v. Jones*, 459 F. App'x 616, 617 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 1937 (2012) (citing *Kantor II*, 858 F.2d 534 (9th Cir. 1988)). *Kantor II* came to us on a writ of mandamus before trial began and a sentence had been entered, and it did not discuss sentencing issues. 858 F.2d at 534. When we decided Jones's prior appeal, we did not refer to his sentence or sentencing claims. *Jones*, 459 F. App'x at 617.

Application of the law of the case is discretionary. *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012). But here the district court had no opportunity to apply its discretion. Jones did not present his constitutional claims to the district court in his first sentencing hearing, and on remand the district court erroneously concluded it had no jurisdiction to consider them for the first time.

Where a district court has not undertaken “the traditional exercise of discretion by a sentencing court,” *Koon v. United States*, 518 U.S. 81, 98 (1996), we should be reluctant to substitute our judgment as to how that discretion would or should have been exercised on any matters of sentencing. I see no merit to an expansive law of the case ruling that forecloses from consideration a non-frivolous issue that neither the district court nor we have previously addressed.

Jones’s arguments against his conviction and sentence were similar, but similar arguments carry distinct meanings when posed in different contexts and to different tribunals. The prior panel knew the sentence would become unbundled on remand and I think would have expected the district court to hear Jones’s claims when it resentenced him. With the majority’s decision now, we know the district court will never consider those claims. Thus I think a legitimate issue goes unreviewed.

I conclude that our prior decision does not represent the law of the case. I would remand to the district court to consider Jones’s sentencing argument in the first instance. I respectfully dissent.

FILED

NOT FOR PUBLICATION

NOV 23 2011

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

|                           |   |                            |
|---------------------------|---|----------------------------|
| UNITED STATES OF AMERICA, | ) | No. 10-50430               |
|                           | ) |                            |
| Plaintiff – Appellee,     | ) | D.C. No. 3:09-cr-01250-W-2 |
|                           | ) |                            |
| v.                        | ) | <b>MEMORANDUM*</b>         |
|                           | ) |                            |
| PATRICK JONES,            | ) |                            |
|                           | ) |                            |
| Defendant – Appellant.    | ) |                            |
|                           | ) |                            |
|                           | ) |                            |

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Appeal from the United States District Court  
for the Southern District of California  
Thomas J. Whelan, Senior District Judge, Presiding

Submitted November 8, 2011\*\*  
Pasadena, California

Before: FERNANDEZ, MOORE,\*\*\* and McKEOWN, Circuit Judges.

Patrick Jones appeals his convictions arising out of his sexual exploitation of

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\*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

\*\*\*The Honorable Karen Nelson Moore, United States Circuit Judge for the Sixth Circuit, sitting by designation.

a fourteen-year-old child. See 18 U.S.C. §§ 2251(a), 1591. We affirm in part and reverse in part.

Jones argues that our decision in United States v. U.S. District Court (Kantor II), 858 F.2d 534 (9th Cir. 1988), which explicated § 2251(a), does not dictate the answer to his claim that the section must require that recklessness be proved as a part of the government's case. However, that decision is controlling on Jones's statutory construction and constitutional claims. Id. at 537–44. While Jones attacks our decision in that case, we are bound by the decision<sup>1</sup> because no subsequent Supreme Court case has undermined Kantor II's explicit and implicit statutory and constitutional determinations.<sup>2</sup> The district court did not err when it followed Kantor II.

Jones also argues that his conviction pursuant to 18 U.S.C. § 1591 must be reversed because the jury was instructed on the statutory requirements as that statute existed at the time of trial, rather than those that existed when he committed his offense. He asserts, and the government agrees, that the ex post facto clause<sup>3</sup> was, therefore, violated. Thus, we will reverse that conviction and remand for

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<sup>1</sup>See Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

<sup>2</sup>See id. at 900.

<sup>3</sup>U.S. Const. art. I, § 9, cl. 3.

further proceedings.

AFFIRMED in part, REVERSED in part, and REMANDED.