No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MIGUEL ANGEL CANO

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding that the scope of a search of an electronic device under the border-search exception to the Fourth Amendment's warrant requirement is limited solely to digital contraband on the device itself, and cannot include evidence of physical smuggling or other border-related crimes.

RELATED PROCEEDINGS

United States District Court (S.D. Cal.):

United States v. *Cano*, No. 3:16-cr-1770-BTM-1 (May 1, 2017)

United States Court of Appeals (9th Cir.):

United States v. *Cano*, No. 17-50151 (Aug. 16, 2019)

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is reported at 934 F.3d 1002. The order of the court of appeals denying rehearing en banc (App., *infra*, 60a-83a) is reported at 973 F.3d 966. The order of the district court (App., *infra*, 43a-59a) is reported at 222 F. Supp. 3d 876.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2019. A petition for rehearing was denied on September 2, 2020 (App., *infra*, 60a-61a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that

date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the 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.

STATEMENT

Following a mistrial and retrial before a jury in the Southern District of California, respondent was convicted on one count of importing cocaine into the United States, in violation of 21 U.S.C. 952 and 21 U.S.C. 960 (2012 & Supp. II 2014). Judgment 1. Respondent was sentenced to 54 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals reversed the district court's denial of respondent's pretrial motion to suppress and vacated respondent's conviction. App., *infra*, 1a-42a.

1. The "'border search' exception" is a "longstanding, historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained" for a search. *United States* v. *Ramsey*, 431 U.S. 606, 621 (1977). "Time and again, [this Court] ha[s] stated that 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself

by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.'" *United States* v. *Flores-Montano*, 541 U.S. 149, 152-153 (2004) (quoting *Ramsey*, 431 U.S. at 616). The Court has observed that "[t]h[e] longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself." *Ramsey*, 431 U.S. at 619. And it has explained that "[b]order searches * * * , from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *Ibid.*

That history reflects an understanding that "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985). "The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *Flores-Montano*, 541 U.S. at 152. At the same time, "the expectation of privacy [is] less at the border than in the interior." *Montoya de Hernandez*, 473 U.S. at 539. Consequently, "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is * * * struck much more favorably to the Government at the border." *Id.* at 540.

This Court has accordingly made clear that "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Montoya de Hernandez*, 473 U.S. at 538. It has held, for example, that "the Government's authority to conduct suspicionless inspections

at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank." *Flores-Montano*, 541 U.S. at 155. In turn, every court of appeals to consider the question has recognized that the border-search doctrine permits warrantless searches of electronic devices at the border, including at least some searches undertaken without any particularized suspicion. See, *e.g.*, *United States* v. *Touset*, 890 F.3d 1227, 1232 (11th Cir. 2018); *United States* v. *Cotterman*, 709 F.3d 952, 960-961 & n.6, 967 (9th Cir. 2013) (en banc), cert. denied, 571 U.S. 1156 (2014); *United States* v. *Ickes*, 393 F.3d 501, 505-506 (4th Cir. 2005); see also *United States* v. *Wanjiku*, 919 F.3d 472, 485 (7th Cir. 2019) (collecting cases illustrating that "no circuit court * * * has required more than reasonable suspicion" for any type of search of an electronic device at the border).

2. Respondent is a Mexican citizen and lawful permanent resident of the United States who, in 2016, moved away from his family to live in Mexico. App., *infra*, 3a. While there, he stayed with a cousin, Jose Medina, and made six trips to the United States that summer, some as short as 30 minutes. *Ibid.* When he crossed into the United States on those trips, he was twice referred for a continuation of the initial border inspection, commonly known as secondary inspection, but no contraband was found on those occasions. *Ibid.*

In July 2016, respondent sought to enter the United States from Mexico through the San Ysidro, California, port of entry just north of Tijuana. App., *infra*, 3a. During an initial inspection, respondent told officers of U.S. Customs and Border Protection (CBP), a component of the Department of Homeland Security (DHS), that he was "living in Mexico, working in San Diego, but

going to [Los Angeles] on that day." *Ibid.* He was randomly referred to secondary inspection, where a drug dog alerted to his trunk's spare tire. *Ibid.* A CBP officer removed the spare tire and discovered 14 vacuum-sealed packages containing nearly 31 pounds of cocaine. *Ibid.*; see C.A. Supp. E.R. 5-7 (photographs).

Respondent was arrested, and CBP officers seized his cell phone. App., *infra*, 3a. Two DHS Homeland Security Investigations (HSI) agents arrived on the scene. *Ibid.* One agent conducted a "brief[]" manual (technologically unaided) search of respondent's cell phone, for the dual purposes of "find[ing] some brief investigative leads in the current case" and "see[ing] if there's evidence of other things coming across the border." *Id.* at 3a-4a. The agent noticed a "lengthy call log" but no text messages. *Id.* at 4a.

The HSI agents then interviewed respondent, who "waived his *Miranda* rights and agreed to talk." App., *infra*, 4a. Respondent denied knowledge of the cocaine found in his truck and stated—contrary to his earlier statement that he was headed to Los Angeles—that he was traveling to San Diego to look for work at a carpet store in Chula Vista. *Ibid.* He was unable, however, to provide the name or address of that store, and "did not have his flooring tools with him in his pickup truck." *Ibid.* When asked about the absence of text messages on his cell phone, he responded that he had erased them on the advice of his cousin, "just in case" he was pulled over in Mexico and the Mexican police checked the phone. *Ibid.*

While one agent continued the interview, the other agent conducted a second manual search of respondent's cell phone, browsing the call log and writing down some of the phone numbers. App., *infra*, 4a-5a. As he

did so, the agent noticed that, while respondent had been at the port of entry, the phone had received two new text messages, from a sender named "Jose." *Id.* at 5a; see 10/26/16 Tr. 155 (D. Ct. Doc. 200 (June 6, 2017)). The agent photographed those messages, the first of which read, "Good morning," and the second of which read, "Primo, are you coming to the house?" App., *infra*, 5a; see C.A. Supp. E.R. 11 (photograph).

The agents then conducted a more sophisticated search of respondent's phone (called a "logical download"), using software that allowed the agents to access text messages, contacts, call logs, media, and application data and to choose which data to download. App., *infra*, 5a. The software did not enable agents to access data stored in third-party applications. *Ibid.* And it did not allow access to encrypted data or otherwise "provide information beyond what a person would see by manually searching the phone." C.A. E.R. 38; see *id.* at 130-131, 139; Gov't C.A. Br. 16. The logical download of respondent's phone did not uncover any additional sent or received messages. App., *infra*, 5a.

The agents later determined that none of the phone numbers in the phone's call log corresponded to a carpet store in San Diego. App., *infra*, 5a. Approximately two weeks after respondent's arrest, the agents obtained a warrant to search the cell phone and conducted an additional search. *Id.* at 6a n.1. The results of that later search are not at issue here. See C.A. E.R. 214-217; Gov't C.A. Br. 19 n.9.

3. A federal grand jury in the Southern District of California returned an indictment charging respondent with one count of unlawfully importing cocaine, in violation of 21 U.S.C. 952 and 21 U.S.C. 960 (2012 & Supp. II 2014); and one count of conspiring to do so, in violation

of 21 U.S.C. 952 and 963 and 21 U.S.C. 960 (2012 & Supp. II 2014). Indictment 1-2. The government later voluntarily dismissed the conspiracy charge. C.A. E.R. 213-214; 16-cr-1770 Docket entry No. 55 (Oct. 26, 2016).

Before trial on the cocaine-importation count, respondent moved to suppress all evidence obtained from the searches of his cell phone at the border. App., *infra*, 5a, 43a, 45a. Following an evidentiary hearing, the district court denied respondent's motion. *Id.* at 43a-59a. The court found that the manual searches of respondents' cell phone were "clearly permissible" under then-existing Ninth Circuit precedent. *Id.* at 53a (citing *United States* v. *Arnold*, 533 F.3d 1003 (9th Cir. 2008), cert. denied, 555 U.S. 1776 (2009)). The district court additionally found that the subsequent logical download was permissible because the agents had "at least reasonable suspicion" to support it. *Ibid.* The court noted in particular that "[t]he agents had reason to believe that [respondent] used his cell phone as an instrumentality of the crime." *Id.* at 53a-54a.

The case proceeded to trial, which resulted in a hung jury and a mistrial. App., *infra*, 8a. At respondent's second trial, the government introduced evidence obtained from the border searches of respondent's cell phone to establish three facts: (1) text messages had been deleted from the phone, see C.A. E.R. 612-613, 668-669, 688-689; (2) the call log did not reflect any calls to carpet stores in the San Diego area, see *id.* at 685-688; and (3) respondent's phone had received the two text messages from his cousin while respondent was at the port of entry, see *id.* at 688-689; C.A. Supp. E.R. 11. The jury found respondent guilty, and he was sentenced to 54 months of imprisonment. App., *infra*, 8a; Judgment 2.

4. The court of appeals reversed the district court's denial of respondent's motion to suppress and vacated his conviction. App., *infra*, 1a-42a. As relevant here, the court of appeals concluded that, notwithstanding the border-search doctrine, the searches of respondent's cell phone at the border violated the Fourth Amendment. *Id.* at 9a-31a.

The court of appeals recognized that "[b]order searches constitute a historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained." App., *infra*, 13a (citation and internal quotation marks omitted). It further recognized that "border searches typically do not require any particularized suspicion, so long as they are 'routine inspections and searches of individuals or conveyances seeking to cross our borders.'" *Ibid.* (quoting *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973)). "Such searches," the court acknowledged, "are 'reasonable simply by virtue of the fact they occur at the border.'" *Ibid.* (quoting *Ramsey*, 431 U.S. at 616). And the court rejected arguments by respondent and an amicus that the border-search doctrine is categorically inapplicable to searches of cell phones or that, in the alternative, a warrantless search of a cell phone is so intrusive that it requires probable cause. *Id.* at 15a-20a.

The court of appeals nevertheless concluded that the border searches of respondent's cell phone "violated the Fourth Amendment" on the theory that they "exceeded the permissible scope of a border search." App., *infra*, 2a; see *id.* at 21a-31a. The court took the view that the border-search doctrine does not encompass even "searches for evidence that would aid in prosecuting past and preventing future border-related crimes." *Id.* at 22a. Instead, according to the court, "the border

search exception authorizes warrantless searches of a cell phone only to determine whether the phone contains contraband." *Id.* at 26a. The court reasoned that "'detection of . . . contraband is the strongest historic rationale for the border-search exception'" and that searches of electronic devices at the border "cannot be 'justified by the particular purposes served by the [border-search] exception'" unless "limited in scope to a search for digital contraband" on the device itself. *Id.* at 2a, 24a, 26a (brackets and citation omitted).

The court of appeals emphasized that, under its interpretation of the Fourth Amendment, "the proper scope of a border search" does not "include the power to search for *evidence* of contraband that is *not* present at the border" or for "evidence of past or future border-related" criminal activity. App., *infra*, 24a. The court relied on *Boyd* v. *United States*, 116 U.S. 616, 622-623 (1886), which it characterized as providing "[t]he classic statement" of "'a sharp distinction between searches for contraband and those for evidence that may reveal the importation of contraband.'" App., *infra*, 25a (citation omitted). The court acknowledged that one consequence of drawing such a line in this context would be that "the detection-of-contraband justification would rarely seem to apply to an electronic search of a cell phone outside the context of child pornography." *Id.* at 31a n.13.

The court of appeals additionally acknowledged that its digital-contraband-only limitation conflicted with the Fourth Circuit's decision in *United States* v. *Kolsuz*, 890 F.3d 133 (2018), which had explained that the border-search doctrine authorized border officials who had found firearms parts in an outbound international traveler's luggage to search his cell phone for "evidence of

the export violation they had already detected" and "'information related to other ongoing attempts to export illegally [the] firearm parts.'" *Id.* at 143 (citation omitted); see App., *infra*, 23a. The Ninth Circuit in this case expressly "disagree[d]" with the Fourth Circuit's determination that the border-search doctrine "'is broad enough to accommodate not only the direct interception of contraband as it crosses the border, but also the prevention and disruption of ongoing efforts to export contraband illegally'" and with the Fourth Circuit's "approv[al] [of] the search for further evidence that [the defendant in *Kolsuz*] was smuggling weapons." App., *infra*, 24a (quoting *Kolsuz*, 890 F.3d at 143) (emphasis omitted).

In holding the border searches here unlawful, the court of appeals adhered to circuit precedent under which at least the initial manual searches of the phone were routine searches that did not require reasonable suspicion. App., *infra*, 18a, 27a. But the court concluded that the agents exceeded the permissible scope of a border search when they wrote down phone numbers from the phone's call log and photographed the two messages that respondent had received, steps that the court stated "have no connection whatsoever to digital contraband." *Id.* at 27a. And the court took the view that, whether or not the "logical download" search was the sort of search that it had previously deemed to require reasonable suspicion—an issue that it did not decide—suspicion "that [respondent's] phone would contain evidence leading to additional drugs" did not suffice to justify the search. *Id.* at 5a, 31a; see *id.* at 30a-31a & n.12. Instead, the court adopted a rule requiring "reasonable suspicion that the digital data in the phone" itself "contained contraband." *Id.* at 31a.

The court of appeals went on to conclude that admission of the evidence discovered in this case was not "allowed by the good faith exception" to the exclusionary rule. App., *infra*, 31a-33a. And it rejected respondent's arguments that the government had subsequently violated his rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and Federal Rule of Criminal Procedure 16. App., *infra*, 34a-42a.

5. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 60a-61a. Judge Bennett, joined by five other judges, dissented. *Id.* at 61a-83a.

The dissenting judges observed that "[t]he panel decision runs headlong into decades of Supreme Court precedent and deviates from the historical understanding of the purpose of the border search exception." App., *infra*, 67a. They further observed that this Court "has never questioned the scope of the border search exception and '[t]ime and again[]' confirmed the broad authority of the sovereign at the border." *Id.* at 70a (quoting *Flores-Montano*, 541 U.S. at 152 (first set of brackets in original)). And they explained that "the inherent power of the sovereign to protect itself, or the border," which underpins the border-search doctrine, "is not limited to searching for contraband like child pornography." *Id.* at 77a.

The dissenting judges additionally observed that the "distinction between evidence and contraband created by *Boyd*," on which the panel had relied, was repudiated by this Court in *Warden* v. *Hayden*, 387 U.S. 294, 301 (1967). App., *infra*, 78a. They also noted that, "when filtered through the Fourth Amendment lens of reasonableness," the panel's limitation leads to "distinctions" that "make no sense." *Id.* at 78a-79a. In particular,

they identified the illogic of allowing border officials "to manually look for child pornography on a phone" while barring them from searching for "evidence of: (1) intent to commit terrorist acts, (2) inadmissibility of the traveler to the United States, (3) other crimes, or even (4) evidence of other contraband." *Id.* at 79a.

Finally, the dissenting judges observed that the panel's decision conflicts in various respects with decisions of other courts of appeals. App., *infra*, 73a-75a, 78a (discussing decisions of Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits). And the dissent emphasized in particular that the panel's approach limiting the scope of searches under the border-search doctrine had "been soundly rejected by at least two other circuits," *id.* at 67a—the Fourth Circuit's decision in *United States* v. *Kolsuz*, *supra*, and the Tenth Circuit's subsequent decision in *United States* v. *Williams*, 942 F.3d 1187 (2019), cert. denied, 141 S. Ct. 235 (2020).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's erroneous conclusion that "the border search exception authorizes warrantless searches of a cell phone only to determine whether the phone contains contraband," and does not even permit "a warrantless search for evidence of past or future border-related crimes," App., *infra*, 24a, 26a, warrants this Court's review. Despite acknowledging that "[b]order searches constitute a 'historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained,'" and that routine "border searches typically do not require any particularized suspicion," *id.* at 13a (citation omitted), the court confined the border-search doctrine in the context of electronic devices solely to detecting "digital contraband"—essentially, "child pornography"—present on the device, *id.* at 16a, 21a,

26a-27a. That cramped view of the doctrine cannot be reconciled with the language or logic of this Court's decisions, or with the doctrine's underpinnings, and it produces illogical and unworkable results.

In imposing its newly minted regime on the Nation's largest circuit, the Ninth Circuit has created an entrenched circuit conflict on an important and recurring Fourth Amendment issue. The court's decision confuses and disrupts the day-to-day work of border officials who, nationwide, inspect hundreds of millions of arriving travelers and examine tens of thousands of electronic devices each year. This Court should grant review and reverse.

A. The Ninth Circuit's Decision Is Incorrect

The Ninth Circuit in this case concluded that border officials violated the Fourth Amendment when, after discovering nearly 31 pounds of cocaine concealed in respondent's truck as he sought to enter the United States, they conducted warrantless searches of his cell phone for evidence of that border-related crime and any related potential smuggling activity. The court arrived at that conclusion only by imposing novel limitations on the border-search doctrine that have no sound basis in this Court's precedents or the doctrine's foundations, and by reviving an arbitrary and untenable distinction between contraband and "mere evidence of crime" (App., *infra*, 23a) that this Court long ago repudiated.

1. As previously explained (pp. 2-4, *supra*), the "'border search' exception" to the Fourth Amendment's warrant requirement is a "longstanding, historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained" for a search. *United States* v. *Ramsey*, 431 U.S. 606, 621 (1977). This Court has "[t]ime and again * * * stated that 'searches

made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable *simply by virtue of the fact that they occur at the border*.'" *United States* v. *Flores-Montano*, 541 U.S. 149, 152-153 (2004) (quoting *Ramsey*, 431 U.S. at 616) (emphasis added). As the Court has observed, the doctrine "has a history as old as the Fourth Amendment itself." *Ramsey*, 431 U.S. at 619. And it reflects that "the Fourth Amendment balance between the interests of the Government," which are at their apex, "and the privacy right of the individual," which is diminished, is "struck much more favorably to the Government at the border." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 540 (1985); see *id.* at 539; *Flores-Montano*, 541 U.S. at 152.

This Court's decisions have consistently emphasized the expansive scope of the border-search doctrine. And the Court has repeatedly upheld warrantless border searches in decisions that demonstrate the doctrine's breadth. For example, in *United States* v. *Ramsey*, *supra*, the Court held that the doctrine authorized customs officials to open and inspect several envelopes sent by "international letter-class mail" from Thailand that they suspected might contain illicit drugs. 431 U.S. at 607; see *id.* at 616-625. The Court rejected the D.C. Circuit's view that "the Fourth Amendment forbade the opening of such mail without probable cause and a search warrant." *Id.* at 608.

In *United States* v. *Montoya de Hernandez*, *supra*, the Court held that the Fourth Amendment allowed border officials to detain a traveler whom they reasonably suspected of smuggling drugs in her "alimentary

canal" and who refused an x-ray. 473 U.S. at 533; see *id.* at 536-544. The Court reaffirmed that "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Id.* at 538. And it rejected the lower court's view that officials exceeded the scope of law-enforcement authority that the Fourth Amendment permits at the border by detaining the traveler for 16 hours, well "beyond the scope of a routine customs search and inspection," based on their reasonable suspicion of smuggling. *Id.* at 541.

Most recently, in *United States* v. *Flores-Montano*, *supra*, the Court unanimously held that the border-search doctrine authorized border officials, without any particularized suspicion, "to remove, disassemble, and reassemble" the gas tank of a vehicle arriving at a port of entry, in which they ultimately found 81 pounds of marijuana. 541 U.S. at 155; see *id.* at 150, 152-156. The Court rejected the Ninth Circuit's view that such an "interference with [the] motorist's possessory interest" required reasonable suspicion, finding that the search was "justified by the Government's paramount interest in protecting the border." *Id.* at 155.

2. As the dissent from the denial of rehearing in this case observed, this Court's precedents demonstrate that the border searches at issue here did not violate the Fourth Amendment. App., *infra*, 75a-79a. After finding nearly 31 pounds of cocaine in respondent's truck, the border agents conducted "manual searches" of respondent's cell phone, "briefly search[ing] [his] phone" for text messages and "open[ing] the phone's call log." *Id.* at 27a; see *id.* at 4a-5a. The agents also photographed two messages they found and wrote down several phone numbers appearing in the call log. *Ibid.* Finally, they

conducted a logical download of the phone, which enabled them to "access text messages, contacts, call logs, media, and application data on [the] phone," *id.* at 5a, but which did not enable them to access "information beyond what a person would see by manually searching the phone," such as "data stored within third-party applications" or encrypted or deleted data. *Ibid.*; C.A. E.R. 38; see C.A. E.R. 130-131, 138; Gov't C.A. Br. 16.

The court of appeals correctly recognized that, under this Court's decisions permitting "routine searches * * * at the border without any showing of suspicion," no particularized suspicion was required for the agents to lawfully browse the phone's contents manually. App., *infra*, 12a; see *id.* at 27a. It erred, however, in its conclusion that their searches crossed some boundary into unlawfulness simply because the agents documented certain things that manual browsing had already revealed, by taking a picture of two messages and jotting down some phone numbers that were not related to child pornography (or whatever else, if anything, the Ninth Circuit might deem to be "digital contraband"). It likewise erred in invalidating the subsequent logical-download search. Even assuming that such a search required some level of particularized suspicion, the search here was lawful because the agents had "at least reasonable suspicion" that the contents of respondent's phone might illuminate border-related unlawful activity based on the 31 pounds of cocaine found in his possession. *Id.* at 53a.

The Ninth Circuit's novel restriction on the scope of the border-search doctrine is insupportable, as consideration of the drug-smuggling context alone well illustrates. Nothing in this Court's precedents suggests, for example, that had border officials here instead found a

written list of phone numbers on the truck's passenger seat, they would violate the Fourth Amendment by copying those phone numbers, or sending them to other law-enforcement officials. This Court's precedents likewise would not preclude border officials from photographing, for further investigation, a secret compartment ideally suited to carrying drugs, but that is not itself illegal to have in a car crossing the border. Those decisions would also presumably permit an official to photocopy the hotel-reservation confirmation found on a known drug kingpin's associate, even if he is not currently smuggling (or suspected of currently smuggling) anything. The Court's precedents similarly permitted the agent's actions here.

3. The Ninth Circuit's unprecedented limitation on the scope of the border-search doctrine is based on a two-step chain of reasoning, both steps of which are flawed. First, invoking its own precedent, the court announced that a "border search must be conducted to enforce importation laws." App., *infra*, 15a (citation and internal quotation marks omitted). Then, proceeding from that premise, the court of appeals concluded that all "cell phone searches at the border, whether manual or forensic, must be limited in scope to a search for digital contraband" on the device itself—not for "mere evidence" of past, present, or future efforts to transport physical contraband or otherwise violate the laws enforced at the border. *Id.* at 2a, 23a; see *id.* 23a-26a, 29a. The Ninth Circuit's starting premise of contraband-only searches has no sound basis in this Court's precedents. And even assuming arguendo that the premise were well-founded, the court of appeals' conclusions would not follow, and they result in an unworkable rule that independently contradicts this Court's decisions.

a. This Court has never adopted the Ninth Circuit's premise that the border-search doctrine exists solely to facilitate the direct discovery of contraband. App., *infra*, 2a, 14a. It has instead described the doctrine in much broader terms.

The Court has explained that, "from before the adoption of the Fourth Amendment," border searches "have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *Ramsey*, 431 U.S. at 619. "It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *Flores-Montano*, 541 U.S. at 153. That "interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," *id.* at 152, where an individual's expectation of privacy is also diminished. See *Montoya de Hernandez*, 473 U.S. at 539-540.

The government's interest in "protecting[] its territorial integrity," *Flores-Montano*, 541 U.S. at 153, undoubtedly encompasses preventing the entry of contraband, digital or physical, and the Court's leading border-search cases happened to involve drug smuggling. But nothing in the language or logic of those decisions suggests that the United States' sovereign prerogative to safeguard its borders is limited to interdicting illicit goods. At a minimum, the doctrine also encompasses, for example, searches aimed at uncovering evidence of other border-related unlawful activity, whether completed or ongoing. Moreover, this Court has explicitly recognized that the "Government's interest" includes not only "preventing the entry of unwanted * * * effects," but also "unwanted persons." *Id.* at 152. Surely,

the government at least has the lesser-included sovereign power to determine whether someone about to enter the United States is currently engaging, plans later to engage, or has in the past engaged in transnational violations of the law, as well as to discern the contours of that unlawful activity. The United States is accordingly entitled as "the sovereign to protect itself by stopping and examining persons and property crossing into this country," *ibid.*, to ensure that it is sufficiently informed about a particular border-crosser.[*]

If the border-search doctrine were truly limited entirely to interdiction of contraband, then the Fourth Amendment would potentially impose limitations even on the scope of the questions that border officials could ask of someone seeking entry before allowing him to proceed. Cf. *Rodriguez* v. *United States*, 575 U.S. 348, 350 (2015) ("[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."). The court of appeals, however, could point to no decision of this Court construing the doctrine to contain such a limitation. As the dissent from the denial of rehearing observed, "[i]n only one instance has th[is] Court limited the border search doctrine," namely, when border officials detained an arriving passenger

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[*] The Ninth Circuit's decision in this case did not specifically address the government's direct national-security and immigration-enforcement interests, and the government does not construe the panel decision to foreclose reliance on those grounds to sustain border searches of cell phones in appropriate circumstances. If the opinion were so construed, its inconsistency with this Court's precedent would be even more patent. The court of appeals' failure to address those interests, however, underscores the incompleteness of the court's view of the governmental interests that the border-search doctrine serves.

for approximately 16 hours on suspicion that she was concealing a controlled substance in her "alimentary canal." App., *infra* 68a, 76a (quoting *Montoya de Hernandez*, 473 U.S. at 537). And even then, the Court "did not narrow the scope" of the border-search doctrine but "only increased the level of suspicion necessary." *Id.* at 76a. The Ninth Circuit's decision here thus "reads the sovereign's interest" underlying the doctrine "far too narrowly." *Id.* at 77a.

b. Even assuming the erroneous premise that border searches must be justified by preventing the entry of contraband (or evasion of customs duties), the second step of the Ninth Circuit's reasoning—that any search of an electronic device must be limited to "digital contraband" stored on the device—is independently flawed. App., *infra*, 2a, 26a-27a, 29a. Authority to search at least for evidence of a planned or ongoing attempt to smuggle drugs or other contraband is a corollary of border officials' undisputed authority to search for the drugs or contraband itself.

By searching an electronic device for evidence about smuggling, for example, border officials may uncover and disrupt a smuggling scheme before it succeeds. Although the border officials in this case had already discovered cocaine in respondent's vehicle, in other circumstances, inspection of a device may provide the critical clue that a traveler is transporting drugs, prompting a routine but discretionary physical search that the officials might not otherwise have conducted. Or border officials might obtain from the traveler's device critical evidence indicating that, although the traveler's own car does not contain drugs, it is the lead car in a drug-smuggling convoy, and the officials should search the

one behind it. And even when border officials have already discovered drugs (or other contraband), information on the traveler's phone may help them ascertain where the traveler is headed, enabling the rapid interdiction of other drugs (which may already have made it past the border) and quick apprehension (or surveillance) of the smugglers before the trail grows cold.

In concluding that the border-search doctrine authorizes only a search for contraband itself, and not even evidence of contraband-related crimes, the Ninth Circuit relied in substantial part on language in *Boyd* v. *United States*, 116 U.S. 616 (1886). App., *infra*, 25a-26a. As the dissent from the denial of rehearing explained, however, this Court more than 50 years ago "rejected the distinction between evidence and contraband created by *Boyd*." *Id.* at 78a. Specifically, the Court in *Warden* v. *Hayden*, 387 U.S. 294 (1967), expressly rejected the "discredited" proposition that courts had derived from *Boyd* that the government may not "seize evidence simply for the purpose of proving crime." *Id.* at 306; see *id.* at 302-309. The Court observed that "[n]othing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband." *Id.* at 301. And the Court noted that, as a safeguard of privacy interests, a "mere evidence" rule is no less arbitrary than a rule limiting searches to "'even-numbered days of the month.'" *Id.* at 309 (citation omitted).

The Court in *Hayden* also highlighted the practical problems with such a distinction, observing that "[t]he 'mere evidence' limitation ha[d] spawned exceptions so numerous and confusion so great * * * that it is questionable whether it affords meaningful protection" at

all. 387 U.S. at 309. The Ninth Circuit's distinction likewise invites intractable uncertainty and leads to untenable results—as the facts of this case well illustrate. The court held that the border officials in this case could search text-message and call-log applications on respondent's phone because the court (correctly) understood those to be possible repositories of child pornography. Yet it concluded that the officials, examining those very areas of the phone, overstepped the border-search doctrine's boundaries by recording the basic facts they found there: photographing two messages consisting of nine words, C.A. Supp. E.R. 11, and writing down a handful of phone numbers in the call log, App., *infra*, 27a, that constituted potential evidence of in-process smuggling, but were not digital contraband. No Fourth Amendment principle supports that arbitrary and counterintuitive limitation.

B. The Question Presented Warrants This Court's Review

The court of appeals' decision, and subsequent denial of en banc review, creates a circuit conflict on an issue with considerable practical importance for border officials' inspection of the hundreds of millions of travelers at U.S. ports of entry each year. It accordingly warrants this Court's review.

1. The panel itself acknowledged that its decision is "in tension" with the Fourth Circuit's decision in *United States* v. *Kolsuz*, 890 F.3d 133 (2018). App., *infra*, 23a; see *id.* at 26a. As the dissent from denial of rehearing en banc observed, however, the panel's decision is in fact in full-blown conflict not only with *Kolsuz*, but also with the Tenth Circuit's later decision in *United States* v. *Williams*, 942 F.3d 1187 (2019), cert. denied, 141 S. Ct. 235 (2020). The Fourth and Tenth Circuits applied the border-search doctrine to non-manual electronic-device

searches that they deemed intrusive enough to require reasonable suspicion (as the Ninth Circuit assumed that the logical-download search here might), and recognized that the border-search doctrine applied even though the reasonable suspicion did not suggest the presence of digital contraband on the device itself.

In *Kolsuz*, border officials at Dulles airport discovered dozens of firearm parts in the luggage of a passenger seeking to board an outbound international flight, and they arrested the traveler and conducted a warrantless "forensic" search of his cell phone. 890 F.3d at 136. The Fourth Circuit recognized that the search of the phone fell within the border-search doctrine. See *id.* at 141-153. In doing so, it specifically rejected the defendant's contention that the doctrine is "limited to intercepting contraband as it crosses the national border" and would not encompass searching his cell phone after the firearm parts had already been discovered and he had been arrested. *Id.* at 143; see *id.* at 143-144.

The Fourth Circuit explained that "[t]he justification behind the border search exception is broad enough to accommodate not only the direct interception of contraband as it crosses the border, but also the prevention and disruption of ongoing efforts to export contraband illegally, through searches initiated at the border." *Kolsuz*, 890 F.3d at 143-144. The court accordingly found that, "[b]ecause the forensic search of [the defendant's] phone was conducted at least in part to uncover information about an ongoing transnational crime, * * * it 'fit[] within the core of the rationale' underlying the border search exception.'" *Id.* at 144 (citation omitted); see *United States* v. *Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019) (reiterating that the border-search doctrine allows searches with "some nexus to the

border search exception's purposes of protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband," but suppressing evidence premised on reasonable suspicion of "domestic crimes" (emphasis omitted)).

Similarly, after the Ninth Circuit panel issued the opinion below, the Tenth Circuit held in *Williams* that the border-search doctrine authorized a warrantless "forensic" search of a traveler's laptop that was not a search for digital contraband, specifically rejecting the argument that "border agents are tasked exclusively with upholding customs laws and rooting out the importation of contraband." 942 F.3d at 1190-1191. The Tenth Circuit's interpretation and application of this Court's border-search precedents, like the Fourth Circuit's, thus refutes the crabbed view of the Ninth Circuit. Had circumstances analogous to those at issue in this case occurred at a port of entry within the Fourth or Tenth Circuits, there is little question that both the manual search and the logical download of the importer's cell phone would have been upheld.

Even beyond that direct conflict, the dissent from the denial of rehearing en banc correctly observed that various aspects of the panel's decision are in tension with the decisions of additional circuits. See App., *infra*, 73a-75a, 78a. That tension is especially acute with respect to recent Fifth and Seventh Circuit decisions, which indicate that, even as to border searches of electronic devices for which those circuits would require particularized suspicion, it need not be suspicion of digital contraband in particular. See *id.* at 75a (citing *United States* v. *Molina-Isidoro*, 884 F.3d 287, 291-292 (5th Cir. 2018), and *United States* v. *Wanjiku*, 919 F.3d

472, 485-488 (7th Cir. 2019)). The D.C. Circuit has similarly refused to draw a line between contraband and evidence of unlawful activity, although in a case that did not involve the search of an electronic device. See *United States* v. *Gurr*, 471 F.3d 144, 149 (D.C. Cir. 2006), cert. denied, 550 U.S. 919 (2007); App. *infra*, 78a. In those circuits as well, the conviction in this case likely would have been affirmed.

2. The panel's decision threatens to disrupt frequent and important government operations to protect our Nation's border. At a minimum, the decision creates needless uncertainty—especially in the Ninth Circuit, whose geographic reach encompasses an outsized share of DHS's border-safeguarding work.

In fiscal year 2019, border officials processed more than 410 million travelers at air, land, and sea ports of entry. See CBP, DHS, *CBP Trade and Travel Report, Fiscal Year 2019*, at 2 (Jan. 2020), https://go.usa.gov/xApNG. A particularly large share of that burden fell on border officials in the Ninth Circuit, where the decision below is now controlling precedent. DHS has informed this Office that ports of entry in the Ninth Circuit accounted for more than 146 million of those entries, representing more than 35% of the nationwide total.

This Office has also been informed by DHS that, during that same period, border officials conducted approximately 40,913 border searches of electronic devices, with 19% of those searches occurring in the Ninth Circuit. Such searches of travelers' electronic devices are a critical tool that border officials use to detect a variety of threats to the Nation's territorial integrity, such as human trafficking, smuggling cash or contraband, export-control violations, and other criminal activity. And although the Ninth Circuit's decision in this case

did not specifically address the government's interests in national security and verifying the admissibility of travelers seeking entry, see p. 19 n.*, *supra*, if its decision were construed categorically to bar even border searches premised on those interests, the harm would be greater still. Cf. App., *infra*, 62a-63a & n.4, 76a-79a (Bennett, J., dissenting from the denial of rehearing).

Given the sheer volume of travelers and effects crossing the border each year and the number of electronic devices border officials find it necessary to inspect, it would be impractical to obtain a judicial warrant whenever an official's actions would not be objectively justified as a search for digital contraband—a category limited almost exclusively to child pornography, App., *infra*, 31a n.13. Moreover, by resurrecting and extending the "confus[ing]" contraband/evidence distinction from *Boyd*, *Hayden*, 387 U.S. at 309, the decision below leaves border officials with little clarity on when a search might require a warrant. The decision itself allowed border officials here to search at least some portions of the phone that the court of appeals viewed as possible repositories of digital contraband, but not to photograph text messages or write down phone numbers that officials saw there. That line-drawing exercise raises vexing questions for border officials and reviewing courts alike.

What if an official in similar circumstances does not write any phone numbers down, but simply remembers phone numbers or text messages for purposes of follow-up investigation? Or what if an official spends more time reviewing a phone than a reviewing court deems necessary to verify that it does not contain digital contraband? These and other uncertainties will chill important border-protection activities. This Court has

"traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001). "Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Ibid.* Those interests are undermined by the Ninth Circuit's nonintuitive approach here.

* * * * *

The division of authority and practical difficulties created by the opinion below are highly unlikely to resolve themselves. The Ninth Circuit has now denied the government's request for rehearing en banc on this issue, over the recorded dissent of six judges. See App., *infra*, 61a-83a. The circuit conflict is thus entrenched, and it has only deepened since the panel rendered its decision. This Court's review is necessary to correct the Ninth Circuit's outlier course and to restore nationwide consistency in the standards governing searches of electronic devices at the border.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2021

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-50151
D.C. No. 3:16-cr-01770-BTM-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MIGUEL ANGEL CANO, DEFENDANT-APPELLANT

Argued and Submitted: Apr. 10, 2019
Pasadena, California
Filed: Aug. 16, 2019

Appeal from the United States District Court
for the Southern District of California
Barry Ted Moskowitz, District Judge, Presiding

OPINION

Before: SUSAN P. GRABER and JAY S. BYBEE, Circuit Judges, and M. DOUGLAS HARPOOL,[*] District Judge.

BYBEE, Circuit Judge:

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[*] The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

Defendant-Appellant Miguel Cano was arrested for carrying cocaine as he attempted to cross into the United States from Mexico at the San Ysidro Port of Entry. Following his arrest, a Customs and Border Protection official seized Cano's cell phone and searched it, first manually and then using software that accesses all text messages, contacts, call logs, media, and application data. When Cano moved to suppress the evidence obtained from the warrantless searches of his cell phone, the district court held that the searches were valid under the border search exception to the Fourth Amendment's warrant requirement.

Applying *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc), we conclude that *manual* cell phone searches may be conducted by border officials without reasonable suspicion but that *forensic* cell phone searches require reasonable suspicion. We clarify *Cotterman* by holding that "reasonable suspicion" in this context means that officials must reasonably suspect that the cell phone contains digital contraband. We further conclude that cell phone searches at the border, whether manual or forensic, must be limited in scope to a search for digital contraband. In this case, the officials violated the Fourth Amendment when their warrantless searches exceeded the permissible scope of a border search. Accordingly, we hold that most of the evidence from the searches of Cano's cell phone should have been suppressed. We also conclude that Cano's *Brady* claims are unpersuasive. Because we vacate Cano's conviction, we do not reach his claim of prosecutorial misconduct.

We reverse the district court's order denying Cano's motion to suppress and vacate Cano's conviction.

I. THE BACKGROUND

A. *The Facts*

Defendant-Appellant Miguel Cano worked in the flooring and carpet installation trade and lived with his wife and children in the Mission Hills community north of Los Angeles. In the summer of 2016, however, Cano moved from Los Angeles to Tijuana, Mexico, where he stayed with his cousin Jose Medina. While staying with Medina, Cano crossed the border into the United States six times, sometimes remaining in the United States for less than thirty minutes. On two of those trips, Cano was referred to secondary inspection, but no contraband was found.

On July 25, 2016, Cano arrived at the San Ysidro Port of Entry from Tijuana. In primary inspection, Cano stated that "he was living in Mexico, working in San Diego, but going to LA on that day." Pursuant to a random Customs and Border Protection (CBP) computer referral, Cano was referred to secondary inspection, where a narcotic-detecting dog alerted to the vehicle's spare tire. A CBP official removed the spare tire from the undercarriage of the truck and discovered 14 vacuum-sealed packages inside, containing 14.03 kilograms (30.93 pounds) of cocaine.

Cano was arrested, and a CBP official administratively seized his cell phone. The CBP officials called Homeland Security Investigations (HSI), which dispatched Agents Petonak and Medrano to investigate. After arriving, Agent Petonak "briefly" and manually

reviewed Cano's cell phone, noticing a "lengthy call log" but no text messages. Agent Petonak later stated that the purpose of this manual search was "two-pronged": "to find some brief investigative leads in the current case," and "to see if there's evidence of other things coming across the border."

Agent Petonak proceeded to question Cano, who waived his *Miranda* rights and agreed to talk. During that interview, Cano denied any knowledge of the cocaine. Cano stated that he had moved to Tijuana to look for work in nearby San Diego, because work was slow in Los Angeles. He also said he had crossed the border every day for the previous three weeks looking for work. He told Agent Petonak that he was headed to a carpet store in Chula Vista that day to seek work. When pressed, Cano was not able to provide the name or address of the store, claiming that he intended to look it up on Google after crossing the border. Cano also explained that he did not have his flooring tools with him in his pickup truck so as to avoid problems with border crossings; Cano intended to drive to Los Angeles to retrieve his tools if he located work in San Diego.

During the interrogation, Agent Petonak specifically asked Cano about the lack of text messages on his cell phone. Cano responded that his cousin had advised him to delete his text messages "just in case" he got pulled over in Mexico and police were to check his cell phone. Cano stated that he erased his messages to avoid "any problems" with the Mexican police.

While Agent Petonak questioned Cano, Agent Medrano conducted a second manual search of the cell phone. Agent Medrano browsed the call log and wrote

down some of the phone numbers on a piece of paper. He also noticed two messages that arrived after Cano had reached the border, and he took a photograph of the messages. The first message stated, "Good morning," and the second message stated, "Primo, are you coming to the house?" Agent Medrano gave all of this information —the recorded list of calls and the photograph—to Agent Petonak.

Finally, Agent Medrano conducted a "logical download" of the phone using Cellebrite software. A Cellebrite search enables the user to access text messages, contacts, call logs, media, and application data on a cell phone and to select which types of data to download. It does not, however, allow the user to access data stored within third-party applications. Agent Medrano typically does not select the option to download photographs.

After Agent Petonak interviewed Cano, he reviewed the results of the Cellebrite download of Cano's phone by Agent Medrano. The Cellebrite results revealed that Cano had sent no text messages, and it listed all the calls made by Cano. Agent Petonak later concluded that none of the phone numbers in the call log corresponded to carpeting stores in San Diego.

B. *The Proceedings*

Cano was indicted for importing cocaine. Before trial, Cano moved to suppress any evidence obtained from Agents Petonak and Medrano's warrantless searches of his cell phone at the border. The district court denied Cano's motion, ruling that the manual searches and the Cellebrite search of Cano's phone were valid

border searches. During trial, the government introduced evidence that resulted from the manual searches of the phone and from Agent Medrano's Cellebrite download of the phone.[1]

In preparation for trial, Cano indicated his intent to present a third-party culpability defense claiming that his cousin, Jose Medina, was responsible for placing the drugs in Cano's spare tire without Cano's knowledge. Cano proffered evidence that Medina had a key to Cano's car and had driven it shortly before Cano's attempted border crossing, that Medina had a criminal record including a conviction for cocaine possession, that Medina was a member of a Chicago-based gang called the Latin Kings, and that the Latin Kings sold cocaine within the United States and were involved with a cartel that trafficked drugs across the border.

Following Cano's implication of Medina, the government contacted Medina and promised him immunity and immigration papers in exchange for his cooperation. Medina initially denied being involved with drugs, but later contacted the government on his own and offered to help them with the "biggest RICO case" and "drug

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[1] Some—but not all—of the evidence was available through alternative channels. For example, the government introduced a call log, unchallenged by Cano, that the government received from Cano's phone company. Similarly, the government later obtained a warrant to search the phone, and an agent conducted further searches. Because the government introduced at trial much evidence predating those events, and because the government has not argued that any Fourth Amendment error was harmless, those later events do not affect our Fourth Amendment analysis of the warrantless searches. *United States v. Rodriguez*, 880 F.3d 1151, 1163 (9th Cir. 2018)

seizures of 20 to 25 kilograms at a time." All of this information was made available to Cano.

As part of his defense, Cano sought additional discovery from HSI, the Federal Bureau of Investigation (FBI), and the Drug Enforcement Agency (DEA) regarding: (1) records linking Medina to drug sales, distribution, or trafficking; and (2) records linking the Latin Kings to drug trafficking from Mexico to Southern California. The government opposed Cano's discovery motion, arguing that the evidence was not material under Federal Rule of Criminal Procedure 16(a)(1)(E)(i) and that discovery should be limited to HSI, as neither the DEA nor the FBI had participated in the investigation of Cano. The district court originally overruled both objections, finding the evidence material under Rule 16 and exculpatory under *Brady v. Maryland*, 373 U.S. 83 (1963). The court also reasoned that, because HSI could inquire of the DEA and FBI if it sought inculpatory evidence, HSI had access to the files and was required to provide any exculpatory evidence held by the DEA or FBI.

In response to the court's discovery order, HSI produced Medina's immigration file and his Bureau of Prisons record. Agent Petonak also searched for Medina's name in two different police clearinghouses, but neither returned any hits.[2] Both Agent Petonak and the United States Attorney's Office (USAO) subsequently requested information showing a link between the Latin

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[2] A police clearinghouse works for the purpose of "deconfliction" by notifying an agency if another agency has an investigation pending against the same person or item. The DEA and FBI participate in the two clearinghouses searched by Agent Petonak.

Kings and drug trafficking from Mexico from the legal counsel of both the FBI and DEA. Both agencies denied the requests without providing any explanation or any indication as to whether the requested information existed.

Following these attempts, the government moved for the district court to reconsider its discovery order and excuse it from discovery relating to files held by the FBI and DEA. The district court granted the motion to reconsider, finding that the prosecutor did not have access to the evidence when he was "rebuffed" by agencies over which he had no control.

The case proceeded to trial and Cano presented his third-party culpability defense. The first trial resulted in a hung jury and a mistrial. On retrial, Cano again relied on his third-party culpability defense. The second trial resulted in Cano's conviction. This appeal followed, in which Cano raises three issues: (1) whether the warrantless searches of his cell phone violated the Fourth Amendment and whether the resulting evidence should be suppressed; (2) whether the government's non-disclosure of materials that may have been held by the DEA and FBI violated his right to due process under *Brady* and Federal Rule of Criminal Procedure 16; and (3) whether the government raised an improper propensity inference in its closing argument. We address Cano's first two arguments in turn. Because we conclude that the district court erred in denying Cano's motion to suppress, we vacate Cano's conviction and do not reach his claim of prosecutorial misconduct.

II. THE WARRANTLESS SEARCH OF CANO'S CELL PHONE

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.[3] Ordinarily, before conducting a search, police must obtain a warrant issued by a judicial officer based "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.* Warrants are generally required "unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978) (citation omitted). Consequently, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). Such "specifically established and well-delineated exceptions" include exigent circumstances, searches incident to arrest, vehicle searches, and border searches. *See Arizona v. Gant*, 556 U.S. 332, 343 (2009) (vehicle searches); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (exigent circumstances; listing other exceptions, including warrantless entry to fight a fire, to prevent the imminent destruction of evidence, or in "hot pursuit" of

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[3] We review de novo "the district court's determination that [a] warrantless search . . . was a valid border search." *United States v. Cardona*, 769 F.2d 625, 628 (9th Cir. 1985).

a fleeing suspect); *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (border searches); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (searches incident to arrest), *overruled in part on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961).

Exceptions to the warrant requirement are subject to two important constraints. First, any search conducted under an exception must be within the *scope* of the exception. Second, some searches, even when conducted within the scope of the exception, are so *intrusive* that they require additional justification, up to and including probable cause and a warrant.

The first constraint is illustrated by the Supreme Court's decision in *Riley v. California*, 573 U.S. 373 (2014), a case involving the search incident to arrest exception. In *Riley*, the Court addressed "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested"; in other words, whether cell phones fell within the scope of the search incident to arrest exception. *Id.* at 378. The Court began by recognizing the increasing role in our lives of "minicomputers that also happen to have the capacity to be used as a telephone"; "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 393. Acknowledging that "it has been well accepted that [a search incident to lawful arrest] constitutes an exception to the warrant requirement," *id.* at 382, the Court pointed out that such searches serve two purposes: (1) to secure "the officer's safety" and (2) to "prevent . . .

concealment or destruction [of evidence]," *id.* at 383 (citation omitted). The Court then considered whether a cell phone search qualified as a search incident to arrest by considering "whether application of the search incident to arrest doctrine to [cell phones] would 'untether the rule from the justifications underlying the . . . exception.'" *Id.* at 386 (quoting *Gant*, 556 U.S. at 343).

The Court concluded that neither purpose for the search incident to arrest exception justified the search of a cell phone. The Court rejected the government's argument that searching a cell phone incident to arrest would "help ensure officer safety in . . . indirect ways, for example by alerting officers that confederates of the arrestee are headed to the scene." *Id.* at 387. The Court reasoned that the government's position "would . . . represent a broadening" of the exception's foundational concern that "an *arrestee himself* might grab a weapon and use it against an officer." *Id.* at 387-88. The Court observed that "once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone," *id.* at 388, and police have means to ensure that data cannot be wiped from the phone remotely, *id.* at 390. The Court concluded "not that the information on a cell phone is immune from search; [but rather] that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id.* at 401.

The second constraint on warrantless searches is illustrated by the Court's decision in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). Montoya was stopped at Los Angeles International Airport and

referred to secondary inspection. *Id.* at 533. She had arrived from Bogota and was carrying $5,000 in cash. *Id.* She had no credit cards and no hotel reservations. *Id.* at 533-34. Because border officials suspected that Montoya may have swallowed cocaine-filled balloons, Montoya was held in the customs office and, after a magistrate judge issued an order, taken to a hospital for a rectal examination. *Id.* at 534-35. Over the next four days, she passed 88 balloons containing cocaine. *Id.* at 536. Montoya argued that the search she was subjected to, though a border search, was so intrusive that it could not be conducted without a high level of particularized suspicion. *Id.* at 536-37, 540. The Court balanced her privacy interests against the interests of the government at the border and concluded that, while routine searches may be conducted at the border without any showing of suspicion, a more intrusive, nonroutine search must be supported by "reasonable suspicion." *Id.* at 537-41; *see also United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (suggesting that nonroutine searches are limited to "highly intrusive searches of the person" involving "dignity and privacy interests").

Cano recognizes that he was subject to search at the border, but Cano and amicus Electronic Frontier Foundation ("EFF") raise two categorical challenges and one as-applied challenge to the searches conducted here. First, EFF argues that any warrantless search of a cell phone falls outside the scope of the border search exception. Second, EFF argues that even if the search is within the scope of the border search exception, a warrantless cell phone search is so intrusive that it requires probable cause. We address these categorical challenges in Part II.A. Third, Cano asserts that, even if

cell phones are generally subject to search at the border, the manual and forensic searches of *his* cell phone exceeded the "well delineated" scope of the border search. We address this as-applied question in Part II.B. Finally, the government argues that even if the border search exceeded the limits of the Fourth Amendment, the search was conducted in good faith, and the evidence is admissible. We consider the good faith exception in Part II.C.

A. *Border Searches and Cell Phones*

"[B]order searches constitute a 'historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained.'" *Cotterman*, 709 F.3d at 957 (quoting *Ramsey*, 431 U.S. at 621). Indeed, border searches typically do not require any particularized suspicion, so long as they are "routine inspections and searches of individuals or conveyances seeking to cross our borders." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *see United States v. Seljan*, 547 F.3d 993, 999 (9th Cir. 2008) (en banc). Such searches are "reasonable simply by virtue of the fact they occur at the border." *Ramsey*, 431 U.S. at 616. The exception is "rooted in 'the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country,'" *Cotterman*, 709 F.3d at 960 (quoting *Ramsey*, 431 U.S. at 616), to "prevent[] the entry of unwanted persons and effects," *id.* (quoting *Flores-Montano*, 541 U.S. at 152).

The sovereign's right to conduct suspicionless searches at the border "does not mean, however, that at the border 'anything goes.'" *Id.* (quoting *Seljan*, 547 F.3d at 1000). Rather, the border search exception is

a "narrow exception" that is limited in two important ways. *Id.* (citation omitted). First, "[t]he authorizing statute limits the persons who may legally conduct a 'border search' to 'persons authorized to board or search vessels.'" *United States v. Soto-Soto*, 598 F.2d 545, 549 (9th Cir. 1979) (citing 19 U.S.C. § 482).[4] This includes customs and immigration officials, but not general law enforcement officers such as FBI agents. *Id.*; *see United States v. Diamond*, 471 F.2d 771, 773 (9th Cir. 1973) (stating that "customs agents are not general guardians of the public peace"). Second, a border search

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[4] Section 482 now reads in relevant part:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine . . . any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law. . . . [and may] seize and secure the same for trial.

19 U.S.C. § 482(a); *see id.* § 1467 ("[T]he appropriate customs officer for [a] port or place of arrival may . . . enforce, cause inspection, examination, and search to be made of the persons, baggage, and merchandise discharged or unladen from [an arriving] vessel. . . . "); *id.* § 1496 ("The appropriate customs officer may cause an examination to be made of the baggage of any persons arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited. . . . "); *id.* § 1582 ("[A]ll persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents. . . . ").

The Court has described § 482 as granting the executive "plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant." *Montoya de Hernandez*, 473 U.S. at 537. We have held that the "outer limits of authority delegated by [§ 482 are] available only in border searches." *Corngold v. United States*, 367 F.2d 1, 3 (9th Cir. 1966) (en banc).

must be conducted "in enforcement of customs laws." *Soto-Soto*, 598 F.2d at 549. A border search must be conducted to "enforce importation laws," and not for "general law enforcement purposes." *Id.* A general search cannot be "justif[ied] . . . on the mere basis that it occurred at the border." *Id.* (affirming the suppression of evidence where an FBI agent stopped and searched the vehicle of an alien to determine whether the car had been stolen).

1. Cell Phone Data as Contraband

As we discussed briefly above, the Supreme Court has identified two principal purposes behind warrantless border searches: First, to identify "[t]ravellers . . . entitled to come in" and, second, to verify their "belongings as effects which may be lawfully brought in." *Carroll v. United States*, 267 U.S. 132, 154 (1925); *see Ramsey*, 431 U.S. at 620 ("The border-search exception is grounded in the recognized right of the sovereign to control . . . who and what may enter the country.").

EFF argues that applying the border search exception to a cell phone's data would "untether" the exception from the purposes underlying it. EFF contends that a border search encompasses only a search for illegal persons and *physical contraband* located on the body of the applicant for admission or among his effects. Because digital data on a cell phone cannot conceal objects such as drugs, guns, or smuggled persons, EFF asserts that digital cell phone searches are always beyond the scope of the border search exception.

We agree with EFF that the purpose of the border search is to interdict contraband, but we disagree with

its premise that cell phones cannot contain contraband. Although cell phone data cannot hide physical objects,[5] the data can contain *digital contraband*. The best example is child pornography. *See United States v. Molina-Isidoro*, 884 F.3d 287, 295 n.3 (5th Cir. 2018) (Costa, J., specially concurring) ("One type of contraband that can be stored within the data of a cell phone . . . is child pornography."). And because cell phones may ultimately be released into the interior, even if the owner has been detained, the United States has a strong interest in preventing the entry of such material. *See*, *e.g.*, *United States v. Vergara*, 884 F.3d 1309, 1311 (11th Cir.) (describing how agents returned one of the defendant's phones to a family member after defendant had been arrested for possessing child pornography on his other two phones), *cert. denied*, 139 S. Ct. 70 (2018). We find no basis for the proposition that the border search exception is limited to searching for physical contraband. At the very least, a cell phone that has photos stored on it is the equivalent of photographs, magazines, and books.[6] *See Riley*, 573 U.S. at

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[5] No one contests that a border official could, consistent with the Fourth Amendment, examine the physical body of a cell phone to see if the phone itself is contraband—because, for example, it is a pirated copy of a patented U.S. phone—or if the phone itself presents a physical threat to officers. *See Riley*, 573 U.S. at 387 ("Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case."). The dispute here concerns only whether border officials may search the digital data contained within the phone.

[6] We need not address here questions surrounding the use of "cloud computing," where the phone gives access to, but does not

394; *Cotterman*, 709 F.3d at 964. The contents may be digital when they are on the phone, but the physicality of the phone itself and the possibility that the phone's contents can be printed or shared electronically gives border officials sufficient reason to inspect it at the border. We conclude that cell phones—including the phones' data—are subject to search at the border.

2. Forensic Cell Phone Searches as an Intrusive Search

The second question we must address in response to amicus EFF is whether forensic searches of a cell phone are so intrusive that they require reasonable suspicion or even probable cause. We answered this question in our en banc decision in *Cotterman*, but with respect to laptop computers.[7] *Cotterman*, 709 F.3d at 962-68. Cotterman was a United States citizen returning to the United States from Mexico. *Id.* at 957. When he reached the port of entry, border officials noted that Cotterman had various convictions for sexual conduct with children. *Id.* Concerned that Cotterman might be involved in child sex tourism, officials conducted a brief search of his laptop computers and digital cameras and noted that the laptops had password-protected files. *Id.* at 958. The officials detained the computers for several days in order to run a comprehensive forensic

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contain in its own memory, digital data stored in the cloud. *See Riley*, 573 U.S. at 397-98; *Cotterman*, 709 F.3d at 965 & n.12.

[7] Although *Cotterman* referred to "electronic devices" generally, *see* 709 F.3d at 962-68, our holding was limited to the "examination of Cotterman's computer," *id.* at 968, and did not address cell phones. We mentioned cell phones only once—in the first paragraph of the introduction describing the modern "digital world." *Id.* at 956.

search of the hard drive, which revealed hundreds of images of child pornography. *Id.* at 958-59. For us, "the legitimacy of the initial search of Cotterman's electronic devices at the border [was] not in doubt," *id.* at 960, "[t]he difficult question . . . [was] the reasonableness, without a warrant, of the forensic examination that comprehensively analyzed the hard drive of the computer," *id.* at 961.

We acknowledged the "substantial personal privacy interests" in "[e]lectronic devices . . . capable of storing warehouses full of information." *Id.* at 964. At the same time, we recognized "the important security concerns that prevail at the border" and the legitimacy of "[t]he effort to interdict child pornography." *Id.* at 966. We held that a routine, manual search of files on a laptop computer—"a quick look and unintrusive search"—is reasonable "even without particularized suspicion," but that officials must "possess a particularized and objective basis for suspecting the person stopped of criminal activity" to engage in a forensic examination, which is "essentially a computer strip search." *Id.* at 960-61, 966, 967 (citation omitted). We concluded that reasonable suspicion was "a modest, workable standard that is already applied in the extended border search, *Terry* stop, and other contexts." *Id.* at 966; *see id.* at 968 (defining reasonable suspicion as "a particularized and objective basis for suspecting the particular person stopped of criminal activity" (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981))).

We think that *Cotterman*'s reasoning applies equally to cell phones. In large measure, we anticipated the Supreme Court's reasoning in *Riley*, 573 U.S. at 393-97,

when we recognized in *Cotterman* that digital devices "contain the most intimate details of our lives" and "the uniquely sensitive nature of data on electronic devices carries with it a significant expectation of privacy," *Cotterman*, 709 F.3d at 965-66; *see Riley*, 573 U.S. at 385, 393 (describing cell phones as "a pervasive and insistent part of daily life" that, "as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse"). The Court's view of cell phones in *Riley* so closely resembles our own analysis of laptop computers in *Cotterman* that we find no basis to distinguish a forensic cell phone search from a forensic laptop search.[8]

Nor do we believe that *Riley* renders the *Cotterman* standard insufficiently protective. *Riley*, of course, held that "a warrant is generally required" before searching a cell phone, "even when a cell phone is seized incident to arrest." 573 U.S. at 401. But here we deal with the border search exception—not the search incident to arrest exception—and the difference in context is critical. In light of the government's enhanced interest in protecting the "integrity of the border" and the individual's decreased expectation of privacy, the Court has emphasized that "the Fourth Amendment's balance

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[8] We note that the Eleventh Circuit disagreed with *Cotterman* in *United States v. Touset*, 890 F.3d 1227, 1234 (11th Cir. 2018). The court held that no level of suspicion was required to conduct a forensic search of a cell phone. *Id.* at 1234-35. Nevertheless, the *Touset* court held, in the alternative, that the forensic search of various electronic devices seized at the border were supported by reasonable suspicion. *Id.* at 1237. As with most cell phone search cases, in *Touset* border agents were looking for child pornography.

of reasonableness is qualitatively different at the international border than in the interior" and is "struck much more favorably to the Government." *Montoya de Hernandez*, 473 U.S. at 538-40. As a result, post-*Riley*, no court has required more than reasonable suspicion to justify even an intrusive border search. *See United States v. Wanjiku*, 919 F.3d 472, 485 (7th Cir. 2019) ("[N]o circuit court, before or after *Riley*, has required more than reasonable suspicion for a border search of cell phones or electronically-stored data."); *Touset*, 890 F.3d at 1234 ("*Riley*, which involved the search-incident-to-arrest exception, does not apply to searches at the border."); *Molina-Isidoro*, 884 F.3d at 291 ("For border searches both routine and not, no case has required a warrant."); *id.* at 293 ("The bottom line is that only two of the many federal cases addressing border searches of electronic devices have ever required any level of suspicion. They both required only reasonable suspicion and that was for the more intrusive forensic search."); *see also Kolsuz*, 890 F.3d 133, 137 (4th Cir. 2018) (concluding that a "forensic examination of Kolsuz's phone must be considered a nonroutine border search, requiring some measure of individualized suspicion" but declining to decide whether the standard should be reasonable suspicion or probable cause).

Accordingly, we hold that manual searches of cell phones at the border are reasonable without individualized suspicion, whereas the forensic examination of a cell phone requires a showing of reasonable suspicion. *See Cotterman*, 709 F.3d at 968.

B. *The Searches of Cano's Cell Phone and the Scope of the Border Search Exception*

Having concluded that border officials may conduct suspicionless manual searches of cell phones, but must have reasonable suspicion before they conduct a forensic search, we still must address the core of Cano's argument: whether the manual and forensic searches of his cell phone were not searches for digital contraband, but searches for evidence of a crime, and thus exceeded the proper scope of a border search.

1. The Border Exception and the Search for Contraband

As a threshold matter, Cano argues that border searches are limited in both purpose and scope to searches for contraband.[9] In response, the government

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[9] Cano emphasizes that the officials who arrested him were looking for evidence of a crime, not contraband that could be seized at the border, and this renders the search unconstitutional. He points to Officers Petonak and Medrano, who searched Cano's cell phone, and who testified that their searches had a dual purpose: "to find some brief investigative leads in the current case" and "to see if there[] [was] evidence of other things coming across the border." Because the agents acknowledged that they sought evidence to use against Cano in building a criminal case, Cano argues that the court should treat the search as one conducted for "general law enforcement purposes" rather than a border search.

Cano's focus on the officials' subjective motivations is misplaced, however. As the district court recognized, "courts have repeatedly held that the Fourth Amendment's reasonableness analysis is 'predominantly an objective inquiry.'" *See Whren v. United States*, 517 U.S. 806, 813 (1996) (upholding a "pretextual" stop because "[s]ubjective intentions play no role in ordinary . . . Fourth Amendment analysis"). We have upheld border searches of persons seeking entry even when those searches were conducted "at the behest"

argues that searches for evidence that would aid in prosecuting past and preventing future border-related crimes are tethered to the purpose of the border search exception—namely, interdicting foreign contraband—and thus fall within its scope.

This is a close question, but we think Cano has the better of the argument. There is a difference between a search for contraband and a search for evidence of border-related crimes, although the distinction may not be apparent. *Cotterman* helps us focus on the difference. There, border officials had been alerted that Cotterman had a criminal record of sex abuse of minors and might be involved in "child sex tourism." *Cotterman*, 709 F.3d at 957. The officials seized his laptop and subjected it to searches for child pornography, which they found. In *Cotterman*, the child pornography was contraband subject to seizure at the border. As contraband, the child pornography is *also* evidence of various crimes, including possession of child pornography, 18 U.S.C. § 2252A(a)(5)(B), and importation of obscene material, 18 U.S.C. § 1462(a). But nothing in *Cotterman* authorized border officials to conduct a search for evidence that Cotterman was involved in sex-related crimes generally.

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of DEA agents seeking criminal evidence. *See United States v. Schoor*, 597 F.2d 1303, 1305-06 (9th Cir. 1979) (holding a border search reasonable where it was conducted "at the behest" of DEA agents and included a search for certain items of evidence in addition to a search for contraband). Thus, the mere fact that Officers Petonak and Medrano subjectively hoped to find "investigative leads" pertaining to the seized shipment of cocaine does not render their searches of Cano's phone beyond the border search exception.

Border officials are authorized to seize "*merchandise* which . . . shall have been introduced into the United States in any manner contrary to law." 19 U.S.C. § 482(a) (emphasis added). The photos on Cotterman's laptop computer were such merchandise. 18 U.S.C. § 2252(a). But border officials have no general authority to search for crime. This is true even if there is a possibility that such crimes may be perpetrated at the border in the future. So, for example, if U.S. officials reasonably suspect that a person who has presented himself at the border may be engaged in price fixing, *see* 15 U.S.C. § 1, they may not conduct a forensic search of his phone or laptop. Evidence of price fixing—texts or emails, for example—is not itself contraband whose importation is prohibited by law. Such emails may be evidence of a crime, but they are not contraband, and there is no law prohibiting the importation of mere evidence of crime.

We recognize that our analysis is in tension with the Fourth Circuit's decision in *Kolsuz*. Kolsuz was detained at Washington Dulles International Airport when customs agents discovered firearm parts in his luggage. *Kolsuz*, 890 F.3d at 138-39. Kolsuz was arrested and his cell phone seized. *Id.* at 139. The agents subjected the phone to a month-long forensic search, producing a 896-page report. *Id.* Kolsuz challenged the search, which the district court upheld and the Fourth Circuit affirmed. *Id.* at 139-42. The court approved the forensic search because the agents had "reason to believe . . . that Kolsuz was attempting to export firearms illegally" and that "their search would reveal not only evidence of the export violation they already had detected, but also 'information related to other ongoing attempts to export illegally various firearm

parts.'" *Id.* at 143 (quoting the district court; citation omitted). According to the Fourth Circuit, "[t]he justification behind the border search exception is broad enough to accommodate not only the direct interception of contraband as it crosses the border, but also *the prevention and disruption of ongoing efforts to export contraband illegally*." *Id.* (emphasis added).[10]

We agree with much of the Fourth Circuit's discussion of foundational principles, but we respectfully disagree with the final step approving the search for further evidence that Kolsuz was smuggling weapons. Our disagreement focuses precisely on the critical question that we previously identified: Does the proper scope of a border search include the power to search for *evidence* of contraband that is *not* present at the border? Or, put differently, can border agents conduct a warrantless search for evidence of past or future border-related crimes? We think that the answer must be "no." The "[d]etection of . . . contraband is the strongest historic rationale for the border-search exception." *Molina-Isidoro*, 884 F.3d at 295 (Costa, J., specially concurring). Indeed, "every border-search case the Supreme Court has decided involved searches to locate

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[10] As support for this proposition, the Fourth Circuit cited two district court cases originating within our circuit. Both of those cases addressed fact-patterns almost identical to Cano's, and in each case the district court held that the border-search exception was not limited to searching for contraband directly. *See United States v. Mendez*, 240 F. Supp. 3d 1005, 1007-08 (D. Ariz. 2017); *United States v. Ramos*, 190 F. Supp. 3d 992, 999 (S.D. Cal. 2016). In neither case was the issue appealed to our circuit. Thus, Cano's case presents the first opportunity for us to consider the matter.

items being smuggled" rather than evidence. *Id.* (emphasis added); *see Montoya de Hernandez*, 473 U.S. at 537 (the border search is "to prevent the introduction of contraband into this country"); *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 125 (1973) (border searches are "necessary to prevent smuggling and to prevent prohibited articles from entry"); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) ("Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country"). In fact, the Court has long "draw[n] a sharp distinction between searches for contraband and those for evidence that may reveal the importation of contraband." *Molina-Isidoro*, 884 F.3d at 296 (Costa, J., specially concurring). The classic statement on the distinction between seizing goods at the border because their importation is prohibited and seizing goods at the border because they may be useful in prosecuting crimes is found in *Boyd v. United States*:

> Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an "*unreasonable* search and seizure" within the meaning of the fourth amendment of the constitution?. . . . The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining

> information therein contained, or of using them as evidence against him. The two things differ *toto coelo*.

116 U.S. 616, 622-23 (1886), *overruled in part on other grounds by Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967); *see also id.* at 633 (stating that compelling a man to produce the evidence against himself not only violates the Fifth Amendment, but makes the seizure of his "books and papers" unreasonable under the Fourth Amendment).

Although we continue to acknowledge that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border" and that "the expectation of privacy is less at the border than it is in the interior," *Flores-Montano*, 541 U.S. at 152, 154, we hold that the border search exception authorizes warrantless searches of a cell phone only to determine whether the phone contains contraband. A broader search cannot be "justified by the particular purposes served by the exception." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

2. The Impact of a Limited Scope for Border Searches

Our conclusion that the border search exception is restricted in scope to searches for contraband implicates two practical limitations on warrantless border searches. First, border officials are limited to searching for contraband only; they may not search in a manner untethered to the search for contraband. The Supreme Court has repeatedly emphasized that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

The validity of the manual searches conducted by Agents Petonak and Medrano *at their inception* is beyond dispute. Manual searches of a cell phone at the border can be conducted without any suspicion whatsoever, *see Cotterman*, 709 F.3d at 960, and both agents were officers of HSI and thus had authority to conduct border searches, *Soto-Soto*, 598 F.2d at 548-49. As the Supreme Court explained in *Terry*, however, "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." 392 U.S. at 18.

Once Cano was arrested, Agent Petonak briefly searched Cano's phone and observed that there were no text messages. The observation that the phone contained no text messages falls comfortably within the scope of a search for digital contraband. Child pornography may be sent via text message, so the officers acted within the scope of a permissible border search in accessing the phone's text messages.

Agent Medrano conducted a second manual search of the phone log and text messages on Cano's phone. Medrano, however, did more than thumb through the phone consistent with a search for contraband. He also recorded phone numbers found in the call log, and he photographed two messages received after Cano had reached the border. Those actions have no connection whatsoever to digital contraband. Criminals may hide contraband in unexpected places, so it was reasonable for the two HSI officers to open the phone's call log to verify that the log contained a list of phone numbers and not surreptitious images or videos. But the border

search exception does not justify Agent Medrano's recording of the phone numbers and text messages for further processing, because that action has no connection to ensuring that the phone lacks digital contraband. Accordingly, to the extent that Agent Medrano's search of Cano's phone went beyond a verification that the phone lacked digital contraband, the search exceeded the proper scope of a border search and was unreasonable as a border search under the Fourth Amendment.[11]

Second, because the border search exception is limited in scope to searches for contraband, border officials

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[11] The fact of Cano's arrest does not affect our analysis. The border search does not lose its identity as such once Cano was arrested. The United States retains a strong interest in preventing contraband from entering the United States, whether it is brought in inadvertently, smuggled, or admitted into the United States once its owner is arrested. *See United States v. Ickes*, 393 F.3d 501, 503-05 (4th Cir. 2005) (upholding the post-arrest search of a laptop computer at the border where the officials had reason to suspect the computer carried child pornography); *see also United States v. Bates*, 526 F.2d 966, 967-68 (5th Cir. 1976) (per curiam) (upholding a search of the defendant's vehicle after he had been arrested at the border for violating his bond in connection with a previous drug crime under both the search incident to arrest *and* the border search exception).

The government has not argued that the forensic search of Cano's phone can be justified as a search incident to lawful arrest. Such an argument is foreclosed by *Riley*. *See Riley*, 573 U.S. at 388-91. Nor has the government argued that once Medrano saw the phone numbers in the call log and the text messages that he could record them consistent with the plain view exception. *See United States v. Comprehensive Drug Testing*, 621 F.3d 1162, 1175-77 (9th Cir. 2010) (en banc) (per curiam), *overruled in part on other grounds as recognized by Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2018) (per curiam).

may conduct a forensic cell phone search only when they reasonably suspect that the cell phone contains contraband. We have held that a "highly intrusive" search—such as a forensic cell phone search—requires some level of particularized suspicion. *Cotterman*, 709 F.3d at 963, 968; *see Flores-Montano*, 541 U.S. at 152. But that just begs the question: Particularized suspicion of what? Contraband? Or evidence of future border-related crimes? Having concluded above that border searches are limited in scope to searches for contraband and do not encompass searches for evidence of past or future border-related crimes, we think the answer here is clear: to conduct a more intrusive, forensic cell phone search border officials must reasonably suspect that the cell phone to be searched itself contains contraband.

Were we to rule otherwise, the government could conduct a full forensic search of every electronic device of anyone arrested at the border, for the probable cause required to justify an arrest at the border will always satisfy the lesser reasonable suspicion standard needed to justify a forensic search. As the Court pointed out in *Riley*, modern cell phones are "minicomputers" with "immense storage capacity." 573 U.S. at 393. Such phones "carry a cache of sensitive personal information" —"[t]he sum of an individual's private life"— such that a search of a cell phone may give the government not only "sensitive records previously found in the home," but a "broad array of private information never found in a home in any form—unless the phone is." *Id.* at 393-97. Were we to give the government unfettered access to cell phones, we would enable the government to evade the protections laid out in *Riley* "on the mere basis that

[the searches] occurred at the border." *Soto-Soto*, 598 F.2d at 549.

Moreover, in cases such as this, where the individual suspected of committing the border-related crime has already been arrested, there is no reason why border officials cannot obtain a warrant before conducting their forensic search. This "is particularly true in light of 'advances' in technology that now permit 'the more expeditious processing of warrant applications.'" *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2192 (2016) (quoting *Missouri v. McNeely*, 569 U.S. 141, 154 (2013)); *see Riley*, 573 U.S. at 401. Indeed, in most cases the time required to obtain a warrant would seem trivial compared to the hours, days, and weeks needed to complete a forensic electronic search. *See*, *e.g.*, *Wanjiku*, 919 F.3d at 477 (noting that a forensic "preview" takes one to three hours; the full examination "could take months"); *Kolsuz*, 890 F.3d at 139 (describing how the forensic search "lasted for a full month, and yielded an 896-page report"); *Cotterman*, 709 F.3d at 959 (describing how the first forensic search was conducted over five days; additional evidence was found "[o]ver the next few months"). We therefore conclude that border officials may conduct a forensic cell phone search only when they reasonably suspect that the cell phone to be searched itself contains contraband.

Applied here, if the Cellebrite search of Cano's cell phone qualifies as a forensic search, the entire search was unreasonable under the Fourth Amendment.[12] Al-

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[12] Whether the Cellebrite search constitutes a forensic search is disputed. Because the district court passed on the issue without deciding it, because neither party has briefed the question to us, and

though Agents Petonak and Medrano had reason to suspect that Cano's phone would contain evidence leading to additional drugs, the record does not give rise to any objectively reasonable suspicion that the digital data in the phone contained contraband.[13] Absent reasonable suspicion, the border search exception did not authorize the agents to conduct a warrantless forensic search of Cano's phone, and evidence obtained through a forensic search should be suppressed.

C. *Good Faith Exception*

We next consider whether the evidence uncovered by the searches is nevertheless allowed by the good faith exception. Having held that the manual searches partially violated the Fourth Amendment and having held that, if the Cellebrite search of Cano's phone was a forensic search, it violated the Fourth Amendment, we must determine whether the appropriate remedy is suppression of the evidence. The exclusionary rule is "a

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because we are vacating Defendant's conviction, we decline to reach the merits of the parties' dispute. *See ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1079 (9th Cir. 2015).

[13] Indeed, the detection-of-contraband justification would rarely seem to apply to an electronic search of a cell phone outside the context of child pornography. The courts of appeals have just begun to confront the difficult questions attending cell phone searches at the border. Most of the cases have involved child pornography. *See*, *e.g.*, *Wanjiku*, 919 F.3d 472; *Touset*, 890 F.3d 1227; *Molina-Isidoro*, 884 F.3d 287; *Vergara*, 884 F.3d 1309; *Cotterman*, 709 F.3d 952. Among the courts of appeals, only the Fourth Circuit has addressed the question outside the context of pornography. *Kolsuz*, 890 F.3d 133 (exportation of firearms parts); *see also United States v. Kim*, 103 F. Supp. 3d 32 (D.D.C. 2015) (exports in violation of Iranian trade embargo); *United States v. Saboonchi*, 990 F. Supp. 2d 536 (D. Md. 2014) (same).

'prudential' doctrine"; it is "'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." *Davis v. United States*, 564 U.S. 229, 236 (2011) (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976)). Because "[e]xclusion exacts a heavy toll on both the judicial system and society at large," we invoke the rule when we are confident that it will "deter future Fourth Amendment violations." *Id.* at 236-37. The exclusionary rule does not deter such violations "when the police conduct a search in objectively reasonable reliance on binding judicial precedent." *Id.* at 239. We have said that the good faith exception applies only to searches where "binding appellate precedent . . . 'specifically authorizes' the police's search." *United States v. Lara*, 815 F.3d 605, 613 (9th Cir. 2016) (quoting *Davis*, 564 U.S. at 232). It is not sufficient for the question to be "unclear" or for the government's position to be "plausibly . . . permissible." *Id.* at 613-14. At the same time, the "precedent [does not have] to constitute a factual match with the circumstances of the search in question for the good-faith exception to apply" so as not to "make the good-faith exception a nullity." *United States v. Lustig*, 830 F.3d 1075, 1082 (9th Cir. 2016).

The government points to *Cotterman* as support for the good faith of the officials. We fail to see how border officials could believe that *Cotterman* was "binding appellate precedent" authorizing their search. Although we have concluded that *Cotterman* is still good law after *Riley*, the officials could not rely on *Cotterman* to justify a search for *evidence*; *Cotterman* was a search for *contraband* that the government has a right to seize at the border. Here, the officials' search was objectively tied

only to proving their case against Cano and finding *evidence* of future crimes. Searching for evidence and searching for contraband are not the same thing.

We understand that border officials might have thought that their actions were reasonable, and we recognize that border officials have to make in-the-moment decisions about how to conduct their business—whether or not they have written guidance from the courts. But as we understand the *Davis* rule, the good faith exception to the exclusionary rule applies only when the officials have relied on "*binding* appellate precedent." *See Lara*, 815 F.3d at 613; *see also Wanjiku*, 919 F.3d at 485-86 (finding that agents had reasonable suspicion to search the defendant's cell phone, laptop, and portable hard drive for child pornography; holding that, if probable cause was required, the officials acted in good faith). This is a rapidly developing area, not an area of settled law. Even if our decision in *Cotterman* rendered the searches "plausibly . . . permissible," it did not "specifically authorize" the cell phone searches at issue here. *Lara*, 815 F.3d at 613-14.

* * *

In sum, the manual searches and the Cellebrite search of Cano's cell phone exceeded the scope of a valid border search. Because the good faith exception does not apply, most of the evidence obtained from the searches of Cano's cell phone should have been suppressed. We thus reverse the district court's order denying Cano's motion to suppress, and we vacate Cano's conviction. On any retrial, the district court should determine whether any additional evidence from the warrantless searches of Cano's cell phone should be

suppressed, either because the Cellebrite search qualifies as a forensic search, which the government lacked reasonable suspicion to conduct, or because the evidence exceeds the proper scope of a border search.

III. DISCOVERY ISSUES

Cano has also alleged that the government violated his rights under both *Brady* and Federal Rule of Criminal Procedure 16 when it failed to turn over certain information that Cano requested from the FBI and DEA. We address Cano's discovery claims, as the issues may be relevant on any retrial.

Under *Brady*, the prosecution has an obligation, imposed by the Due Process Clause, to produce "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment." 373 U.S. at 87. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).[14]

Under Rule 16, the government must, upon request, turn over any documents "within the government's possession, custody, or control" that are "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E)(i). The defendant "must make a threshold showing of materiality, which requires a presentation of facts which would tend to show that the Government is in possession of information helpful to the defense." *United States v. Muniz-Jaquez*, 718 F.3d 1180, 1183-84 (9th Cir. 2013)

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[14] We review de novo whether a *Brady* violation has occurred. *United States v. Stever*, 603 F.3d 747, 752 (9th Cir. 2010).

(quoting *United States v. Stever*, 603 F.3d 747, 752 (9th Cir. 2010)). Because "[i]nformation that is not exculpatory or impeaching may still be relevant to developing a possible defense," Rule 16 is "broader than *Brady*." *Id.* at 1183.[15]

Under both *Brady* and Rule 16, the government "has no obligation to produce information which it does not possess or of which it is unaware." *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995). It has an obligation to turn over only material, exculpatory or otherwise helpful to the defense, that it has in its possession.[16] "Possession" is not limited to what the prosecutor personally knows. *Browning v. Baker*, 875 F.3d 444, 460 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2608 (2018); *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989). Because prosecutors are in a "unique position to obtain information known to other agents of the government," they have an obligation to "disclos[e] what [they] do[] not know but could have learned." *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (en banc); *see*

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[15] Although discovery rulings are generally reviewed for abuse of discretion, *Stever*, 603 F.3d at 752, we review a district court's interpretation of the discovery rules de novo, *United States v. Cedano-Arellano*, 332 F.3d 568, 570-71 (9th Cir. 2003).

[16] The "possession" element of *Brady* is treated as coextensive with that of Rule 16. *See, e.g.*, *United States v. Bryan*, 868 F.2d 1032, 1037 (9th Cir. 1989) (using the same "knowledge and access" test to determine "possession" for both Rule 16 and *Brady*); *United States v. Grace*, 401 F. Supp. 2d 1069, 1076 (D. Mont. 2005) ("Whether exculpatory information is in the government's possession for *Brady* purposes is measured by the same . . . test used under Rule 16(a)(1)(E) for discovery.").

also Kyles v. Whitley, 514 U.S. 419, 437 (1995) (describing how the "individual prosecutor has a duty to learn of any favorable evidence known to [those] acting on the government's behalf"); *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam). This includes information held by subordinates such as investigating police officers, *see Kyles*, 514 U.S. at 438; *United States v. Price*, 566 F.3d 900, 908-09 (9th Cir. 2009), and sometimes extends to information held by other executive branch agencies, *see United States v. Santiago*, 46 F.3d 885, 893 (9th Cir. 1995); *United States v. Jennings*, 960 F.2d 1488, 1490-91 (9th Cir. 1992).

Documents held by another executive branch agency are deemed to be "in the possession of the government" if the prosecutor has "knowledge of and access to" the documents. *Bryan*, 868 F.2d at 1036. Knowledge and access are presumed if the agency participates in the investigation of the defendant. *Id.* ("The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant."). However, "a federal prosecutor need not comb the files of every federal agency which might have documents regarding the defendant in order to fulfill his or her obligations under [Rule 16]." *Id.*; *see also Kyles*, 514 U.S. at 437 ("We have never held that the Constitution demands an open file policy. . . . ").

Here, Cano asserted a third-party defense theory: he was staying in Tijuana with his cousin, Jose Medina; Medina was a member of the Latin Kings gang which was involved in the drug trade; and Medina had access to Cano's car before Cano was stopped at the border.

Cano requested that the U.S. Attorney's Office turn over any material held by HSI, the FBI, and the DEA relating to: (1) records linking his cousin Jose Medina to drug sales, distribution, and trafficking; and (2) documentation showing a link between the Latin Kings and drug trafficking through the United States-Mexico border. The district court found that both requests might produce evidence that was exculpatory under *Brady* and material under Rule 16, but limited Cano's discovery to only material held by HSI. The court concluded that the prosecutor did not have access to evidence held by the FBI and DEA, and thus had no obligation to provide such evidence, because both agencies had "rebuffed" the prosecutor's attempts to obtain information. Thus, the only issue raised on appeal is whether any material held by the DEA and FBI should be deemed "within the government's possession."

We find no evidence that the prosecution had knowledge or possession of evidence showing that Medina or the Latin Kings were involved in drug trafficking at the Mexico-California border. Medina had one drug-related conviction, and it was for simple possession of cocaine, not trafficking. Before trial, however, the prosecution team reached out to Medina and promised him immunity and immigration documents in exchange for cooperation and information concerning drug importation. Although Medina originally rebuffed the government, he eventually offered to work with the government and "stated that he would be able to assist the Government with the . . . biggest RICO . . . case and drug seizures of 20 to 25 kilograms at a time." The district court found that Medina's statements "spawn[ed] an inference that [he] is closely connected to the drug-

traffickers in Tijuana." Based on this inference, Cano argues that the government had sufficient knowledge of a possible connection between Medina and drug trafficking to trigger the government's discovery obligations.

Cano's argument, however, misstates the test we first set out in *Bryan*. Cano has argued only that the prosecutor had knowledge that certain *facts* might exist. However, we have said that the prosecutor's disclosure obligations turn on "the extent to which the prosecutor has knowledge of and access to *the documents* sought by the defendant." *Bryan*, 868 F.2d at 1036 (emphasis added); *see also Santiago*, 46 F.3d at 894 (analyzing whether the prosecutor had knowledge of and access to certain inmate files). We have required disclosure only of documents that the prosecutor knew existed. *Bryan*, 868 F.2d at 1034-37.

Here, although Cano has presented evidence alleging a plausible connection between Medina and drug trafficking, Cano has failed to adduce any evidence showing that prosecutors or investigators knew that the FBI or the DEA possessed documents showing that connection. In fact, the record established the opposite. One of the HSI agents ran Medina's name through two different law enforcement clearinghouses—in which the FBI and DEA both participate—and neither search returned any hits.

Moreover, the prosecutor did not have access to FBI or DEA files and thus was under no obligation to "comb the files" of the FBI and DEA for documents relating to

Medina.[17] We have occasionally presumed that a prosecutor has access to an agency's files where the prosecutor actually obtained inculpatory information from the agency, even if the agency was not involved in the investigation or prosecution. *See Santiago*, 46 F.3d at 894 (concluding that the prosecutor had access to other inmates' prison files where the prosecutor was able to obtain the defendant's prison file from the Bureau of Prisons). Here, however, the U.S. Attorney's Office advised the district court that it did not obtain any evidence—inculpatory or exculpatory—from the FBI or the DEA. Following the district court's initial discovery order, HSI's agent—Agent Petonak—made a formal request to the legal counsel for the FBI and the DEA for any "materials related to the Latin Kings importing cocaine from Mexico to the United States," but both agencies "declined to provide [him] with any such information." Neither agency revealed whether any such information existed or provided a reason for its refusal. The U.S. Attorney's Office also reached out to the FBI and the DEA for Latin Kings-related discovery. That request was also denied.

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[17] Cano sought to introduce a 2015 report from the FBI's National Gang Intelligence Center listing the Latin Kings as one of the top gangs involved in cross border crime, and including drug importation in its list of cross-border crimes. (The evidence was not ultimately presented at trial.) Cano also proffered information concerning two government informants working within the Latin Kings. Although these reports may suggest that the FBI may have had further information regarding a connection between the Latin Kings and drug importation, Cano has not established that the prosecutor had access to the FBI's or the DEA's files.

Cano argues that the FBI and DEA's refusal to turn over information in this particular case should not be determinative and that the test for access under *Bryan* and *Santiago* requires only that the U.S. Attorney's Office or investigating agency generally have access to this type of information. Cano points to evidence from both prosecution and defense witnesses that HSI regularly works with the FBI and the DEA; that "interagency cooperation has been emphasized" after September 11, 2001; that agents from the different agencies regularly access information for one another; that a DEA representative worked in Agent Petonak's office; and that agents are often cross-listed between agencies. From this, Cano argues that HSI generally has access to FBI and DEA files for inculpatory purposes, and thus asserts that the refusal of the FBI and DEA to provide information in this particular case should not relieve HSI of its discovery obligations. To rule otherwise, Cano contends, would allow these withholding agencies "to effectively wall off exculpatory information from the government in a particular defendant's case, all the while providing the government free-flowing access to information in its overall investigations."

Although we are sympathetic to Cano's concerns regarding strategic withholding, the rule Cano urges us to adopt is much too broad. *Brady* and Rule 16 obligations are case specific. In *Bryan* we stated that the test for "possession" turns on the prosecutor's "knowledge of and access to the documents sought by the defendant *in each case*" and that "[t]he prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency

participating *in the same investigation of the defendant*." 868 F.2d at 1036 (emphases added). Such a case-by-case approach makes sense, as the FBI and DEA may have valid concerns over revealing sensitive information in cases wholly unrelated to the agencies' own workload; the agencies may be reluctant to cooperate in a particular investigation if it means opening their files in other investigations. If Cano thinks that the FBI or the DEA have other information, not known to the U.S. Attorney's Office or the investigating officers, he may file a request under the Freedom of Information Act, subject to that Act's own restrictions on releasing "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). *Brady* and Rule 16 are not a means for a defendant to require the prosecutor to do this work for him. *See generally Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1175-76 (D.C. Cir. 2011); *Boyd v. Crim. Div. of U.S. Dep't of Justice*, 475 F.3d 381, 386-89 (D.C. Cir. 2007).

Cano is unable to identify any case in which the prosecutor was required to obtain discovery from an agency wholly unrelated to the investigation of the defendant in spite of that agency's refusal to comply; all of the cases cited by Cano imposing a "duty to learn" on the prosecutor involve independent federal agencies that had participated in the investigation of the defendant. *See Price*, 566 F.3d at 908-09; *Carriger*, 132 F.3d at 479-80; *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991); *United States v. Osorio*, 929 F.2d 753, 762 (1st Cir. 1991). Indeed, the Third Circuit has held that a *Brady* obligation is not triggered where the agency did not participate in the investigation in any way, did not share any information with the prosecuting team, and

where the prosecutor had no authority or control over the agency's members. *United States v. Pelullo*, 399 F.3d 197, 218 (3d Cir. 2005); *see also United States v. Salyer*, 271 F.R.D. 148, 156 (E.D. Cal. 2010) (concluding that "[t]he need for formal process in the acquisition of documents [from another agency] is the antithesis of 'access'"). We similarly now hold that the prosecutor should not be held to have "access" to any information that an agency not involved in the investigation or prosecution of the case refuses to turn over.

Because the HSI agents and prosecutors in Cano's case neither knew of nor had access to any additional files relating to Medina and the Latin Kings, we conclude that the government has satisfied its discovery obligations under *Brady* and Rule 16.

IV. CONCLUSION

We **REVERSE** the district court's order denying Cano's motion to suppress and **VACATE** Cano's conviction.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 16-cr-01770-BTM

UNITED STATES OF AMERICA, PLAINTIFF

v.

MIGUEL ANGEL CANO, DEFENDANT

Filed: Nov. 23, 2016

ORDER DENYING MOTION TO SUPPRESS AND MOTION FOR RETURN OF PROPERTY

Presently before the Court are Defendant's motion to suppress and motion for return of property. The Court held an evidentiary hearing on these matters on October 25, 26 and 31, 2016. For the reasons discussed below, Defendant's motions are **DENIED**.

I. FACTUAL BACKGROUND

On July 25, 2016 at approximately 6:30 a.m., Defendant, Miguel Angel Cano, applied for entry to the United States at the San Ysidro Port of Entry ("POE"). A Customs and Border Protection ("CBP") officer conducted a primary inspection of Defendant and his pick-up truck. The CBP officer subsequently referred Defendant to secondary inspection.

During secondary inspection, a dog alerted to the spare tire located underneath the bed of the truck. Secondary officers handcuffed Defendant shortly thereafter. Defendant was taken to the security office where he was handcuffed to a bench. CBP officers cut the spare tire open and found approximately 16.52 kilograms of cocaine. Defendant was subsequently placed under arrest.

After the cocaine was found, CBP officers called the Homeland Security Investigations ("HSI") office, which dispatched Special Agents ("SA") Petonak and Medrano to investigate. Upon arriving at the POE, SA Petonak spoke to the seizing CBP officers, inspected Defendant's vehicle and property, and reviewed Defendant's crossing records. SA Petonak also did a cursory inspection of Defendant's cell phone to look for relevant text messages and recent calls. SA Medrano conducted a "logical download" of Defendant's cell phone using Cellebrite technology . A "logical download" has the capability of downloading text messages, contacts, call logs, media, and application data, though not messages contained within the applications themselves. He also took notes of incoming and outgoing calls. He related his findings to SA Petonak after his interview of Defendant.

At around 9:50 a.m., SA Petonak began his interview of Defendant. SA Petonak advised Defendant of his *Miranda* rights and obtained a written waiver of them. Defendant agreed to speak to SA Petonak without an attorney present. During the interview SA Petonak asked Defendant about his recent crossing history and the reason for his recent move to Mexico. Defendant's

post-*Miranda* interview ended at about 10:20 a.m. Defendant was transported to the Metropolitan Correctional Center ("MCC") in San Diego and booked during the 5:30 p.m. booking window. The following day, on July 26, 2016, Defendant made his initial appearance before Judge Stormes.

On August 5, 2016, Judge Adler granted the government a search warrant for Defendant's cell phone and ordered that it be executed by August 19, 2016.

II. DISCUSSION

Defendant moves to suppress all evidence derived from the search of his cell phone at the POE, contending that his Fourth Amendment rights were violated because the agents searched his cell phone without a warrant. He also petitions the Court for the return of his cell phone under Federal Rule of Criminal Procedure 41(g). Lastly, Defendant argues that his statements should be suppressed as an appropriate remedy for a Federal Rule of Criminal Procedure Rule 5(a) violation. The Court addresses each argument below.

A. Search of Defendant's Cell Phone at the POE

Defendant argues that the agents' search of his cell phone on July 25, 2016 does not fall into any recognized exceptions to the Fourth Amendment's warrant requirement. Defendant relies on *Riley v. California*, __U.S.__, 134 S. Ct. 2473 (2014), to argue that the search incident to arrest doctrine does not apply. He further argues that the search does not fall within the border search exception to the Fourth Amendment because its purpose was to further the agents' investigation, rather

than to prevent the entry of unwanted persons or contraband. The Government submits that *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc), supports the "logical search" of Defendant's cell phone —regardless of whether it is deemed a cursory or forensic search.

1. Search Incident to Arrest Exception

In *Riley*, the Supreme Court held that police officers must get a warrant before searching a cell phone seized incident to arrest. 134 S. Ct. at 2495. Defendant argues that because he was already arrested when the agents arrived at the POE, the warrantless search of his phone was performed as a search incident to arrest and was impermissible under *Riley.*

However, the search incident to arrest doctrine is one of numerous exceptions to the Fourth Amendment's warrant requirement. In fact, even the Supreme Court in *Riley* recognized that although "the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone." *Riley*, 134 S. Ct. at 2494. Though the Supreme Court did not specifically address the border search exception, *Riley* does not preclude the application of such doctrine.

2. Border Search Exception

Border searches have long been recognized as a narrow exception to the Fourth Amendment's warrant requirement. *See Cotterman*, 709 F.3d at 956. Courts have repeatedly held that searches performed at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons

and property crossing into the United States, are "reasonable simply by virtue of the fact that they occur at the border." *Cotterman*, 709 F.3d at 960. However, border searches are not without limits. *Id.* "Even at the border, individual privacy rights are not abandoned but balanced against the sovereign's interests." *Id.*

i. Purpose of the Search

Defendant submits that the justification for a border search exception, preventing the entry of unwanted persons or contraband, is inapplicable here. Defendant argues that because he was already in custody, and the drugs and his phone were seized before the agents arrived at the POE, the agents' search of his phone was "investigatory" in nature. That is, they performed the search to gather evidence in an ongoing criminal investigation. Defendant thus attempts to draw a line between searches that are performed for the purpose of preventing the entry of unwanted persons or things, like those at issue in *United States v. Arnold*, 533 F.3d 1003, 1009 (9th Cir. 2008) and *Cotterman*, and "investigatory" searches.

Though not framed as an inquiry into the actual motivations of the agents, Defendant's argument is effectively seeking that the Court give weight to the agents' subjective intent and motivations behind their search. However, courts have repeatedly held that the Fourth Amendment's reasonableness analysis is "predominately an objective inquiry." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 736 (2011). In upholding a "pre-text stop," the Supreme Court in *Whren v. United States*, 517 U.S. 806, 813 (1996), reaffirmed the principle that "[s]ubjective intentions play no role in ordinary, probable-cause

Fourth Amendment analysis." There, police officers discovered drugs after allegedly conducting a pretextual traffic stop. *Id.* at 808-809. The Supreme Court rejected the argument that "ulterior motives can invalidate police conduct justified on the basis of probable cause" and ultimately upheld the temporary detention of the defendant upon probable cause that he had violated a traffic law. *Id.* at 812. It stated: "[n]ot only have we never held, outside the context of inventory search or administrative inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." *Id.*

The Supreme Court has only recognized two limited exceptions to this general rule: 1) special-needs search cases[1]; and 2) administrative-search cases[2]. *See Al-*

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[1] The Supreme Court has upheld "suspicionless searches where the program was designed to serve 'special needs,' beyond the normal need for law enforcement." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). *See, e.g., Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (finding that "special needs" exist in the public school context and upholding random drug testing of student-athletes); *Nat'l Treasury Emps. Union v. Von Raab* 489 U.S. 656 (1989) (upholding the testing of employees directly involved in drug interdiction or required to carry firearms); *Skinner v. Ry. Labor Execs.' Assn.*, 489 U.S. 602 (1989) (upholding the toxicologist testing of railroad employees involved in train accidents or found to be in violation of particular safety regulations).

[2] *See, e.g., New York v. Burger,* 482 U.S. 691 (1987) (holding that the State's authorization of warrantless inspections of junkyards, concededly for the purpose of uncovering criminality, was not unconstitutional); *Camara v. Mun. Court of City and Cnty. of San Francisco*, 387 U.S. 523 (holding that administrative searches by municipal health and safety inspectors when authorized and conducted

Kidd, 563 U.S. at 736; *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (holding that "Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion may be invalid if the scheme as a whole "pursue[s] primarily general crime control purposes."). Apart from those cases, the Supreme Court has "almost uniformly rejected invitations to probe subjective intent." *Al-Kidd*, 563 U.S. at 737. As the Supreme Court phrased the inquiry, when determining whether a search or seizure is reasonable under the Fourth Amendment," we ask whether "the circumstances, viewed objectively, justify the challenged action." *Id.* at 736. If so, then that action was reasonable "'whatever the subjective intent' motivating the relevant officials." *Id.* (quoting *Whren*, 517 U.S. at 814).

As such, border search cases do not turn on the purpose or motivation behind the search. Rather, they focus on the degree of intrusiveness in light of the sovereign's interest at the border. In *United States v. Hsi Heui TSAI*, 282 F.3d 690, 694 (9th Cir. 2002), the Ninth Circuit specifically addressed whether the alleged investigative purpose of a search conducted at the border took it outside the scope of a "routine" border search. There, the defendant had flown into Hawaii from Guam. *Id.* at 694. The defendant argued that because the INS inspector knew that he was suspected of criminal activity in Guam, the search of his briefcase was conducted for purposes of criminal investigation, not as a "routine" border search. *Id.* The Ninth Circuit reinforced that

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without warrant procedure, lack traditional safeguards which Fourth Amendment guarantees to individuals).

"[t]he 'critical factor' in determining whether a border search is "routine" is the degree of intrusiveness it poses." *Id.* While acknowledging that there are some cases like *Edmond*, in which subjective motivation is not wholly irrelevant, the Ninth Circuit held this case was not one of them. *Id.* at 695. It therefore held that the search of the defendant's briefcase was reasonable as a routine border search notwithstanding the INS inspector's investigative purpose. *Id.* at 696.

A review of Ninth Circuit cases specifically addressing digital searches at the border also reveals that the subjective motivation behind a search does not "serve to impose a warrant requirement that ordinarily does not exist at the border." *Id.* at 694. In *Arnold*, the Ninth Circuit held that warrantless searches of laptops or other personal electronic storage devices at the border did not require reasonable suspicion. *Id.* at 533 F.3d 1003. There, the defendant was stopped by customs officials at the Los Angeles International Airport as he returned from a trip to the Philippines. *Id.* at 1005. He was asked by the customs officers to boot his laptop up and they proceeded to look through two folders of images on his desktop. *Id.* The folders contained two nude photos, which led the officers to further examine the computer. *Id.* The computer search revealed child pornography. *Id.* In determining whether this search required reasonable suspicion, the Ninth Circuit turned to the well-grounded border search doctrine. *Id.* at 1007. The court held that the search of the laptop, like that of a gas tank, did not "implicate the same 'dignity and privacy' concerns as 'highly intrusive searches of the person.'" *Id.* at 1008 (quoting *United*

States v. Flores-Montano, 541 U.S. 149, 152 (2004)). No reasonable suspicion was therefore required.

The Ninth Circuit in *Cotterman* narrowed the holding in *Arnold* and outlined a two-tiered approach for determining what level of suspicion is required for digital border searches. 709 F.3d at 961. There, agents seized the defendant's laptop at the U.S.-Mexico border in response to an alert of a child molestation conviction. *Id.* at 957. The agents conducted an initial search of his laptop which revealed no incriminating material. *Id.* at 957-58. Only after the defendant's laptop was shipped away and subjected to a comprehensive forensic examination were images of child pornography discovered. *Id.* at 958. The Court held that, under *Arnold*, the initial cursory search of the defendant's electronic devices at the border was reasonable even without particularized suspicion. *Id.* at 960. However, given the intrusive nature of a forensic examination of the electronic device, to justify the search as reasonable, it had to be supported by reasonable suspicion. *Id.* at 968.

The Ninth Circuit's holding in *Cotterman* did not depend on whether the search was "investigatory" in nature. It instead rested on the "comprehensive and intrusive nature of a forensic examination." *Id.* at 962. Defendant cites no authority to support his proposition that if the search is "investigatory," it ceases being a border search. In fact, several courts in this District have refused to decide cases involving searches at the border on such a distinction. *See United States v. Ramos*, No. 16-cr-467 JM, 2016 WL 3552140, at *13 (S.D. Cal. June 3, 2016) (finding that an agent's manual search of the defendant's phone approximately an hour and a

half after his arrest was reasonable under the border search exception); *see also United States v. Caballero*, No. 15-cr-2738, 2016 WL 1546731-BEN, at *4 (S.D. Cal. Apr. 14, 2016) (applying *Cotterman* and finding that the warrantless, post-arrest cursory search of the defendant's cell phone was permissible under the border search doctrine); *see also United States v. Hernandez*, No. 15-cr-2613, 2016 WL 471943-GPC, at *3 (S.D. Cal. Feb. 8, 2016) (refusing to make a distinction between "investigatory" border searches and "protecting the United States' sovereign integrity by excluding unwanted persons or things.").

It is also worth noting that here, there is evidence that the agents were motivated, at least in part, by the desire to prevent the entry of additional contraband into the country. At the hearing, both SA Medrano and SA Petonak testified that they searched Defendant's phone, in part to prepare for Defendant's interview, but also to look for communications that might lead to co-conspirators and messages from co-conspirators that could reveal other drug loads being smuggled. Thus, even if the Court were to take into account the subjective intentions of the agents, the search is nevertheless a border search. *See, e.g.*, *Ramos*, 2016 WL 3552140, at *5 (noting that though the border search may have not uncovered additional information regarding the defendant's wrongdoing, it may have uncovered more information about more contraband entering into the country at that time or the location where the defendant was to drop off or transfer the drugs).

ii. Reasonable Under *Arnold* and *Cotterman*

Therefore, the issue here is whether the searches of Defendant's cell phone at the border were reasonable under *Cotterman*. The Court holds that they were. SA Petonak's warrantless search of Defendant's cell phone is clearly permissible under *Arnold*. Like the manual search in *Arnold*, Agent Petonak here performed a cursory search of Defendant's phone.

SA Medrano's "logical" search of the phone is also lawful under the border search doctrine, but merits further discussion. In addition to performing a manual search of the phone, SA Medrano also used Cellebrite technology to conduct a "logical download" of the cell phone. The Government contends that this does not constitute a forensic search, and as such, no reasonable suspicion was required. In the alternative, the Government argues that even if the Court were to characterize the search as "forensic," *Cotterman* nevertheless supports it because the agents had reasonable suspicion and even probable cause.

Here, the Court need not decide whether the use of Cellebrite technology transforms it from a mere "cursory search" to a "forensic search," as the "logical download" was supported by at least reasonable suspicion. SA Medrano searched through Defendant's phone after CBP officers found approximately 16.52 kilograms of cocaine in the spare tire of his truck. This not only amounts to reasonable suspicion, but gives rise to probable cause. The agents had reason to believe that Defendant used his cell phone as an instrumentality of the

crime. Accordingly, SA Medrano's search of Defendant's phone using Cellebrite technology was reasonable under the border search exception.

3. Good Faith Exception

Even if the search of Defendant's phone does not fall within the border search exception, the evidence is nevertheless admissible because the good faith exception to the exclusionary rule applies here.

Not every Fourth Amendment violation demands applying the exclusionary rule. *Herring v. United States*, 555 U.S. 135, 140 (2009). "[E]vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *United States v. Schesso*, 730 F.3d 1040, 1050-51 (9th Cir. 2013) (quoting *Herring*, 555 U.S. at 143).

Here, there is both Supreme Court and Ninth Circuit law approving the well-grounded border search doctrine. Specifically, *Cotterman* remains good law and permits agents to search electronic devices at the border without a warrant. At the hearing, Defendant argued that the good faith exception does not apply because *Riley*'s warrant requirement is established law. However, as already discussed above, *Riley* did not address the border search exception, but instead based its holding on the search incident to arrest exception. The Court is aware of no case, post-*Riley*, that applies its holding to searches of cell phones conducted at the border. In fact, as already noted, there are several courts in this District that have upheld a warrantless, post-arrest, search of a defendant's cell phone pursuant to

the border search doctrine. The Court therefore finds that the agents in this case searched Defendant's cell phone in reliance on the border search doctrine. The good faith exception to the exclusionary rule thus applies.

Defendant's motion to suppress evidence derived from the search of his cell phone at the POE is therefore **DENIED**.

B. Return of Property Under Rule 41(g)

Defendant moves for the return of his cell phone pursuant to Federal Rule of Criminal Procedure 41(g), which "provides a mechanism by which a person may seek to recover property seized by federal agents." *Ordonez v. United States*, 680 F.3d 1135, 1137 (9th Cir. 2012). The text of the rule states:

> A person aggrieved by an unlawful search and seizure of property or by deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g). Unless "the property in question is no longer needed for evidentiary purpose, either because trial is complete, the defendant has pleaded guilty, or . . . the government has abandoned its investigation," the movant bears the burden of demonstrating that he or she is entitled to lawful possession of

the property. *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987); *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, n.2 (9th Cir. 2010).

Here, as discussed above, Defendant's cell phone was not subject to an unlawful search and seizure. Defendant argues that because the government has already seized the data from his phone, it no longer needs the physical phone. Nevertheless, the cell phone serves an evidentiary purpose as the case remains open and it was seized as an alleged instrumentality of the charged crime. As such, Defendant's motion for return of his cell phone is **DENIED WITHOUT PREJUDICE**.

C. Suppression of Statements Under Rule 5

Defendant argues that his statements must be suppressed because the Government delayed his initial appearance before a Magistrate Judge in violation of Federal Rule of Criminal Procedure 5.

Rule 5 of the Federal Rules of Criminal Procedure states that, "[a] person making an arrest within the United States must take the defendant *without unnecessary* delay before a magistrate . . . ". Fed. R. Crim. P. 5(a)(1)(A) (emphasis added). Unnecessary delay "must be determined in light of all the facts and circumstances of the case." Fed. R. Crim. P. 5 advisory committee's notes. The *McNabb-Mallory* rule "generally render[s] inadmissible confessions made during periods of detention that violate the prompt presentment requirement of [Rule] 5(a)." *Corley v. United States*, 556 U.S. 303, 303 (2009). In response to the application of *McNabb-Mallory* in some federal courts, Congress

enacted 18 U.S.C. § 3501(c). *See Corley*, 556 U.S. at 322. Section 3501(c), provides that:

> In any criminal prosecution by the United States . . . , a confession made . . . by a defendant therein, while such person was under arrest . . . , shall not be inadmissible solely because of delay in bringing such person before a magistrate judge . . . if such confession is found by the trial judge to have been made voluntarily . . . and if such confession was made . . . within six hours immediately following his arrest . . . [this six-hour time limit] shall not apply in any case in which the delay in bringing such person before magistrate judge . . . is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

§ 3501(c). In interpreting section 3501, the Supreme Court in *Corley* held that it modified *McNabb-Mallory*, without supplanting it. *Id.* at 322. The Supreme Court established a two-part test for applying the *McNabb-Mallory* rule in light of the six-hour safe harbor period in section 3501(c). *Id.* at 322; *see also United States v. Pimental*, 755 F.3d 1095, 1101 (9th Cir. 2014) (applying the two-part test established in *Corley*). First, a district court must determine "whether the defendant confessed within six hours of arrest (unless a longer delay was 'reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate judge]')." *Id.* If the confession falls within the six-hour period, "it is admissible . . . so long as it was 'made voluntarily and . . . the weight

to be given it is left to the jury.'" *Id.* If the defendant, however, made the confession before presentment and beyond six hours, a court must find "whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed." *Id.*

Defendant cites to *Pimental* to argue that his presentment on the day following his arrest violated Rule 5 and, as such, the statements he made before presentment should be suppressed. The defendant in *Pimental* was arrested on a Friday morning at the San Ysidro POE, but was not presented before a Magistrate Judge until the following Tuesday. 755 F.3d at 1098-99. There, the defendant made the incriminating statements more than six hours after his arrest. *Id.* at 1101. Because the section 3501(c) safe harbor did not apply, the Ninth Circuit's analysis turned on whether the delay was "unreasonable or unnecessary under the *McNabb-Mallory* cases." *Id.* The Ninth Circuit ultimately held that the delay was unnecessary and reversed the district court's denial of the defendant's motion to suppress. *Id.* at 1104.

Defendant argues that his case "is on all fours with" *Pimental*, yet he ignores one crucial distinguishing fact. Here, Defendant made the statements at approximately 9:50 a.m.[3]—less than six hours after being arrested. Under Ninth Circuit law, because the statements were

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[3] The parties dispute the time of Defendant's arrest. Defendant argues that he was arrested at 6:45 a.m. The Government contends that he was arrested at 8:00 a.m. The Court need not determine the time of arrest because it is undisputed that the statements were made within six-hours of being arrested at either time.

made within the six-hour safe harbor, they are admissible so long as they were made voluntarily. As determined by the Court during the hearing on this motion, Defendant knowingly, intelligently and voluntarily waived his rights and proceeded to make the statements at issue.

Moreover, the Court does not find that there have been a series of Rule 5 violations for the purpose of obtaining confessions so as to warrant suppression of Defendant's statements in this case.

Consequently, Defendant's motion to suppress his statements is **DENIED**.

III. CONCLUSION

For these reasons, Defendant's motion to suppress and motion for return of property are **DENIED.**

IT IS SO ORDERED.

Dated: Nov. 23, 2016

/s/ BARRY TED MOSKOWITZ, Chief Judge
BARRY TED MOSKOWITZ
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-50151
D.C. No. 3:16-cr-01770-BTM-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MIGUEL ANGEL CANO, DEFENDANT-APPELLANT

Filed: Sept. 2, 2020

ORDER

Before: SUSAN P. GRABER and JAY S. BYBEE, Circuit Judges, and M. DOUGLAS HARPOOL,* District Judge.

Order; Dissent by Judge BENNETT

The panel judges have voted to deny Plaintiff-Appellee's petition for rehearing. Judge Graber voted to deny the petition for rehearing en banc, and Judges Bybee and Harpool recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote

* The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

Plaintiff-Appellee's petition for rehearing and petition for rehearing en banc, filed January 2, 2020, are **DENIED**.

BENNETT, Circuit Judge, with whom CALLAHAN, M. SMITH, R. NELSON, BADE and VANDYKE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

In 2016, Defendant Miguel Cano entered the United States from Mexico, and a routine search of his truck turned up 31 pounds of cocaine hidden in his spare tire. As the panel correctly noted, border officials "had reason to suspect that Cano's [cell] phone would contain evidence leading to additional drugs." *United States v. Cano*, 934 F.3d 1002, 1021 (9th Cir. 2019).[1] And so, those border officials—objectively relying on decisions from the Supreme Court and a recent en banc decision from our court—searched the phone. Unsurprisingly they found more evidence of Cano's guilt. Despite an unbroken line of cases authorizing the border search here, the panel reversed Cano's convictions because in their view, reasonable suspicion of criminal activity cannot justify a forensic search of Cano's phone. Instead,

[1] The district court had found that "[t]his not only amounts to reasonable suspicion, but gives rise to probable cause." *United States v. Cano*, 222 F. Supp. 3d 876, 882 (S.D. Cal. 2016) *rev'd,* 934 F.3d 1002 (9th Cir. 2019).

the panel held that absent a warrant, border officials, with reasonable suspicion or probable cause of other criminal activity, could only forensically search a cell phone to see if it contained contraband. And since effectively the only contraband a cell phone can contain is child pornography,[2] the only permissible forensic search at the border is one *for* child pornography. Even then, only if agents have reasonable suspicion the phone contains child pornography. The government has referred to the panel's decision as an "outlier."[3] It is that, but far more. The Supreme Court has told us that a border search is reasonable simply because it takes place at the border. The Court has also instructed that the sovereign's power at the border is at its "zenith." The limits the panel placed on border searches ignores the Court's teachings and, as a result, makes our borders far more porous and far less safe.

Border officials in our circuit are now *constitutionally barred* from forensically searching a traveler's cell phone at the border, even if armed with reasonable suspicion the phone contains evidence of terrorist acts the traveler is about to commit in the United States; evidence the traveler is entering the United States under a false name; evidence of contemporaneous smuggling activity by the traveler; evidence of other border related

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[2] *Cano*, 934 F.3d at 1021.

[3] Brief for the United States in Opposition at 27, *Williams v. United States*, No. 19-1221 (U.S. June 19, 2020).

crimes; or evidence of non-child pornography contraband.[4] This is the sovereign power at its nadir, not its zenith.

We should have taken this case en banc to correct the panel's errors, and I respectfully dissent from our failure to do so.

I.

On July 25, 2016, Miguel Cano entered the United States from Tijuana for the seventh time that summer.[5]

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[4] The opinion quotes language from *Carroll v. United States*, 267 U.S. 132 (1925) describing the government's interest in controlling who may enter the country. *See United States v. Cano*, 934 F.3d 1002, 1013 (9th Cir. 2019). But the *holding* of *Cano* leaves no room for this interest—"the border search exception authorizes warrantless searches of a cell phone *only* to determine whether the phone contains contraband." 934 F.3d at 1018 (emphasis added). Nor does the opinion mention the government's national security interest at the border. *See, e.g.*, *United States v. Kolsuz*, 890 F.3d 133, 143 (4th Cir. 2018) (concluding that some transnational offenses implicating national security interests "go[] to the heart of the border search exception"); *United States v. Boumelhem*, 339 F.3d 414, 423 (6th Cir. 2003) (noting that the sovereign interest to protect itself includes "significant government interests in the realms of national security and relations with other nations"); *see also Tabbaa v. Chertoff*, 509 F.3d 89, 97 (2d Cir. 2007) (recognizing that a "crucial" aspect of Customs and Border Protection's authority "is to 'prevent terrorist attacks within the United States' and 'reduce the vulnerability of the United States to terrorism.'" (quoting 6 U.S.C. § 111(b)(1)).

[5] He had crossed the border six times that summer, sometimes staying less than thirty minutes in the United States. *Cano*, 934 F.3d at 1008. He was twice referred to secondary inspection, but no contraband was found. *Id.*

Cano, 934 F.3d at 1008. During a secondary inspection, a narcotics dog alerted near the spare tire of Cano's truck. *Id.* A Customs and Border Protection (CBP) officer discovered about 31 pounds of cocaine in 14 vacuum-sealed packages inside the spare tire. *Id.*

CBP officers arrested Cano and seized his cell phone. *Id.* They then called Homeland Security Investigations, which dispatched two agents to investigate. *Id.* The agents manually searched Cano's phone and questioned Cano after he waived his *Miranda* rights. *Id.* Cano told them that he moved to Tijuana to look for work in San Diego because work was slow in Los Angeles, and he was going to a carpet store in Chula Vista to seek work. *Id.* He also explained that he deleted his text messages before crossing the border on his cousin's advice "just in case" he was pulled over by Mexican police. *Id.* One of the agents conducted a second manual search of the phone during the interview, wrote down some of the phone numbers in the phone's call log, noted that two new text messages had arrived after Cano crossed the border, and took a picture of those messages. *Id.* The agent then used Cellebrite software to download data from the phone.[6] Agents reviewed the download after the interview and saw a list of Cano's calls. *Id.* at 1009. None of the numbers Cano called "corresponded to carpeting stores in San Diego." *Id.*

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[6] A Cellebrite "logical download" allows the government "access [to] text messages, contacts, call logs, media, and application data on a cell phone and to select which types of data to download." *Id.* at 1008-09. But the software does not allow access to data stored within third-party applications. *Id.* at 1009.

Cano was indicted for importing cocaine and moved to suppress the evidence obtained from the warrantless searches of his phone at the border. *Id.* The district court denied the motion, finding the manual search was "clearly permissible" and "the agents had reasonable suspicion and even probable cause" to perform the "logical download." *Cano*, 222 F. Supp. 3d at 882. The government introduced, and relied on, evidence obtained from the phone at trial. Cano in turn presented a third-party culpability defense, claiming that his cousin placed the drugs in Cano's spare tire without Cano's knowledge. *Cano*, 934 F.3d at 1009. The jury was hung after the first trial and convicted Cano at the second. *Id.* at 1010.

A panel of this court reversed because "the district court erred in denying Cano's motion to suppress." *Id.* at 1010. The panel agreed with Cano that the warrantless searches of his phone at the border violated the Fourth Amendment because "border searches are limited in both purpose and scope to searches for contraband." *Id.* at 1016-17. The panel drew a "distinction between seizing goods at the border because their importation is prohibited and seizing goods at the border because they may be useful in prosecuting crimes." *Id.* at 1018. From this, the panel imposed "two practical limitations on warrantless border searches." *Id.* at 1019. First, border officials can search for only contraband (rather than evidence of contraband-related crimes) because otherwise the search is "untethered" from the exception. *Id.* Second, border officials need reasonable suspicion of digital contraband (like child pornography) concealed within a cell phone to forensically search a cell phone. *Id.* at 1020. Otherwise, the panel

opined, the government could forensically search "every electronic device of anyone arrested at the border" and this would go against "the protections laid out in *Riley*"[7] simply because the search occurred at the border. *Id.*

Applying this new view of the border search exception to the facts of the case, the panel found that the second manual search of the phone was outside the scope of the border search exception irrespective of the reasonable suspicion of border-related crimes. *Id.* at 1019. The agent could not record the phone numbers or photograph the two messages received because "[t]hose actions have no connection whatsoever to digital contraband." *Id.* Thus, the second manual search was unreasonable. And the panel held if the use of the Cellebrite software to download some of the phone's contents was a forensic search, it was unreasonable because agents had no reasonable suspicion that there was contraband on the phone. *Id.* at 1020. The panel also concluded that once a person has been arrested "there is no reason why border officials cannot obtain a warrant before conducting their forensic search" because new technology allows for faster processing of warrant applications. *Id.*

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[7] In *Riley v. California*, 573 U.S. 373 (2014), the Court held "a warrant is generally required before . . . a search [for information on a cell phone], even when a cell phone is seized incident to arrest." *Id.* at 401. The Court limited this holding only to the search incident to arrest exception. *Id.* at 385 ("These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones. . . . "); *id.* at 401-02 ("[E]ven though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone.").

Finally, the panel found the good faith exception did not apply because under the panel's new interpretation of *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc)—that *Cotterman* authorized only a search for contraband, not evidence—the CBP agents could not have relied in good faith on *Cotterman* to search for evidence of border-related crimes. *Id.* at 1021-22.

II.

The panel decision runs headlong into decades of Supreme Court precedent and deviates from the historical understanding of the purpose of the border search exception. The panel's framework also goes against the clear statement of the law in *Cotterman* and has been soundly rejected by at least two other circuits.

A.

The border search exception is "as old as the Fourth Amendment itself" and "is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country." *United States v. Ramsey*, 431 U.S. 606, 619, 620 (1977). In *Ramsey*, the Court emphasized that a border search is reasonable by one "single fact": did the "person or item in question . . . enter[] into our country from outside[?]" *Id.* at 619. Nothing in the opinion purported to limit the power of the sovereign at the border to search only for contraband, and the Court expressly reserved the question of whether the search was authorized under the statute at issue or whether that statute imposed a limit "on otherwise existing authority of the Executive." *Id.* at 615. Put differently, *Ramsey* did not decide whether border

searches need to be authorized by statute or are per se valid exercises of Executive power. The Court in *Ramsey* chided the D.C. Circuit for characterizing the Court's prior decisions as a refusal "to take an expansive view of the border search exception or the authority of the Border Patrol." *Id.* at 622. The Court instead noted that the border search authority is "plenary." *Id.*

The Court revisited the border search exception in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), reversing a decision of our court. The case focused on an alimentary canal search of a cocaine "balloon-smuggler," and once again emphasized the government's "plenary authority to conduct routine searches and seizures at the border" because searches "at the national border rest on different considerations and different rules of constitutional law from domestic regulations." *Id.* at 537 (citation omitted). The Court again was clear:

> Here the seizure of respondent took place at the international border. Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.

Id. Balancing the "sovereign's interests at the border [against] the Fourth Amendment rights of [the] respondent" the Court held that reasonable suspicion is necessary for searches "beyond the scope of a routine customs

search and inspection."[8] *Id.* at 539-41. The Court also cautioned judges to "not indulge in unrealistic-second guessing" or engage in *post hoc* evaluation of agents' behavior when discussing whether a particular detention was reasonably related in scope to the circumstances. *Id.* at 542. The Court lastly took us to task for establishing an intermediate standard between "reasonable suspicion" and "probable cause"—that of a "clear indication." *Id.* at 540-41.

The final time the Court addressed the border search exception was in *United States v. Flores-Montano*, 541 U.S. 149 (2004), after our court held that agents needed reasonable suspicion to remove a gas tank at the border. *Id.* at 151. The Court once again emphasized that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border" because "[i]t is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *Id.* at 152-53. The Court also noted that "the expectation of privacy is less at the border than it is in the interior." *Id.* at 154. Applying these principles, the Court reversed our decision. *Id.* at 156.

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[8] The Court did not define what types of searches were beyond the scope of a *routine* customs search other than "strip, body cavity, or involuntary x-ray searches." *Montoya de Hernandez*, 473 U.S. at 541 n.4.

Thus, the Court has never questioned the scope of the border search exception and "[t]ime and again," confirmed the broad authority of the sovereign at the border.[9] *Id.* at 152.

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[9] This also tracks the English common law understanding of the traditional search powers of the sovereign. During the 1600s, for example, "[m]ost Englishmen . . . understood their houses to be castles only against their fellow subjects and conceded almost absolute powers of search, arrest, and confiscation to the government." William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 1602-1791, Ixiii (2009). Similarly, the sovereign search power at common law extended beyond enforcement of excise taxes and contraband. *Id.* at 89 (noting that the Privy Council directed customs personnel and other officials to search for "military deserters returning from France" in 1592). It was not until the mid-1700s that the view that a "man's home is his castle" expanded to bar certain searches by the Crown. *Id.* at Ixiv. But while this change was occurring and the sovereign's powers to search the *home* became restricted by law, there was no accompanying shift in the view of the power at the border in England, *id.* at 325 ("[F]or affairs on which the perceived survival of the realm hinged . . . only the general warrant existed, and the specific warrant was not even a candidate."), or in the Colonies, *id.* (noting that the primary focus was on searches of the home and "ship searches" for example were not discussed or debated "even during the decade in which the Fourth Amendment was framed, debated, and ratified"); *see also id.* at 745 (noting the requirement for a warrant "stopped at the waterline" in the Colonies). There is no historical precedent that the sovereign's power at the border was in any way limited at the founding. *Cf. Riley*, 573 U.S. at 403 ("Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through *homes* in an unrestrained search for evidence of criminal activity." (emphasis added)).

B.

Our circuit has imposed another limitation on the sovereign at the border. In *Cotterman*, we held that border officials needed reasonable suspicion to forensically search electronic devices at the border. *See United States v. Cotterman*, 709 F.3d at 970. While in tension with the Court's admonition that a border search is "reasonable" by virtue of being at the border, *see Ramsey*, 431 U.S. at 619, our court imposed this "modest, workable standard" because it analogized intrusive forensic searches to "computer strip search[es]" given "the uniquely sensitive nature of data on electronic devices." *Cotterman*, 709 F.3d at 966. But we plainly stated that officials must "possess a particularized and objective basis for suspecting the person stopped of *criminal activity*" to forensically search a laptop at the border. *Id.* at 967 (quotation marks omitted and emphasis added). In fact, we could not have been clearer in explaining the reasonable suspicion standard as we used "criminal activity" thirteen times when discussing the appropriate focus of the standard. Not once did we say reasonable suspicion of *contraband*.

In articulating why reasonable suspicion is a workable standard at the border, we explained that border officials would conduct forensic searches when "their suspicions are aroused by what they find or by other factors" and the reasonable suspicion standard "leaves ample room for agents to draw on their expertise and experience to pick up on subtle cues that *criminal activity* may be afoot." *Id.* (emphasis added). This statement is unambiguous. Then, when discussing the relevant

factors agents must consider in the totality of the circumstances analysis, we explained that encryption or password protection of data on a device does not alone create reasonable suspicion. *Id.* at 969. Rather, the encryption or password protection must relate "to the suspected criminal activity." *Id.* We also differentiated between the different types of criminal activity agents could reasonably suspect to justify a forensic search. *Id.* at 970 ("Nor did the agents' discovery of vacation photos eliminate the suspicion that Cotterman had engaged in criminal activity while abroad *or* might be importing child pornography into the country." (emphasis added)). Before this decision, courts across the country uniformly applied *Cotterman* to determine whether border officials had reasonable suspicion of criminal activity, not just contraband, to justify forensic searches of electronic devices at the border.[10] The

[10] No other court has interpreted *Cotterman*'s reasonable suspicion test to apply only to contraband. *See, e.g.*, *United States v. Hassanshahi*, 75 F. Supp. 3d 101 (D.D.C. 2014) (forensic laptop search was supported by reasonable suspicion that defendant was violating the Iran trade embargo); *United States v. Saboonchi*, 990 F. Supp. 2d 536 (D. Md. 2014) (forensic search of electronic devices including a cell phone was supported by reasonable suspicion defendant was engaged in export control violations); *United States v. Kim*, 103 F. Supp. 3d 32 (D.D.C. 2015). In *Kim* in particular, the court found that the *Cotterman* standard would have been satisfied if the officer "would have been justified in his belief that [defendant] was engaged in ongoing *criminal activity* at the time he was stopped." 103 F. Supp. 3d at 44.

panel's "clarification" goes against the text and analysis in *Cotterman*.[11]

C.

The panel's view has also already been rejected by the Fourth and Tenth Circuits, with others likely to follow. The panel acknowledged that its "analysis is in tension with the Fourth Circuit[]." *Cano*, 934 F.3d at 1017 (citing *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018)). Just after *Cano* was decided, the Tenth Circuit deepened that split. *See United States v. Williams*, 942 F.3d 1191 (10th Cir. 2019) *petition for cert. filed*, (U.S. Apr. 13, 2020) (No. 19-1221).

In *Kolsuz*, the Fourth Circuit upheld the forensic search of a cell phone after the defendant was arrested for violating export laws. 890 F.3d at 136-37. The court reasoned "[t]he justification behind the border search exception is broad enough to accommodate not only the direct interception of contraband as it crosses the border, but also prevention and disruption of ongoing efforts to export contraband illegally, through searches initiated at the border."[12] *Id.* at 143-44.

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[11] This clarification also runs into another problem. We have already relied on *Cotterman*'s reasonable suspicion test in another decision unrelated to the border search exception. *See United States v. Valdes-Vega*, 738 F.3d 1074 (9th Cir. 2013) (en banc). The panel's narrow view of *Cotterman*'s legal test is difficult to square with our citing *Cotterman* for the broad rule that reasonable suspicion requires some suspicion of *criminal activity*. *Id.* at 1078.

[12] In *United States v. Aigbekaen*, 943 F.3d 713 (4th Cir. 2019), the Fourth Circuit clarified that the border search exception must have a "transnational" nexus under *Kolsuz*. The criminal activity must have a nexus "to the sovereign interests underlying the border search

Kolsuz had unsuccessfully argued that the scope of the border search exception was untethered from the search of his phone because "there was no contraband poised to exit the country" once he was arrested. *Id.* at 142-43.

Similarly, after *Cano* was decided, the Tenth Circuit found that reasonable suspicion of criminal activity justified a warrantless search of a laptop and cell phone. *See Williams*, 942 F.3d at 1190-91. A search of the laptop using a software program to bypass the passwords revealed child pornography after defendant's passport triggered a secondary inspection based on "lookout alerts." *Id.* at 1188-90. The Tenth Circuit found reasonable suspicion existed based on defendant's border-related criminal history, his untruthful answers about his travel history, and that he was returning on a one-way ticket from Paris, the site of a recent terrorist attack, after visiting the three countries linked to the attack. *Id.* at 1190-91. The court also rejected the defendant's argument that "border agents are tasked exclusively with upholding customs laws and rooting out the importation of contraband," and thus rejected the argument that because the agents did not suspect him of these crimes the agents could not search his electronic devices. *Id.* at 1191. The court explained that "the Fourth Amendment does not require law enforcement officers to close their eyes to suspicious circumstances." *Id.* (brackets and citation omitted).

The Eleventh Circuit is sure to follow. In *United States v. Touset*, 890 F.3d 1227, 1234 (11th Cir. 2018),

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exception." *Id.* at 724. That nexus, is, of course, present in our case, where Cano imported 31 pounds of cocaine.

the court already rejected *Cotterman* and found no reasonable suspicion is necessary for forensic searches of electronic devices at the border. The court also found that *Riley*, a case *Cano* relies on extensively to narrow the scope of the border search exception, 934 F.3d at 1011, 1020, has no application at the border. 890 F.3d at 1234; *see also United States v. Vergara*, 884 F.3d 1309, 1312-13 (11th Cir. 2018). In combination, these two cases firmly reject the panel's narrow view.

Nor will these be the last circuits to disagree with us. The Seventh and Fifth Circuits have already applied broader definitions of reasonable suspicion when considering forensic warrantless cell phone searches at the border under the good faith exception. *See United States v. Wanjiku*, 919 F.3d 472, 485-88 (7th Cir. 2019) (finding agents had the good faith belief that searches of defendant's electronic devices only required reasonable suspicion and agents did have reasonable suspicion that the devices would "reveal *evidence* of criminal activity involving minors" (emphasis added)); *United States v. Molina-Isidoro*, 884 F.3d 287, 291-92 (5th Cir. 2018) (finding agents had probable cause to search defendant's phone at the border because there was a high probability she "was engaged in drug trafficking" and thus had a good faith belief that their search was lawful).

III.

This should have been a simple case. As the district court recognized, under *Cotterman* the government agents had more than reasonable suspicion of criminal activity to search Cano's phone. *Cano*, 222 F. Supp. 3d at 882. Cano was found with 31 pounds of cocaine in his truck's spare tire. *Cano*, 934 F.3d at 1008. The agents had,

at minimum, reasonable suspicion more drugs might be coming across the border, which the Court has specifically recognized heightens the sovereign's concern "for the protection of the integrity of the border." *Montoya de Hernandez*, 473 U.S. at 538. These are not the facts on which to effectively eliminate an exception "as old as the Fourth Amendment itself." *Ramsey*, 431 U.S. at 619.

First, the sweeping language used by the Court in each of its border search decisions cuts against narrowing the scope or purpose of the border search exception. In only one instance has the Court limited the border search doctrine, and it did not narrow the scope but only increased the level of suspicion necessary for a particularly intrusive type of search of the person. *See Flores-Montano*, 541 U.S. at 152-53. The Court has already twice reversed us for trying to impose greater limits on the border search exception, *see id.*; *Montoya de Hernandez*, 473 U.S. at 540-41, and has cautioned us against creating new exceptions, *Flores-Montano*, 541 U.S. at 152 ("Complex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no place in the border searches of vehicles.").

Second, the panel inexplicably limits the government's interest at the border to only stopping contraband.[13] The panel contends that "'every border-search

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[13] And even under the panel's cramped view of the border search exception, it is hard to see how the *plenary* authority "to prevent the introduction of contraband into this country," *Montoya de Hernandez*, 473 U.S. at 537, does not include within it the ability to prevent the *future* introduction of contraband. The expansive view

case the Supreme Court has decided involved searches to locate *items being smuggled*' rather than evidence." *Cano*, 934 F.3d at 1018 (quoting *Molina-Isidoro*, 884 F.3d at 295 (Costa, J., specially concurring)).[14] True, but this limited view reads the sovereign's interest far too narrowly. *See United States v. Oriakhi*¸ 57 F.3d 1290, 1297 (4th Cir. 1995) ("While it is undoubtedly true that border searches are more often conducted in furtherance of the sovereign's interest in excluding" people and goods at the border, "that interest in *exclusion* is not the only function of the border search.").

The Court has explicitly stated that the exception is rooted in "the long-standing right of the sovereign to protect itself," *Ramsey*, 431 U.S. at 616, and "the Government's paramount interest in protecting the border," *Flores-Montano*, 541 U.S. at 155. Statutory language and other circuit decisions reaffirm the expansive reading that the inherent power of the sovereign to protect itself, or the border, is not limited to searching for contraband like child pornography. *See, e.g.*, 6 U.S.C. § 211(e)(3) (the duties of the border patrol agents includes duty to prevent not only contraband but also entry of terrorists and terrorist weapons); 8 U.S.C. § 1357(c) (immigration officials can "without warrant . . . [search] the personal effects . . . of any person seeking admission to the United States" based on

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the Court has accorded the Congress and the Executive in this realm should guide our analysis.

[14] The panel's view reads a lot like the dissent in *Montoya de Hernandez*. *See* 473 U.S. at 554 (Brennan, J., dissenting) (arguing that there is a difference at the border between Congress's immigration and customs authority and "searches [that] are carried out *for purposes of investigating suspected criminal activity*").

"reasonable cause to suspect that grounds exist for denial of admission to the United States . . . which would be disclosed by such search"); 31 U.S.C. § 5317(b) (power to seize undeclared currency flowing through the border); *Kolsuz*, 890 F.3d at 143 (transnational offenses involving export controls and national security interests "go[] to the heart of the border search exception"); *Molina-Isidoro*, 884 F.3d at 297 (Costa, J., specially concurring) (acknowledging contours of border-search doctrine for phone searches should include government interests in national security); *see also United States v. Boumelhem*, 339 F.3d 414, 423 (6th Cir. 2003) (sovereign interest to protect itself includes "significant government interests in the realms of national security and relations with other nations").

Third, "[t]he distinction that [the panel] would draw between contraband and documentary evidence of a crime is without legal basis." *United States v. Gurr*, 471 F.3d 144, 149 (D.C. Cir. 2006) (citing *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967)) (rejecting this specific distinction in the context of a border search). In *Hayden*, the Supreme Court rejected the distinction between evidence and contraband created by *Boyd v. United States*, 116 U.S. 616 (1886). 397 U.S. at 300-02. The Court explained that it has "examined on many occasions the history and purposes of the [Fourth] Amendment" and explained that "[n]othing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband." *Hayden*, 387 U.S. at 301-02. This broad pronouncement leaves little room for the panel's position that *Boyd* militates a distinction

between a search for evidence and a search for contraband. *See Cano*, 934 F.3d at 1018.

The panel's decision also makes little constitutional sense when filtered through the Fourth Amendment lens of reasonableness.[15] *See Riley*, 573 U.S. at 381-82 ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006))). Why should border agents, with no reasonable suspicion of anything, be able to manually look for child pornography on a phone, but not evidence of: (1) intent to commit terrorist acts, (2) inadmissibility of the traveler to the United States, (3) other crimes, or even (4) evidence of other contraband? And why should border agents with reasonable suspicion that child pornography is on a phone be able to forensically examine the phone, but be constitutionally barred from forensically examining a phone when they have reasonable suspicion that evidence of serious border crimes—including those involving terrorism or false identity documents—is on the phone? If such distinctions make no sense, then they cannot possibly be reasonable.

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[15] The panel also engaged the type of "unrealistic second-guessing" the Court prohibited in *Montoya de Hernandez*, 473 U.S. at 542, when it concluded "there is no reason why border officials cannot obtain a warrant before conducting their forensic search" because the time to get a warrant is "trivial" when compared to the time necessary for a forensic search. *Cano*, 934 F.3d at 1020. "[T]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable." *Montoya de Hernandez*, 473 U.S. at 542 (citation omitted).

And finally, judicial restraint is especially important here, "where there is a longstanding historical practice . . . of deferring to the legislative and executive branches." *Kolsuz*, 890 F.3d at 153 (Wilkinson, J., concurring). One difficulty with judicial decisions like the panel's is they provide no flexibility. Given the origin of the exception, surely the current Congress should have some say in the current officials' ability to prevent future attempts to weaken the border, "the point most freighted with security threats and the point at which a nation asserts and affirms its very right to nationhood." *Id.* at 152. Instead, we rule in a vacuum in an area where technological advances rapidly outpace our best guesses and intuitions and "[w]e have no idea of the dangers we are courting." *Id.* at 150.

Ultimately, the panel's decision to limit the border search exception to searches for contraband finds "no support . . . in the Supreme Court's border-search cases . . . [and] ignores the Court's admonitions to interpret the doctrine broadly and avoid creating new limitations." *United States v. Aigbekaen*, 943 F.3d 713, 730 (4th Cir. 2019) (Richardson, J., concurring in judgment) (challenging the majority for imposing even a transnational nexus requirement on criminal activity for border searches). It is the decision—and not the search of Cano's phone—that is unreasonable.

IV.

The panel made a final error by finding the cell phone evidence obtained by the agents was not covered by the good faith exception. The panel rejected the government's reliance on *Cotterman* because the panel reinterpreted *Cotterman* as a "search for *contraband* that

the government has a right to seize at the border." *Cano*, 934 F.3d at 1021-22. The panel applied its view of the case *retroactively*. That is not how the good faith exception works.

The exclusionary rule does not apply to "[e]vidence obtained during a search conducted in reasonable reliance on binding [appellate] precedent." *United States v. Davis*, 564 U.S. 229, 241 (2011). The inquiry in *Davis* "is not answered simply by mechanically comparing the facts of cases and tallying their similarities and differences." *United States v. Lustig*, 830 F.3d 1075, 1081 (9th Cir. 2016) (quoting *United States v. Katzin*, 769 F.3d 163, 176 (3d Cir. 2014) (en banc)). Thus, in *Lustig*, we held that "it was objectively reasonable" for the government to rely on *United States v. Robinson*, 414 U.S. 218 (1973), as binding precedent authorizing the warrantless search of a cell phone incident to arrest prior to *Riley*. 830 F.3d at 1080. *Robinson* announced a categorial rule, based on a search of a cigarette package, decades before the invention of the modern cell phone. 414 U.S. at 223. More importantly, we "reject[ed] Lustig's contention that the good-faith exception cannot apply here because, at the time of his arrest, there had not been any decision by this Circuit or the Supreme Court directly authorizing warrantless cell phone searches incident to arrest." *Lustig*, 830 F.3d at 1082. Holding otherwise, "would make the good-faith exception a nullity because the exception would only apply when the search was necessarily constitutional under existing precedent." *Id.*

Similarly, the panel erred by applying its own view of *Cotterman* as the appropriate comparison when no court

had ever so held, and the agents' (and the district court's) view was, at the very least, reasonable. I fail to see how CBP agents cannot rely on the "longstanding and expansive authority of the government to search persons and their effects at the border," *Molina-Isidoro*, 884 F.3d at 290, on top of our decision in *Cotterman*, which announced a categorical rule that forensic examinations of computers "required a showing of reasonable suspicion," 709 F.3d at 968. At the time of the search, no court, much less the Supreme Court or other appellate court, had held that a search of a cell phone with reasonable suspicion of criminal activity was outside the scope of the border search exception. As Judge Costa concluded *on nearly identical facts* (as to the evidence obtained through the manual search), "the existence of good faith [here] is not a close call." *Molina-Isidoro*, 884 F.3d at 293 (Costa, J., specially concurring).

The exclusionary rule "exacts a heavy toll on both the judicial system and society at large" because "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Davis*, 564 U.S. at 237. For the cost to be acceptable, "the deterrence benefits of suppression must outweigh its heavy costs." *Id.* When law enforcement officers "act with an objectively reasonable good-faith belief that their conduct is lawful . . . the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* (quotation marks and citations omitted). Requiring law enforcement officers to be Nostradamus, as the panel did here, improperly turns the good faith exception on its head, and requires the "court[] to ignore reliable, trustworthy

evidence"—a "bitter pill" to swallow with no deterrence benefit. *Id.* at 237.

V.

The panel's decision contradicts the history of the border search exception and the Supreme Court's teachings as to the almost plenary nature of the sovereign's authority at the border. The decision also makes a judgment untethered from any Fourth Amendment reasonableness calculus—drawing an unprecedented at-the-border distinction between reasonable suspicion of border-related crimes in general (not enough) and reasonable suspicion of the presence of contraband (enough). This is the exact type of distinction (if it is to be drawn) that must be left to the political branches. And finally, the decision rewrites the good faith exception, penalizing border officers for incorrectly divining future courts' views on presently clear binding appellate precedent. For these reasons, I respectfully dissent from the denial of rehearing en banc.