APPENDIX

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NOT FOR PUBLICATION

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JEFFREY LANGFORD, Defendant - Appellant.	No. 23-3681 D.C. No. 2:18-cr-00195-GW-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted February 4, 2026
Pasadena, California

Before: GRABER, BRESS, and JOHNSTONE, Circuit Judges.

Jeffrey Langford appeals the denial of his motion to suppress evidence seized from a warranted search of his apartment ("March 12 warrant") and from a warranted search of his cellphones ("March 19 warrant"). We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's denial of a suppression motion and its application of the good-faith exception to the

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

exclusionary rule, and we review for clear error the district court's factual findings. *United States v. Underwood*, 725 F.3d 1076, 1081 (9th Cir. 2013). We affirm.

1. For the March 12 warrant, the district court did not err in denying Langford's motion to suppress because that warrant was supported by probable cause. In his affidavit, Agent Wong attested that: Langford paid for the apartment's application fee with his credit card, but the rental application used C.W.'s social security number, birth date, address, and tax return; the apartment's property manager identified a photograph of Langford as the resident of the apartment but named that person as C.W.; C.W.'s information on the rental application matched C.W.'s driver's license; on March 1, the property manager confirmed that Langford still resided in the apartment; and in Agent Wong's training and experience, identity thieves keep evidence of their crimes, including records of transactions linked to stolen identities, in their residences. Taken together, that information established "a fair probability" that Langford committed identity theft in violation of 18 U.S.C. § 1028 by using C.W.'s identification, without lawful authority, to rent the apartment and that evidence of that crime would be found in the apartment. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983) (noting that probable cause exists to issue a search warrant if, considering the totality of the circumstances, the affidavit supporting the warrant request establishes "a fair probability that contraband or evidence of a crime will be found in a particular place").

2. For the March 19 warrant, the district court did not err in denying Langford's motion to suppress evidence obtained from his cellphones after that warrant's original 120-day term expired and after a magistrate judge issued an order granting the government's application for an extension of time to search the devices. The seven-month delay between the seizure of Langford's cellphones pursuant to the warrant and the subsequent search did not violate the Fourth Amendment. *See United States v. Johnson*, 875 F.3d 1265, 1276 (9th Cir. 2017) (determining that a one-year delay was not unreasonable under the Fourth Amendment). The original warrant expressly contemplated the government's extension request. That request provided sufficient reasons explaining the need for additional time, including an evidence backlog, one phone's sophisticated encryption software, and the diversion of resources to investigate a related case. Moreover, the original warrant never required the government to request an extension within the allotted time—rather, it only stated that the government "shall complete the search" within the initial 120-day period. And the government did not search the phones until it received the extension. Under the totality of the circumstances, the delay was reasonable. *See id.*

Even if the extension presented a potential Fourth Amendment problem, the good-faith exception to the exclusionary rule applies because the agents reasonably relied on the magistrate judge's order extending the March 19 warrant for an

additional 120 days. *See United States v. Leon*, 468 U.S. 897, 918 (1984). Where there is a delay between a warranted seizure and subsequent search of the seized property, suppression is justified only "to deter deliberate, reckless, or grossly negligent [police] conduct." *United States v. Jobe*, 933 F.3d 1074, 1079 (9th Cir. 2019) (citation omitted). Langford offers no evidence that the government deliberately tarried or misled the court when it requested the extension, and a reasonably well-trained officer would not have known that the extension order resulted from an allegedly unlawful delay. *See id.* It was reasonable for the agents to rely on the judgment of the government's attorneys and the magistrate judge in concluding that the order properly extended the March 19 warrant's search timeframe. *See id.* (explaining that law enforcement reasonably relied on government attorney's policy in waiting to apply for a second search warrant).

AFFIRMED.

United States District Court
Central District of California

UNITED STATES OF AMERICA vs. **Docket No.** CR 18-195-GW JS 3

Defendant JEFFREY LANGFORD **Social Security No.** 4 4 1 8

akas: (Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
11	09	2023

COUNSEL **Michael D. Driscoll, Jr.**
(Name of Counsel)

PLEA ☑ **GUILTY,** and the court being satisfied that there is a factual basis for the plea. ☐ **NOLO CONTENDERE** ☐ **NOT GUILTY**

FINDING There being a finding/verdict of **GUILTY,** defendant has been convicted as charged of the offense(s) of:
21 U.S.C. § 21:841(a)(1),(b)(1)(A)(viii): POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE; 18 U.S.C. § 1028A(a)(1): AGGRAVATED IDENTITY THEFT as charged in Counts 2 and 4 of the First Superseding Indictment.

JUDGMENT AND PROB/ COMM ORDER The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of: **ONE HUNDRED SIXTY-TWO (162) MONTHS.**

It is ordered that the defendant shall pay to the United States a special assessment of $ 200, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Jeffrey Langford, is hereby committed on Counts 2 and 4 of the First Superseding Indictment to the custody of the Bureau of Prisons for a term of 162 months. This term consists of 138 months on Count 2, and 24 months on Count 4, to be served consecutively to Count 2 of the First Superseding Indictment.

It is recommended that the defendant be allowed to participate in the Bureau of Prison's Residential Drug Abuse Program (RDAP).

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of five years on Count 2 of the First Superseding Indictment and one year on Count 4 of the Indictment, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Second Amended General Order 20-04.

2. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.

3. The defendant shall cooperate in the collection of a DNA sample from the defendant.

4. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.

5. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.

6. The defendant shall not obtain or possess any driver's license, Social Security number, birth certificate, passport or any other form of identification in any name, other than the defendant's true legal name, nor shall the defendant use, any name other than the defendant's true legal name without the prior written approval of the Probation Officer.

7. The defendant shall submit the defendant's person, property, house, residence, vehicle, papers, computers, cell phones, other electronic communications or data storage devices or media, email accounts, social media accounts, cloud storage accounts, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

It is further ordered that the defendant surrender himself to the institution designated by the Bureau of Prisons on or before 12 noon, on November 29, 2023. In the absence of such designation, the defendant shall report on or before the same date and time, to the United States Marshal located at: United States Courthouse, 350 West First Street, Los Angeles, California 90012. Bond is exonerated upon surrender.

The Government's request to dismiss the remaining counts of the First Superseding Indictment and the underlying Indictment is granted.

The Court advises defendant of his rights to an appeal. The Court recommends, but does not order, that defendant serve his term at a federal facility in Southern California.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

USA vs. **JEFFREY LANGFORD** Docket No.: **CR 18-195-GW**

November 9, 2023
Date

HON. GEORGE H. WU, U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

November 9, 2023
Filed Date

By /s/ Javier Gonzalez
Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

USA vs. **JEFFREY LANGFORD** Docket No.: **CR 18-195-GW**

☐ The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
   Non-federal victims (individual and corporate),
   Providers of compensation to non-federal victims,
   The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant must maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds must be deposited into this account, which must be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, must be disclosed to the Probation Officer upon request.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

_____ By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

_____ By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____

Defendant Date

_____ _____

U. S. Probation Officer/Designated Witness Date

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
****UNDER SEAL****
CRIMINAL MINUTES - GENERAL

Case No.	CR 18-195-GW	Date	September 20, 2021

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Interpreter NONE

Javier Gonzalez	Terri A. Hourigan	Varun Behl; Samuel J. Diaz
Deputy Clerk	*Court Reporter/Recorder, Tape No.*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
Jeffrey Langford	✔	✔		Craig A. Harbaugh, DFPD Michael J. Driscoll, DFPD	✔	✔	

PROCEEDINGS:

DEFENDANT'S MOTION TO DISMISS COUNT ONE AS DUPLICITOUS [117]

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM THE ILLEGAL SEARCH OF THE SANTEE APARTMENT [120]

Hearing is held by video teleconference. Defendant's CARES Act waiver is placed on the record.

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. Defendant's Motions are DENIED.

1 : 00

Initials of Deputy Clerk JG

U.S.A. v. Jeffrey Langford; Case No. 2:18-cr-00195-GW-1
Tentative Rulings on: (1) Motion to Dismiss Count One as Duplicitous, and (2) Motion to Suppress Evidence

**** Defendant's Motion to Suppress was filed under seal. Should either party wish this tentative ruling redacted so as to maintain the confidentiality of sealed material, such request should be made to the Court at the hearing. Otherwise this Order may be publicly docketed. ****

I. Background

Defendant Jeffrey Langford is charged with: (1) conspiracy to distribute and possess with intent to distribute cocaine and methamphetamine, in violation of 21 U.S.C. § 846; (2) possession with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii), on March 19, 2018; (3) use of an unauthorized access device, in violation of 18 U.S.C. § 1029(a)(2) on October 25, 2017; and (4) aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1). *See generally* First Superseding Indictment ("Indictment"), Docket 47.

Defendant brings two pretrial motions challenging this prosecution and the evidence used to support it. First, Defendant moves to dismiss Count One as duplicitous, in violation of Federal Rule of Criminal Procedure 8(a), because Count One essentially charges two crimes, occurring about a year-and-a-half apart: conspiracy to distribute cocaine and possession of methamphetamine. *See generally* Motion to Dismiss Count One as Duplicitous ("Motion to Dismiss"), Docket No. 117. But even if the Court does not find that the charges are duplicitous, Defendant argues, it should sever Count One from Counts Two through Four for a separate trial. *Id.* at 4-7. Second, Defendant also moves to suppress evidence derived from the search of an apartment, arguing that the warrant lacked probable cause and that the extension of that warrant was improper. *See* Motion to Suppress Evidence Derived from the Illegal Search of the Santee Apartment ("Motion to Suppress"), Docket No. 120 at 7.

A. Factual Background

1. March 12, 2018 Warrant

On March 12, 2018, Magistrate Judge Paul Abrams of the Central District of California was presented with an application for a search warrant authorizing a search of the "premises located at 819 Santee Street, Unit 601, Los Angeles, CA, 90014." Motion to Suppress, Docket No. 120-1, Ex. B at 2. Federal Bureau of Investigation (FBI) Agent Kamaeol Wong filed the application for a search warrant based on violations of 18 U.S.C. §§ 1028, 1028A, and 1029 for

identity theft and access device fraud. In support of the application, Agent Wong attached his affidavit ("March 12 Affidavit"). *See* Motion to Suppress, Docket No. 120-1, Ex. B ("March 12 Affidavit") at 11. Agent Wong stated in his affidavit that he had been a Special Agent with the FBI since January 2001 and was currently assigned to investigate gangs, violent crime, and narcotics. *Id.* at 12. He stated that he had experience investigating narcotics, money laundering, and cases where the principal subjects had acquired false identities to avoid prosecution. *Id.*

Agent Wong stated that Defendant was a suspected drug dealer who was using another person's identity – his/her name, date of birth, home address, and tax return – to rent the Santee apartment. *Id.* Defendant came to the FBI's attention in the course of an investigation into the death of J.A.,[1] a 22-year-old who had died from a fentanyl overdose on August 22, 2016. *Id.* In October 2016, J.A.'s family member provided law enforcement "screenshots of J.A.'s text messages with the apparent supplier of the Fentanyl." *Id.* at 13. One of the text messages, for example, read "Call me in the morning. You gave me something by accident." *Id.* The number J.A. was texting was listed in J.A.'s phone as "Jeff Mitches friend," and was subscribed to the same address listed on Defendant's driver's license. *Id.*

At some point, a confidential source told investigators that s/he had purchased cocaine from Langford several times and that s/he had given Defendant's phone number to J.A. for the purchase of cocaine. *Id.* In November 2017, another confidential source[2] told investigators that J.A. was living at the Santee apartment. *Id.* Agents saw Defendant around the Santee apartment premises in November 2017 and in January 2018, and in January agent showed the Santee apartment general manager Defendant's driver license photograph. *Id.* at 14. The general manager told agents that the person in the photograph resided at the Santee apartment – but said that his name was C.W., not Langford. *Id.* The general manager then showed agents the rental application for the Santee apartment. *Id.* The fee had been paid with a credit card with Defendant as the cardholder, but the biographical information – including the date of birth, social security number, address, and criminal history – did not match Defendant's information. *Id.* A tax return provided with the application for proof of income belonged to C.W. *Id.* An agent

[1] Names have been changed to initials for privacy.

[2] The affidavit notes that this confidential source had, before the writing of the affidavit, been terminated as a DEA confidential source because s/he "had attempted to extort money from a DEA target and his family." March 12 Affidavit at 13. Nevertheless, that source provided information in multiple DEA cases, and Agent Wong's affidavit states that an agent independently verified this source's information on Defendant. *Id.*

retrieved a copy of the Massachusetts driver's license for C.W., which listed the date of birth and address that Defendant had listed on his rental application. *Id.* at 15. Two months later, in March 2018, the general manager told agents that Defendant still resided at the Santee apartment. *Id.* at 14.

Agent Wong stated in the affidavit that, based on his training and experience, "drug traffickers often use false identities to facilitate and conceal their crimes," including their own identity and the locations at which transactions take place. *Id.* at 15. That may include "vehicles, properties, telephones, utilities, and other items purchased in the names of others, and through the use of stolen identities" to conceal their crimes. *Id.* Often, Agent Wong continued, "[i]dentity thieves will . . . steal and maintain several identities at once to facilitate their crimes, and keep evidence of their crimes in their residences." *Id.* And these individuals "heavily utilize cellular telephones and other electronic devices to communicate with one another and to commit and conceal their crimes," and these devices often contain evidence of the crimes. *Id.*

Magistrate Judge Abrams issued the warrant ("March 12 Warrant"), authorizing the search of the Santee apartment and the seizure of the items listed in the application. Motion to Suppress, Docket No. 120-1, Ex. A at 1. These items were the "evidence, fruits, and instrumentalities of identity theft and access device fraud[,]" including records, documents, emails, text messages, digital devices, or any other materials concerning the Defendant's identity theft or his use of and association with the Santee apartment. *Id.* at 5–7. The warrant also referenced the "Search Procedure for Digital Devices," which was attached to the application and read in part as follows:

> In searching digital devices or forensic copies thereof, law enforcement personnel executing this search warrant will employ the following procedure: law enforcement personnel . . . will, in their discretion, either search the digital device(s) on-site or seize and transport the device(s) to an appropriate law enforcement laboratory or similar facility to be searched at that location. The search team shall complete the search as soon as is practicable but not to exceed 120 days from the date of execution of the warrant. The government will not search the digital service(s) beyond this 120-day period without obtaining an extension of time order from the Court.

Id. at 8. The search warrant also permitted agents to attempt to unlock any biometric sensor-enabled device within the scope of the warrant via fingerprint or facial recognition features. *Id.* at 11.

2. Execution of March 12 Warrant

On March 19, 2018, Drug Enforcement Administration (DEA), Los Angeles Field Division (LAFD), and FBI agents executed the March 12 Warrant on the Santee apartment. *See* Motion to Suppress, Docket No. 120-2 ("Investigation Report") at 2. Defendant and another man, D.F., were in the apartment, and Defendant was arrested there. *Id.* In the course of the search, agents found approximately 25 to 30 pounds of methamphetamine, a half ounce of cocaine, and a pound of marijuana. *See* Motion to Suppress, Docket No. 120-2, Ex. D at 15. The methamphetamine was inside of various types of packaging, including vacuum-sealed bags, duffle bags, antenna boxes, and headphone boxes, and it was in Defendant's bedroom and living room. *Id.* at 12. A utility bill in C.W.'s name was also seized. *Id.* at 14.

Agents also found and seized two cell phones belonging to Defendant, "iPhone 1" and "iPhone 2." *Id.* at 15. iPhone 1 was unlocked and did not need a passcode or biometric input to access the device. *See* Motion to Suppress, Docket No. 120-3, Ex. F at 5. Agents searched through iPhone 1 and found text messages between Defendant and a contact named "Brandon Thompson" that discussed drug sales. Motion to Suppress, Docket No. 120-2, Ex. D at 16. One text message from Defendant's phone stated "Wanna sell an oz out of this pound for 175? I got someone that want it." *Id.* Thompson responded with "Nah not yet Im waiting on my Lil brother to see if he wants it Ill know tomorrow when he sees the other units." *Id.* During the search, Thompson arrived and knocked at the front door, carrying packaging similar to what had been found inside the apartment. *Id.* at 15–16. He also had two cell phones in his possession, dubbed "iPhone 3" and "iPhone 4." *Id.* at 10. Agents detained Thompson and later arrested him.

3. March 19 Warrant and Extension

As they executed the March 12 Warrant, agents quickly realized the evidence indicated additional crimes to those listed in the warrant. Consequently, the agents sought to obtain rollback warrants on the same day the March 12 Warrant was executed. *See* Motion to Suppress, Docket No. 120-2, Ex. D ("March 19 Application") at 1–11. The application contained the same language the procedure for searching digital devices as the March 12 Warrant, included *supra*. Magistrate Judge Abrams issued the March 19 Warrant that evening, permitting the search of Defendant's home and digital devices, Thompson's cell phones, and Thompson's car. *See* Motion to Suppress, Docket No. 120-3, Ex. E ("March 19 Warrant") at 3. The search of the Santee apartment concluded that same evening. *See* Motion to Suppress, Docket No. 120-2, Ex.

C ("Investigation Report") at 3.

Just as the March 12 Warrant had, the March 19 Warrant gave the government 120 days from the execution of the warrant – until July 17, 2018 – to search Defendant's digital devices. *See* Motion to Suppress, Docket No. 120-3, Ex. E ("March 19 Warrant") at 10. But on September 28, 2018, a search of Defendant's digital devices had not yet been completed, and the government submitted an *ex parte* application for a 120-day extension to retain and complete a search of these digital devices. *See* Motion to Suppress, Docket No. 120-3, Ex. F. ("Extension Application") at 1. In an affidavit attached to the application, the Assistant U.S. Attorney stated that the government had not searched the devices after the 120-day period expired. *Id.* at 4. The affidavit also explained that iPhone 2 was encrypted and locked. *Id.* The government gave four reasons for requesting the 120-day extension: (a) forensic examination of digital devices is time-consuming and the agencies have a large backlog of devices to review; (b) Defendant's devices contain dozens of gigabytes of information; (c) iPhone 2, which was locked during the March 19 search, contained sophisticated encryption software that substantially slowed down the unlocking process but new methods for bypassing encryption have since been developed; and (d) the unexpected investigation of Thompson diverted investigative resources from Defendant. *Id.* at 5–6. Magistrate Judge John McDermott granted the extension request later that day, extending the time period to January 26, 2019. *See* Motion to Suppress, Docket No. 120-3, Ex. G ("Extension Order") at 1.

In October 2018, agents sent Defendant's cell phones to a computer forensic laboratory for passcode extraction and analysis. *See* Motion to Suppress, Docket No. 120-3, Ex. H & Ex. I. Agents completed a forensic search of iPhone 1 on October 5. *See* Motion to Suppress, Docket No. 120-3, Ex. H at 1. The computer forensic laboratory unlocked iPhone 2 on November 10, and the agents completed the search of iPhone 2 on November 28. *See* Motion to Suppress, Docket No. 120-3, Ex. I at 1.

II. Discussion

A. Motion to Dismiss Count 1 as Duplicitous

1. Duplicity

Duplicity is the joining of two or more distinct and separate offenses into a single count. *See United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). Duplicity is disfavored because "a jury may find a defendant guilty on a count without having reached a unanimous

verdict on the commission of a particular offense." *Id.*; *see also United States v. Renteria*, 557 F.3d 1003, 1008 (9th Cir. 2009). Such an outcome "may conflict with a defendant's Sixth Amendment rights and may also prejudice a subsequent double jeopardy defense." *UCO Oil Co.*, 546 F.2d at 835. These "considerations, which reflect fundamental due process rights of defendants, inhibit the otherwise broad . . . discretion" prosecutors have when drafting indictments. *Id.* When reviewing an indictment for duplicity, a court's "task is not to review the evidence presented at trial to determine whether it would support charging several crimes rather than one, but rather solely to assess whether the indictment itself can be read to charge only one violation in each count." *United States v. Mancuso*, 718 F.3d 780, 792 (9th Cir. 2013) (quoting *United States v. Martin*, 4 F.3d 757, 759 (9th Cir. 1993) (internal quotation marks omitted).[3]

If an offense is continuous, meaning that it is a "continuous, unlawful act or series of acts set on foot by a single impulse," *Mancuso*, 718 F.3d at 792 (quoting *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939)), it may be charged in a single count. "The continuous nature of [an offense] prevents the indictment from being duplicitous." *Mancuso*, 718 F.3d at 792 (quoting *United States v. Anderson*, 605 F.3d 404, 415 (6th Cir.2010); internal quotation marks omitted); *see also Duplicity - What Can Be in a Single Count*, 9 Fed. Proc., L. Ed. § 22:1073.

Furthermore, in the context of conspiracy charges, "[a]n indictment charging conspiracy to commit more than one offense is not duplicitous." *United States v. Begay*, 42 F.3d 486, 501 (9th Cir. 1994). One conspiracy can include smaller agreements or subgroups therein, and "the evidence does not have to exclude every hypothesis other than that of a single conspiracy." *United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996). "A single conspiracy exists, as compared with multiple conspiracies, where there is one overall agreement to perform various functions to achieve the objectives of the conspiracy." *Id.* (quoting *United States v. Patterson*, 819 F.2d 1495, 1502 (9th Cir.1987)). One conspiracy charge can, for example, cover dealing

[3] Defendant contends that the Court should look at "whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy." *United States v. Gordon*, 844 F.2d 1397, 1401 (9th Cir. 1988) (quoting *United States v. Moran*, 759 F.2d 777, 784 (9th Cir.1985)). The relevant factors in this inquiry, Defendant argues, are "the nature of the scheme, the identity of the participants, the quality, frequency and duration of each conspirator's transactions, and the commonality of times and goals." *Id.* But such an analysis is made only when the duplicity issue is discussed *after* review of the evidence at trial. *See, e.g.*, *United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1218 (D. Mont. 2006) (concluding that the *Gordon* test applies only when reviewing the evidence heard at trial). Because the Court may only review the indictment and charging documents at this stage, it must "solely . . . assess whether the indictment itself can be read to charge only one violation in each count." *Mancuso*, 718 F.3d at 792 (quoting *Martin*, 4 F.3d at 759).

multiple types of narcotics. *See, e.g.*, *United States v. Fifer*, 27 F. App'x 892, 894 (9th Cir. 2001) (concluding that conspiracy count against defendant was not duplicitous even though "it charged dealing in several different narcotics as objects of the same conspiracy"); *Martin*, 4 F.3d at 759 (concluding that "indictment charged but one overall conspiracy and [thus was] not duplicitous"). And it is well-settled that an indictment may properly charge an offense as well as conspiracy to commit that offense because they are separate crimes. *See Iannelli v. United States*, 420 U.S. 770, 777–78 (1975).

Finally, there are several methods of curing duplicity. First, a duplicitous charge can in some circumstances be cured by election, in which the government chooses "one offense within the count to prosecute and treat[s] the rest of that count as surplusage." *United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985). But election must neither change the nature of the charge nor prejudice the defendant. *See id.* ("Substantive amendment of an indictment, particularly if the amendment broadens or alters the offense charged, is reversible error since it violates the defendant's Fifth Amendment right to stand trial only on the charges made by a grand jury in its indictment."). Accordingly, a court must determine whether the election is an "an amendment of form (deletion of surplusage) or of substance (altering nature of charge), and whether the election prejudiced [the defendant's] trial preparation because, as a result, he was not properly notified of the charges against him." *Id.* Second, the court may cure a duplicitous charge by giving a "limiting instruction requiring the jury to unanimously find the defendant guilty of at least one distinct act." *Cure for Duplicity*, 9 Fed. Proc., L. Ed. § 22:1074; *see also Mancuso*, 718 F.3d at 793 ("[A] specific unanimity instruction is required if there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." (internal footnote and quotation marks omitted)); *United States v. Starks*, 472 F.3d 466, 471 (7th Cir. 2006). This prevents jury confusion and ensures the defendant receives a unanimous verdict. *Mancuso*, 718 F.3d at 792–93. And third, a court may dismiss the duplicitous count. *See Aguilar*, 756 F.2d at 1422–23; *United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1219 (D. Mont. 2006).

Here, because the Indictment can be read to charge only one crime in Count One, the Court would deny Defendant's motion to dismiss Count One for duplicity.

Handed down from the grand jury in January 2019, Count One charges Defendant with "conspiracy to distribute and possess with intent to distribute cocaine and methamphetamine."

See Indictment, Docket No. 47 at 1. The Indictment describes the object of this conspiracy as follows:

> Beginning on a date unknown, and continuing until on or about March 19, 2018, . . . [Defendant], together with others known and unknown to the Grand Jury, conspired and agreed with each other to knowingly and intentionally distribute, and possess with intent to distribute, cocaine . . . and at least 500 grams of a mixture and substance containing a detectable amount of methamphetamine . . . .

Indictment, Docket No. 47 at 1–2. It also described the manner and means by which Defendant allegedly went about this conspiracy, including storing both cocaine and methamphetamine in an apartment he had fraudulently rented under a stolen identity. The Indictment listed fifteen overt acts in which Defendant had engaged, including using coded language in text messages in order to sell cocaine (Overt Act No. 1), offering "something" over text messages to customers (Overt Act Nos. 4, 6, 13), arranging for customers to obtain cocaine from co-conspirators (Overt Act Nos. 5 and 7), offering discounts for customer referrals (Overt Act No. 8), and generally running a drug business via his phone (Overt Act Nos. 1–14). *Id.* at 3–4. The last overt act described Defendant's alleged possession of around 16.1 kilograms of methamphetamine and 1.5 grams of cocaine at the apartment he fraudulently rented (Overt Act No. 15). *Id.* at 4. The first fourteen overt acts are alleged to have occurred from April 2016 to August 2016, and the last overt act occurred after a search took place at Defendant's apartment in March of 2018.

The sole inquiry the Court makes at this stage is whether the indictment can be read to charge only one violation in Count One. *See Mancuso*, 718 F.3d at 792. Here, the Could would find that Count One can be read to charge only one crime: conspiracy. As the indictment states, the charge is for a single conspiracy – taking place over the course of at least 19 months – that encompasses the distribution and possession of both drugs. It is not, as Defendant would have it, a charge encompassing (A) a conspiracy to distribute cocaine and (B) possession of methamphetamine. *See* Motion to Dismiss, Docket No. 117 at 3–4. On the contrary, it is clear from the plain language of the Indictment that Count One is charging one conspiracy with two goals: distribution as well as possession of cocaine and methamphetamine. *See* Indictment, Docket No. 47 at 1–2. It is well-settled in Ninth Circuit case law that one conspiracy can have multiple unlawful aims. *See Bauer*, 84 F.3d at 1560. Those multiple aims can be the distribution of and possession with intent to distribute multiple types of drugs. *See Fifer*, 27 F. App'x at

894.

Because "[a]n indictment charging conspiracy to commit more than one offense is not duplicitous," *Begay*, 42 F.3d at 501, the Could would find that Count One is not duplicitous. To the extent that it can prevent jury confusion and ensure unanimity, the Court would be willing to give a specific unanimity instruction, should the case go to trial.

2. Severance

An indictment may join multiple offenses against a defendant where the offenses are (1) "of the same or similar character," (2) "based on the same act or transaction," or (3) "are connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a). "[T]he validity of the joinder is determined solely by the allegations in the indictment." *United States v. Jawara*, 474 F.3d 565, 572 (9th Cir. 2007) (quoting *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990)). For offenses to be of the same or similar character, "the similar character of the joined offenses should be ascertainable – either readily apparent or reasonably inferred – from the face of the indictment." *Id.* at 578. To make this determination, the court may "consider factors such as the elements of the statutory offenses, the temporal proximity of the acts, the likelihood and extent of evidentiary overlap, the physical location of the acts, the modus operandi of the crimes, and the identity of the victims[.]" *Id.* For the offenses to be parts of a common scheme or plan, "commission of one of the offenses either depended upon or necessarily led to the commission of the other; proof of the one act either constituted or depended upon proof of the other." *Id.* at 574; *see also Anderson*, 642 F.2d at 284 ("When the joined counts are logically related, and there is a large area of overlapping proof, joinder is appropriate.").

If an otherwise proper joinder of charges appears to prejudice a defendant, a court is permitted, at its discretion, to "order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14. The district court's decision to deny severance will only be overturned on appeal if the defendant shows that the "denial was so manifestly prejudicial that it overcomes the dominant concern with judicial economy." *United States v. Johnson*, 820 F.2d 1065, 1070 (9th Cir. 1987) (internal citation omitted). "A denial is manifestly prejudicial if it violate[s] one of the defendant's substantive rights." *Id.*

Because the allegations describe offenses that are similar in character and appear to be part of the same scheme or plan, the Court is inclined to deny Defendant's motion to sever Count

One from Counts Two through Four.

To analyze the validity of the joinder, the Court looks solely at the allegations in the Indictment. The Indictment alleges that, over the period from April 26 to August 2016, Defendant used his phone to facilitate drug sales to J.A. and offer discounts to any customers J.A. referred to Defendant. Most of these allegations explicitly reference the sale of cocaine – namely, Overt Acts 1, 2, 3, 5, 7, 9, 10, 11, 12, and 14. But Overt Acts 4, 6, 8, and 13 all allege that Defendant sent text messages to J.A. using the word "something" as coded language for drugs. And Overt Act 15 alleges that both cocaine and methamphetamine were found in March 2018 in an apartment that Defendant had "fraudulently rented using the name, date, and social security number of victim C.W." Indictment, Docket No. 47 at 4.

The similar character of these offenses are "ascertainable . . . from the face of the indictment."[4] *Jawara*, 474 F.3d at 578. Here, Count One deals with the conspiracy to possess and distribute, and Counts Two through Four deal with possession and identity fraud, both of which were allegedly undertaken in part to carry out that conspiracy. The allegations here all concern Defendant's illicit sale of drugs: his methods, his customers, his coded language, and his practice of storing drugs at his place of residence, the most recent one of which he fraudulently rented. Given this, the Court would find a high likelihood of evidentiary overlap between the conspiracy charge in Count One and the possession and fraud charges in Counts Two to Four. For the same reason, Court would also find that the offenses are "connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a). The conspiracy described in Count One was allegedly carried out in part by the actions in Counts Two to Four. In other words, possession of a drug is nearly always a predicate of distribution, and of conspiracy to distribute. And identity fraud may be a component of a conspiracy to possess and distribute drugs – in this case, allegedly renting an apartment to store such drugs.

Although there are two main time periods in the allegations – the sales to J.A. allegedly occurred from April to August 2016, and the discovery of the drugs in the apartment was in a search conducted in March 2018 – the attenuation does not mean the offenses are not similar in

[4] Though not at issue here, the Court notes that the inquiry in "judging the sufficiency of the indictment is whether the indictment adequately alleges the elements of the offense and fairly informs the defendant of the charge, not whether the Government can prove its case." *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982). In an indictment, the "Government need not allege its theory of the case or supporting evidence, but only the 'essential facts necessary to apprise a defendant of the crime charged.'" *Id.* (quoting *United States v. Markee*, 425 F.2d 1043, 1047–48 (9th Cir. 1970)).

character or connected with a common scheme or plan. Indeed, several cases indicate that offenses can be similar in character or part of a common scheme despite gaps of time between them. *See, e.g.*, *United States v. Drummondo-Farias*, 622 F. App'x 616, 617 (9th Cir. 2015) (concluding joinder between *conspiracy* to distribute methamphetamine and *distribution* of methamphetamine was proper despite a 14-month gap between the former and the latter); *United States v. Rousseau*, 257 F.3d 925, 932 (9th Cir. 2001) (upholding joinder between two offenses separated by an eight-month gap because "both incident involved firearms charges" and were thus similar in character); *United States v. Akana*, 210 F. App'x 681, 682 (9th Cir. 2006) (concluding joinder was proper despite one-and-a-half year gap between offenses because all counts dealt with "violations of possession of a controlled substance with intent to distribute").

As a final matter, the Court would also find that joinder does not result in manifest prejudice to Defendant. Defendant contends that trying all four counts together are prejudicial to him. But beyond general descriptions of juries not properly compartmentalizing damaging information about a defendant, Defendant provides no specific prejudice that would result from trying the charges together. Moreover, given the Court's conclusion that all charges are "of the same or similar character" and "connected with or constitute parts of a common scheme or plan," Fed. R. Crim. P. 8(a), it would frustrate judicial economy and expediency to sever the charges into two trials. Trying the charges together is also proper because of the evidentiary overlap between the charges, as well as the legal overlap of the elements of the conspiracy and the possession charges. Finally, as the government notes in its Opposition, the ongoing effects of the COVID-19 pandemic on court operations and trial scheduling cannot be ignored. The Court would thus decline to sever Count One from the other counts as a matter of discretion.

B. Motion to Suppress Evidence

1. Probable Cause for March 12 Warrant

"The Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'" *United States v. Jones*, 565 U.S. 400, 404 (2012) (quoting U.S. Const. amend IV). "[S]earches and seizures 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." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).

In order to uphold a search warrant on review, the reviewing court must find that the issuing judge had a "substantial basis" for finding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). "A search warrant is supported by probable cause if the issuing judge finds that, 'given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Underwood*, 725 F.3d 1076, 1081 (9th Cir. 2013) (quoting *Gates*, 462 U.S. at 238). "Whether there is a fair probability depends upon the totality of the circumstances, including reasonable inferences, and is a 'commonsense, practical question.'" *United States v. Kelley*, 482 F.3d 1047, 1050 (9th Cir. 2007) (quoting *United States v. Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006) (en banc)). The Supreme Court has cautioned that "[a]lthough in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, resolution of doubtful or marginal cases in this area should largely be determined by the preference to be accorded to warrants." *Gates*, 462 U.S. at 237 n.10 (quoting *United States v. Ventresca*, 380 U.S. 102, 109 (1965)).

Moreover, a warrant may not be broader than the probable cause on which it is based. *Vonder Ahe v. Howland*, 508 F.2d 364, 372 (9th Cir. 1974). The probable cause for and the scope of the search must be properly established. *See Kentucky v. King*, 563 U.S. 452, 459 (2011). Accordingly, "[a] search warrant must allege with reasonable particularity the types of items that may be seized." *United States v. Clark*, 31 F.3d 831, 836 (9th Cir. 1994). While "[t]he remedy for an overbroad search warrant is suppression of the seized evidence[,]" only the "items seized pursuant to the invalid portion of a search warrant" need be suppressed. *Id.*

Here, defendant contends that seeking to seize the "evidence, fruits, and instrumentalities of identity theft and access device fraud in violation of 18 U.S.C. §§ 1028, 1028A, and 1029" was based on an inference that Defendant "*submitted* an application to rent the Santee Apartment using third-party C.W.'s identification, and that identity thieves often utilize digital devices." Motion to Suppress, Docket No. 120 at 17 (emphasis in original). Defendant argues that the affidavit fails to establish probable cause because it "states only that the rental application was in C.W.'s name, paid for with Mr. Langford's credit card, and that the apartment manager thought that Mr. Langford was C.W." *Id.* In other words, the four corners of the warrant application alleges only "that Mr. Langford was living in an apartment that was rented in someone else's

name." *Id.*

Contrary to Defendant's assertion, the Court would find that the affidavit establishes probable cause to search the Santee apartment in the March 12 Warrant. The affidavit provided information that Defendant used his credit card to rent the apartment but used the social security number, date of birth, address, tax return, and criminal history of C.W. on the rest of the application. *See* March 12 Affidavit, Docket No. 120-1, Ex. B at 14–15. The affidavit also stated that the apartment's property manager was shown a Defendant's driver license photo and identified him as "C.W." *Id.* The property manager also said that Defendant was currently living in the Santee apartment, and officers saw Defendant in the vicinity twice. *Id.* at 13–14. Moreover, the affidavit also included the text messages regarding the cocaine transactions between J.A. and Defendant, whose number in J.A.'s phone was listed under the contact "Jeff Mitches friend." *Id.* at 13. This suggests Defendant was concealing his identity while trafficking drugs and that he was using his phone to facilitate the transactions. Defendant overlooks this link when he contends there is no mention of Defendant "using a cell phone to commit identity theft." Motion to Suppress, Docket No. 120 at 18. And the affidavit also set forth information that, according to Agent Wong's training and experience, drug traffickers (1) use false identities to conceal their crimes, (2) keep evidence of crimes in their residence, and (3) often use cell phones and other electronic devices to commit and conceal their crimes. March 12 Affidavit, Docket No. 120-1, Ex. B at 15.

When taken together, the Court would find these facts provide a "substantial basis" for probable cause to search the Santee apartment. *Gates*, 462 U.S. at 238. The affidavit sufficiently established a fair probability that evidence of identity theft would be found at the premises, and it identified the types of items to be seized with sufficient particularity. Even if this were a close call, the Court is to resolve marginal cases with the "preference to be accorded to warrants." *Gates*, 462 U.S. at 237. The Could would find the affidavit here sufficiently defined and substantiated probable cause to search the apartment, and thus the warrant was valid.

2. Unreasonable Delay

"An unreasonable delay between the seizure of a package and obtaining a search warrant may violate the defendant's Fourth Amendment rights." *United States v. Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015). In considering such a delay, the "touchstone is reasonableness." *Id.* Accordingly, the Court "determine[s] whether the delay was reasonable under the totality of the

circumstances, not whether the Government pursued the least intrusive course of action." *Id.* (quoting *United States v. Hernandez*, 313 F.3d 1206, 1213 (9th Cir. 2002)).

In doing so, the Court engages in a "balancing test to determine whether a seizure is reasonable. The analysis starts with "considering the extent of the intrusion on [the defendant's] possessory interests given the totality of the circumstances." *Sullivan*, 797 F.3d at 633. The Court must balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). This determination should take into account differences in the types of property seized and the corresponding privacy interests – for example, the "significant expectation of privacy" that accompanies electronic devices. *Cotterman*, 709 F.3d at 966. Such analysis also takes into account the length of the invasion of the Fourth Amendment interests and the diligence of the investigation. *See Place*, 462 U.S. at 709.

In *Sullivan*, for example, the Ninth Circuit held that the government had a legitimate interest in "searching [a] laptop for evidence of crimes," and that a 21-day delay in obtaining a warrant was reasonable. *Sullivan*, 797 F.3d at 634. The panel first looked to Sullivan's possessory interests, which the panel concluded were minimal because he was a parolee at the time of the search – giving the government an "overwhelming interest" in his supervision – and was in custody for parole violations. *Id.* Sullivan's possessory interests were even more minimal because "an individual who did 'not even allege, much less prove, that the delay in the search . . . adversely affected legitimate interests protected by the Fourth Amendment' and 'never sought return of the property' has not made a sufficient showing that the delay was unreasonable." *Id.* at 633–34 (alterations incorporated). The government's interests in retaining and searching the laptop, on the other hand, were substantial: Sullivan was a parolee under the supervision of the government, and the laptop likely "contained evidence of Sullivan's parole violations, as well as [evidence of the charged crime]." *Id.* at 634. Concluding that the government's interests far outweighed Sullivan's, and noting that "the government is not required to pursue 'the least intrusive course of action[,]'" the panel concluded that the 21-day delay before obtaining a search warrant was not an unreasonable seizure. *Id.*

However, the unreasonable-delay legal framework has been largely developed and applied to cases involving *warrantless* seizures. *See, e.g.*, *Sullivan*, 797 F.3d at 634 (concluding

21-day delay between warrantless seizure of laptop and search was reasonable); *United States v. Johns*, 469 U.S. 478, 487–88 (1985) (concluding a "warrantless search three days after the packages were placed in the DEA warehouse was reasonable and consistent with our precedent involving searches of impounded vehicles"); *Cooper v. California*, 386 U.S. 58, 61–62 (1967) (upholding warrantless search that took place seven days after seizure of automobile pending forfeiture proceedings); *United States v. Song Ja Cha*, 597 F.3d 995, 997 (9th Cir. 2010) (concluding 26.5-hour gap between seizure of residence and obtaining/executing a search warrant was unreasonable); *United States v. Dass*, 849 F.2d 414, 415 (9th Cir. 1988) (concluding delays of up to 23 days between the warrantless seizure of packages and the issuance of warrants was unreasonable); *United States v. Jobe*, 933 F.3d 1074, 1078 (9th Cir. 2019) (concluding 21-day delay between the seizure of a laptop pursuant to a state warrant – later found to have lacked probable cause – and the obtaining and execution of a federal search warrant did not justify suppression); *United States v. Burgard*, 675 F.3d 1029, 1035 (7th Cir. 2012) (concluding six-day delay between warrantless seizure of phone and obtaining/executing a search warrant was reasonable); *United States v. Mitchell*, 565 F.3d 1347, 1350 (11th Cir. 2009) (holding that a 21-day delay in obtaining a search warrant for the seizure of a computer hard drive was unreasonable). Where the government seizes the evidence pursuant to a lawful warrant, delays are more likely to be reasonable. *See, e.g.*, *United States v. Mulder*, 889 F.2d 239, 241 (9th Cir. 1989) (finding a two-year delay between seizure of pills and obtaining/execution of a warrant to test the pills reasonable, where the pills were not obtained "as the result of an unlawful search," the defendant "never made a motion for the return of the pills," and "the time lapse was the result of the judicial appeal process rather than any dilatory tactics"). In cases where the evidence has been seized lawfully, the government's investigatory interest in the evidence is at a high, while the defendant's possessory interest is, both legally and practically, at a minimum. *See* Sullivan, 797 F.3d at 633–35.

Here, Defendant first argues that the Extension Order issued on September 28, 2018, was invalid because the March 19 Warrant had become void when it expired on July 17, 2018. *See* Motion to Suppress, Docket No. 120 at 8. Defendant points to *Sgro v. United States*, a Prohibition-Era case in which the Supreme Court disapproved of the government simply redating and reissuing 10-day warrants to search for liquor. *Sgro v. United States*, 287 U.S. 206, 210 (1932). But the affidavit supporting that case was filed by a man who "swore he made a

purchase of beer of the defendant." *Id.* at 208. But unlike here, that statutorily-created warrant had "no provision which authorize[d] the commissioner to extend its life or revive it." *Id.* at 211. Here, the March 12 Warrant, the March 19 Warrant, and the Extension Order all provided a 120-day time period for searching the electronic devices. Most significant here, the March 12 Warrant and the March 19 Warrant both *specifically provide for* a process to extend the time period, stating that "The Government will not search the digital device(s) beyond this 120-day period without obtaining an extension of time order from the Court." *See* March 12 Warrant, Docket No. 120-1, Ex. A at 8; March 19 Warrant, Docket No. 120-3, Ex. E at 10. The warrants themselves explicitly anticipated a scenario in which the government would need to request more time to undertake forensic searches of electronic devices. Consequently, the Court would find that the government was simply undertaking the extension process already approved twice by a judge in the March 12 and March 19 Warrants. Defendant points to no case law dictating a different outcome.

Defendant's second argument is that the delay between the seizure and the search of Defendant's cell phones was unreasonable, violating the Fourth Amendment. Keeping in mind that the "touchstone" of this inquiry is "reasonableness," the Court would first consider the government's intrusion on Defendant's "possessory interests given the totality of the circumstances." *Sullivan*, 797 F.3d 623, 633. As the Court discussed above, it would find the March 12 Warrant and the March 19 Warrant were lawful. The phones were lawfully seized and, until July 17, 2018, were subject to a valid, accompanying search warrant. As a result, the Defendant had a lower possessory interest in the phones from the execution of the March 12 and March 19 Warrants until at least July 17, if not beyond. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 125 (1984) (using, in part, the fact that the property had already been lawfully detained to determine that "the 'seizure' could, at most, have only a de minimis impact on any protected property interest"); *see also Sullivan*, 797 F.3d at 633–34. The government's interest, on the other hand, was very high, as it had strong reason to believe that there was evidence of identity fraud and drug trafficking on the phones. *See id.* at 634 (concluding "the government had a reasonable basis for retaining and searching the laptop based on the likelihood that it contained evidence" of the defendant's offenses). And as in *Sullivan*, Defendant presents no evidence that he requested the phones back after the 120-day period lapsed in July 2018. Further, at no point in this case did law enforcement officers proceed with searches without a warrant issued by a

"neutral and detached magistrate." *Riley v. California*, 573 U.S. 373, 382 (2014). Given that the "nature and quality of the intrusion" on Defendant's Fourth Amendment interests were *already* found supported by probable cause and thus justifiable, Defendant's interests would not outweigh here. *Id.* at 633.

The Court acknowledges that there are two factors weighing in favor of Defendant in this balancing test. For one, the digital nature of the devices means they are accompanied by a "significant expectation of privacy." *Cotterman*, 709 F.3d at 966; *see also Riley*, 573 U.S. at 393 ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."). Here, Defendant's cell phones presumably store gigabytes of information – the very reason forensic searches take longer than searches of other non-digital items. *See* Motion to Suppress, Docket No. 120-3, Ex. F. ("Extension Application") at 1 (discussing the gigabytes of information stored on Defendant's phones as a contributing factor to the delay in completing the forensic search). For another, seventy-two days passed from the point that the March 19 Warrant time period lapsed to the day the government filed the *ex parte* Extension Application. This was in addition to the 120 days that had already passed from the March 19 Warrant. Because the Court must also weigh the length of the invasion of the Fourth Amendment interests and the diligence of the investigation, *see Place*, 462 U.S. at 709, it must consider the seven months that the government possessed the phones without searching them. Although the government noted that there was a backlog of forensic searches, the agents had not yet sent the phones to the forensic lab in the intervening months. *See* Motion to Suppress, Docket No. 120-3, Ex. I at 1 (describing the transport of one of the phones on October 1, 2018); Motion to Suppress, Docket No. 120-3, Ex. H at 1 (describing the transport of one of the phones on October 5, 2018).

The doctrine of unreasonable delay was developed foremost to prevent unreasonable searches and seizures. But in a case were the seizure is lawful, the concerns over unreasonableness diminish. Accordingly, the Court would conclude that, on balance, the interests of the government in carrying out the searches that had been sanctioned in the March Warrants outweigh the possessory interests of Defendant.

3. Good Faith Exception

The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights through a deterrent effect," and bars the admission of evidence that was

unlawfully seized or searched. *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). The exclusionary rule is applied on a case-by-case basis, and only in cases where the exclusion will further the rule's deterrence rationale. *Id.* at 917; *see also Herring v. United States*, 555 U.S. 135, 141 (2009) (the exclusionary rule "applies only where there is an appreciable deterrence"). In *Leon*, the Supreme Court ruled that when law officers acted under an objectively reasonable belief that their conduct did not violate the Fourth Amendment, the exclusionary rule should not apply. 468 U.S. at 917. The Court noted that the exclusionary rule could not be expected to deter objectively reasonable law enforcement activity, and therefore "should not be applied where the official action was done in complete good faith." *Id.* (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975)). The good faith exception allows admission of evidence seized pursuant to a defective warrant so long as the officers acted in reasonable and objective good faith in relying on the warrant. *Leon*, 468 U.S. at 920.

Here, even if the delay between the seizure of the phones and their search was unreasonable, the good faith exception would apply. As discussed above, the agents in this case received valid warrants for every single search they conducted on Defendant, his residence, and his belongings. When the search at the Santee apartment resulted in unexpected items, the agents immediately applied for another warrant, ensuring that their search was lawful. It is true that the agents let the warrant expire before the search, and deterrence might be served by suppressing the evidence in such a case. But once the agents had the time or resources to conduct the forensic searches, they applied for the extension provided in the original warrant. This evinces good faith, and deterrence purposes would not be served here by suppression. Thus, the Court would find that, even if the delay were unreasonable, the agents acted in good faith in applying for – and subsequently relying on – the Extension from the court.

III. Conclusion

Based on the foregoing discussion, the Court would DENY the Motion to Dismiss Count One as Duplicitous. The Court would also DENY the Motion to Suppress Evidence from the Search of the Santee Apartment.[5]

[5] Defendant also made a cursory request for an evidentiary hearing. He argues that the "inconsistent" reasons the government gave for the 2018 delay in searching Defendant's phones and for the three-year delay for the 2021 search warrant for Thompson's phones "entitles the defense to an evidentiary hearing to demonstrate that the government's proffered justifications were illegitimate. *See* Motion to Suppress, Docket No. 120 at 3 (citing *Franks*

v. Delaware, 438 U.S. 154, 171 (1978)). But these are easily consistent with each other, given the different time frames and the developing investigation. Otherwise, Defendant does not make sufficient allegations for the Court to conclude that an evidentiary hearing is warranted. *See United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000) ("An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist.").