No. 25-

IN THE

Supreme Court of the United States

MATTHEW SCOTT ROCCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does it violate the Fourth Amendment when, during the execution of a residential search warrant, law enforcement subverts the geographical restrictions established in *Bailey v. United States*, 568 U.S. 186 (2013) by directing probation officers to order Mr. Rocco, a probationer, to return home for fictitious reasons, thus bringing him (and his phone) within the purview of the residential search warrant?

PARTIES TO PROCEEDING AND RELATED CASES

Besides the proceedings below, there are no other related proceedings to the instant matter. In this matter, the proceedings below are as follows:

> *United States v. Rocco*, No. 1:24-cr-00025-MSN, U.S. District Court for the Eastern District of Virginia. Judgment Entered: Oct. 31, 2024.
>
> *United States v. Rocco*, No. 24-4609, U.S. Court of Appeals for the Fourth Circuit. Judgment Entered: Sept. 9, 2025; Rehearing Denied: Oct. 7, 2025.

The petitioner is Matthew Scott Rocco, the defendant-appellant below. There are no other defendants/appellants in this matter. Respondent is the United States of America, appellee below. There are no other respondents/appellees. A corporate disclosure statement is not necessary in the instant matter.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Matthew Scott Rocco respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

DECISION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. A) is unpublished but may be found at 2025 WL 2602537 (4th Cir. 2025). App. 1a-7a. The District Court issued no written opinion in denying Defendant's Motion to Suppress the fruits of the seizure and search of his cellular phone; however, the reasons for the district court's ruling were stated on the record. App. 52a-54a. The District Court's order is found at App. 9a-10a.

JURISDICTION

The Fourth Circuit entered judgment in this case on September 9, 2025. App. 8a. A petition for both a panel rehearing and a rehearing *en banc* was filed on September 22, 2025. App. 12a-30a. The Fourth Circuit denied both rehearing petitions on October 7, 2025. App. 11a. The deadline for the petitioner to seek a writ of certiorari is January 5, 2025; as such, the instant petition is timely under Supreme Court Rule 13.3. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

At issue here is the application of the Fourth Amendment to the United States Constitution, which

provides in pertinent part that: "[t]he right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

STATEMENT OF THE CASE

For Matthew Rocco, the morning of April 21, 2023, started as any other; at roughly 6:00 a.m., he left his home in Woodbridge, Virginia, and commuted to work. However, on this otherwise typical weekday morning, Mr. Rocco was unaware that his house was under surveillance by both State and Federal law enforcement agents and that a multijurisdictional task force was preparing to execute a residential search warrant. Indeed, these same agents would have Mr. Rocco's probation officer—who they arranged to have on scene at the time of the search—order Mr. Rocco back to his home so the task force agents could illegally seize and search his cellphone—an action that they (the HSI agents) would otherwise not have been permitted to take had Mr. Rocco been absent from the premises at the time of the search.

In the months and weeks preceding the April 2023 search at issue here, the Virginia State Police conducted an online undercover investigation into the online sharing of Child Sexual Abuse Material ("CSAM"). During this investigation, a number of suspected CSAM files were allegedly downloaded via a law enforcement version of the BitTorrent program from the IP address associated with the Rocco home. The subsequently obtained search warrant affidavit does not state which device within the

home hosted these files or who they belonged to; it merely shows that the referenced whole-home IP address hosted them. At some point, the investigation was turned over to Homeland Security Investigations ("HSI").

On March 23, 2023, Mr. Rocco's Probation Officer—PO Raymond—received a call from SA Collins—the lead HSI agent in charge of the home search—informing him that SA Collins' task force was investigating Mr. Rocco for potential CSAM violations. Importantly, after being informed of Rocco's status as the subject of an active CSAM investigation, PO Raymond took no action as a result of SA Collins' call.

After making the Rocco residence a target of their investigation, HSI agents conducted surveillance on the home, establishing that Mr. Rocco and his father resided there, observing their comings and goings, and determining both Mr. Rocco's and his father's morning schedules.

On April 19, 2023, based on the information detailed above, HSI agents obtained a search warrant for Mr. Rocco's home. The search warrant obtained only authorized law enforcement to search the Rocco residence; the warrant *did not* provide the authority for an independent seizure and/or search of Mr. Rocco's cellphone, or anything else, outside the presence or curtilage of his home:

ATTACHMENT A

Property to be Searched

> The property to be searched is 4120 Burning Ridge Court, Woodbridge, Virginia 22192. This residence is a two-story, single-family home with a light brown brick front exterior. The SUBJECT PREMISES is located at the corner lot of Burning Ridge Court and Crest Maple Drive.

(Search Warrant for Rocco Residence).[1]

A day or two before the search warrant was set to be executed, SA Collins telephoned PO Raymond again and asked him to be present at the search of the Rocco home, due to the fact that he (PO Raymond) had a good relationship with the Rocco family, and he (SA Collins) thought it would make the search go smoothly. Indeed, the government previously conceded that POs Raymond and Olson (Raymond's supervisor) were present at the scene of the search that day to further assist in the execution of the HSI warrant—"[PO Raymond] simply omitted mention of the search warrant and *it[] being the reason he was in that area*." *United States v. Rocco*, 1:24-cr-025, Dkt. 40, pg. 6 (E.D. Va. 2024) (Government's Response in Opposition).

On the day of the search, at approximately 5:05 a.m., state law enforcement officials arrived on scene and began conducting surveillance of the Rocco home. Other members of the task force—which included Mr. Rocco's

1. The search warrant also allowed for the seizure and search of electronic devices found within the Rocco home.

probation officers—waited at a staging location a few miles away. Almost an hour later, these officers observed Mr. Rocco exit his home and drive away. At no point did an officer attempt to stop Mr. Rocco or ensure that he was not taking any electronic devices—such as his cellphone—off the premises. Mr. Rocco's father was still present at the home when Mr. Rocco departed for work that morning.

As the district court found, a short time after Mr. Rocco left his residence, SA Collins called PO Raymond and directed that he (PO Raymond) order Mr. Rocco to return home for a "probation matter." App. 52a ("the Court is, for the purposes of this motion, finding, for purposes of argument, that [PO] Raymond was directed by HSI to bring Mr. Rocco back or to make that call."). Being ordered back to his home by his Probation Officer—under the ruse of a home visit which he was required to comply with—Mr. Rocco followed his probation officer's instructions, terminated his commute to work, and returned to his residence.

At approximately 6:10 a.m., "HSI special agents and US Probation personnel arrived on-scene of the [Rocco] residence to serve the search and seizure warrant . . . as personnel were approaching the residence, [Mr. Rocco] exited the garage and greeted [PO] Raymond [who was then joined] by HSI [SA] Collins on the driveway of the residence." *United States v. Rocco*, 1:24-cr-025, Dkt. 31-3 (E.D. Va. 2024) (HSI Report of Investigation, 4/26/23). Within a matter of minutes, Mr. Rocco saw nearly a dozen law enforcement officers approach his residence, detain him, and subject him to a pat-down search of his person—wherein SA Collins confiscated a utility knife, a wallet, and a Samsung cellphone. Probation never touched Mr. Rocco's phone that day. Immediately following this, Mr. Rocco complied with SA Collins' request to sit down

for an interview; again, probation was not present for the interview.

Later, an HSI computer forensic examination of the electronic devices seized showed that there was no CSAM stored on these devices, with the exception of Mr. Rocco's cellphone. On the cellphone, the HSI examiner found approximately ten files in the phone's cache of possible CSAM. Before the forensic examination, the Probation Officer's robust monitoring software installed on Mr. Rocco's cellphone detected no signs of CSAM.

Importantly, as the related SRV Petition makes clear, the April 21 search of the home was not done at the behest of Mr. Rocco's probation officer:

> On March 23, 2023, this officer received a telephone call from Special Agent Jeffrey Collins with Homeland Security Investigations (HSI). Special Agent Collins advised this officer that Mr. Rocco was currently being investigated by the Northern Virginia/Washington D.C. Internet Crimes Against Children Task Force for allegedly downloading and distributing numerous files of child sexual abuse material and/or child pornography. Special Agent Collins stated that a search warrant was being sought and that he would keep the probation office informed as to the status of the investigation and warrant request.
>
> Subsequent to serving a search warrant on April 21, 2023, Special Agent Collins notified this officer that ten (10) videos were retrieved from an SD/MicroSD card located in Mr. Rocco's

> personal smart phone and that after review of the videos, all contained sexually explicit material, to include child pornography. Although it cannot be determined when the videos were uploaded to the SD card, they were last modified in April 2022.

United States v. Rocco, 1:24-cr-025, Dkt. 31-7 (E.D. Va. 2024) (SRV Petition, May 2, 2023).

Finding the search and seizure proper, the district court denied Mr. Rocco's motion to suppress, and Mr. Rocco was convicted of receiving child pornography, in violation of 18 U.S.C. § 2252(a)(2), (b)(1), and possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4), (b)(2). The Fourth Circuit panel affirmed in a five-page *per curiam* opinion. App. 2a.

REASONS FOR GRANTING THE PETITION

I. By Ordering Mr. Rocco Back to His Home, Law Enforcement Violated the Geographic Rule Established by this Court in *Bailey v. United States*.

The undisputed facts, combined with the district court's findings, make clear that Mr. Rocco was seized the moment POs Raymond and Olson ordered Mr. Rocco to stop his morning commute to work and return to his residence. This seizure by probation officers, acting at the specific direction of law enforcement to facilitate the execution of a search warrant, was unlawful and in clear violation of the geographic rule established by this Court in *Bailey v. United States*, 568 U.S. 186 (2013).

A. Mr. Rocco was seized by law enforcement officials when he was ordered back to his home.

For the purposes of a Fourth Amendment analysis, the seizure of an individual occurs whenever a law enforcement officer "by means of physical force or show of authority terminates or restrains [an individual's] freedom of movement." *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal citations omitted); *see also Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("[i]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

Indeed, "[w]here, as here, physical force is absent, a seizure requires both a show of authority from law enforcement officers and submission to the assertion of authority by the defendant." *United States v. Stover*, 808 F.3d 991, 995 (4th Cir. 2015) (citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991)). To aid a reviewing court's determination of whether police have displayed a show of authority sufficient to implicate the Fourth Amendment, a court applies the objective test set forth in *United States v. Mendenhall*, 446 U.S. 544 (1980) (plurality opinion). The police committed a seizure "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554; *see also United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989); *Stover*, 808 F.3d at 995. Indeed, as further elaborated by the Fourth Circuit in *Stover*:

> A court considers a number of factors in resolving whether an officer's conduct would convey to a reasonable person that he is not free to leave. *See, e.g.*, *Michigan v. Chesternut*, 486 U.S. 567,

> 575-6 (1988) (listing examples of police behavior that "communicate[] to the reasonable person an attempt to capture or otherwise intrude upon [his] freedom of movement," including "activat[ing] a siren or flashers," "command[ing a person] to halt," or "operat[ing] the [police] car in an aggressive manner to block [a person]'s course"); [*United States v. Jones*, 678 F.3d 293, 299-300 (4th Cir. 2012)] (listing various relevant factors)[.]

Stover, 808 F.3d at 995; *see also Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) ("[t]he test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.").

In this case, without dispute, Mr. Rocco was seized when he was in his car, commuting to work, and then ordered back to his residence by his probation officers. As the government conceded below, Mr. Rocco had no ability to refuse the probation officers' order to return home, a fact that the government readily concedes:

> . . . because in asking the defendant to come back, they weren't leaving the—probation was asking the defendant to return pursuant to their authority to be able to order him . . . and probation has the ability to call the defendant back pursuant to their own valid authority[.]

App. 36a-37a; App. 39a (" . . . what happened here, which was a lawful exercise of authority by probation to facilitate the search warrant in general[.]"). As such, this seizure

was conducted at the direction of and on behalf of law enforcement. It was not being performed as part of an independent probationary matter.

As plainly demonstrated below, the district court performed its fact-finding function, despite the conflicting material, and made an actual finding—though it merely disagreed with Mr. Rocco as to its significance:

> . . . The Court is, for the purposes of this motion, *finding*, for purposes of argument, that *Mr. Raymond was directed by HSI to bring Mr. Rocco back or to make that call*. Again, I understand there's some evidence in the record that suggests it was Mr. Olson's idea. I know that Ms. Ginsberg had a conversation. There's an affidavit in the record that suggests that he said he was told to bring them back; but either way, *I don't find that that factual determination is meaningful* because Officer Raymond had the authority to do a home visit, to require him to come back at any time, and the fact that it was beneficial to HSI doesn't change or make that authority improper in any way.

App. 52a (emphasis added).

The district court's determination here of "[w]hether an agency relationship exists [between HSI and probation] is a question of fact based on all the circumstances[,]" and can be disregarded only if clearly erroneous. *United States v. Mancha*, 230 F.3d 1355 (4th Cir. 2000) (also holding that such a determination is subject to the clearly erroneous standard of review); *see also United States v. Ellyson*,

326 F.3d 522, 528 (4th Cir. 2003) (emphasis added) ("once it has been established that the [district] court did not *clearly err* in its findings that the police neither directed nor acquiesced in [third party]'s independently-motivated activities, our inquiry is at an end even though the evidence might have allowed a different conclusion."); *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987) (cited favorably in *Ellyson*, 326 F.3d at 528) ("[i]t matters not then whether the defendants characterize the inquiry as one into [third-party]'s motive or into [their] purpose for conducting the search for in either case the court found [their] actions to be independent of government involvement. We will disturb the district court's findings of fact only if clearly erroneous.").

As demonstrated further below, HSI investigators' seizure—by employing a probation officer's authority over their wards to further the execution of a residential search warrant—was unlawful and in clear violation of the geographic rule established by this Court in *Bailey v. United States*, 568 U.S. 186 (2013).

B. Mr. Rocco's seizure by this joint task force was unconstitutional.

This Court, in *Michigan v. Summers*, 452 U.S. 692 (1981), created a limited exception to the typical probable cause or reasonable articulable suspicion requirement for law enforcement's seizure of a person. Specifically, in Summers, the Court held that without more, "a warrant to search [a home] for contraband founded on probable cause implicitly carries with it the *limited authority* to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705 (emphasis added).

Importantly, however, on the opposite side of this particular Fourth Amendment coin, this Court would later place strict limitations on law enforcement's authority to detain under *Summers* to only the physical grounds of the searched premises. In defining the authority granted by *Summers*, this Court elaborated in *Bailey v. United States*, 568 U.S. 186 (2013), that:

> Because [Summers] exception grants substantial authority to police officers to detain outside of the traditional rules of the Fourth Amendment, it must be circumscribed . . . A spatial constraint defined by the immediate vicinity of the premises to be searched is therefore required for detentions incident to the execution of a search warrant. The police action permitted here—the search of a residence—has a spatial dimension, and so a spatial or geographical boundary can be used to determine the area within which both the search and detention incident to that search may occur. Limiting the rule in Summers to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe . . . Confining an officer's authority to detain under Summers to the immediate vicinity of a premises to be

> searched is a proper limit because it accords with the rationale of the [Summer's] rule.

Bailey, 568 U.S. at 200-201 (emphasis added).

While the Court acknowledged that it might be useful to an investigation to detain occupants of a searched residence wherever they may be found, "[t]his would give officers too much discretion." *Id.* at 199. Therefore, the rule in *Bailey* is that the geographic boundary of the search warrant determines not only the area to be searched pursuant to the warrant but also the area in which law enforcement has the authority to seize individuals without probable cause. *Id.* ("[t]he categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched."); *See also United States v. Brodie*, 742 F.3d 1058, 1062 (D.C. Cir. 2014) (holding that law enforcement officers waiting to execute a search warrant who observed an individual depart the residence could not seize the individual after he left the premises, the Court observed that the Supreme Court "was emphatic that *Summers-Bailey* was not to be subject to some sort of risk creep").

Here, where HSI was strictly prohibited from seizing Rocco under *Summers*/*Bailey* unless he was present at his residence at the time of the search, *Bailey*, 568 U.S. at 187, the question presented is whether the HSI agents involved here could subvert the restrictions placed upon them by this Court by having Mr. Rocco's probation officer order Rocco return home for a supposed "probation matter," thus bringing Rocco back within the purview of *Summers*. The obvious answer must be no. Indeed, law enforcement cannot be permitted to engage in a ruse—which, as stated

above, operated as a seizure—in an attempt to bring an individual who is outside the spatial constraints defined by the Supreme Court in *Bailey* so that they may seize sought-after evidence. Simply put, the agents here took a shortcut, that the Fourth Amendment does not allow, to circumvent the constitutional limitations placed upon them. *See, e.g.*, *Hoffa v. United States*, 385 U.S. 293, 301 (1966) ("[t]he Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area[]"); *United States v. Ramirez*, 976 F.3d 946 (9th Cir. 2020).

Stated another way, HSI agents extended the reach of their authority to seize Mr. Rocco—and by extension the cellphone on his person—by commandeering the highly coercive powers belonging to a probation officer. Such a use of the probation officer's powers is clearly an abuse of the type of seizures authorized: "[c]onducting a *Summers* seizure incident to the execution of a warrant is not the [g]overnment's right; it is an exception—justified by necessity—to a rule that would otherwise render the seizure unlawful." *Bailey v. United States*, 568 U.S. 186, 204 (2013) (internal citations omitted). Here, because Mr. Rocco had departed the residence before the execution of the warrant, law enforcement was not permitted to seize him under the *Summers*' justification—which only allows such seizure to necessitate the safe and efficient search of the premises. *Bailey*, 568 US at 201-202.

The district court nevertheless found the seizure of Mr. Rocco by HSI, via his probation officers, reasonable (and thus lawful) because:

> Officer Raymond had the authority to do a home visit, to require him to come back at

> any time, and the fact that it was beneficial to HSI doesn't change or make that authority improper in any way . . . And the fact that Mr. Rocco chose to bring the phone back was Mr. Rocco's decision. Nothing in the record suggests that HSI or Mr. Raymond was responsible for the decision to bring the phone. If Mr. Rocco had decided to throw the phone in the river or leave it at the office, presumably, we would be in a different position, but he chose to leave the house, and when he came back, at the direction of probation, he chose to bring the phone[.]

App. 52a-53a.

In upholding the district court's decision, the Fourth Circuit panel affirmed in a five-page *per curiam* opinion:

> Rocco asserts that law enforcement's seizure of his telephone during the execution of a search warrant on his residence was unconstitutional because, working in conjunction with law enforcement, his probation officer instructed him to return to his home, which brought him within the geographical location of law enforcement's search. However, Rocco, who was on supervised release at the time of law enforcement's search, was required to allow the probation officer to conduct at-home visits as a condition of his release. Thus, the probation officer's instruction that Rocco return home was only a minimal impingement on Rocco's privacy.

United States v. Rocco, 2025 WL 2602537, at *2 (4th Cir. Sept. 9, 2025); App. 5a-6a.

First, as it pertains to the district court opinion, for obvious reasons, it was Officer Raymond's "authority to do a home visit, [and] to require him to come back at any time" that made his *order* to Mr. Rocco to return home constitutionally problematic under *Bailey*. Should PO Raymond have been an independent citizen—not being directed by law enforcement and with no independent legal authority over the movements of Rocco—who merely requested that Mr. Rocco return home, then it would have been an entirely different situation, and HSI would have enjoyed a boon from happenstance. However, this is certainly not the situation presented to the Court now. Instead, the government would have this court hold that law enforcement's commandeering of a probation officer's power over their wards may be used as a sword—in ordering an individual into an area subject to a search warrant—and as a shield—by stating they cannot be held to account for their constitutional overreach because the probation officer had their own authority over the individual. Such a result has no basis in the law.

Second, as it pertains to the reasonableness of law enforcement's actions here—and Mr. Rocco's privacy interests—the Fourth Circuit panel opinion relied almost exclusively on *United States v. Knights*, 534 U.S. 112 (2001), wherein this Court examined the constitutionality of a warrantless search by law enforcement of a probationer's apartment. There, the probationer was subject to the explicit condition that he "'[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at *anytime*, *with or without a search warrant*, warrant of arrest or reasonable cause *by any probation officer or law enforcement officer*.'" *Id.* at 114 (emphasis added). Specifically, several days after the defendant in *Knights* had been placed on probation, police suspected that he had been involved in several incidents of arson/

vandalism. *Id.* at 115. Based upon that suspicion and pursuant to the search condition of his probation, the police conducted a warrantless search of the defendant's apartment and found paraphernalia related to arson and drugs. *Id.* at 115-116. Importantly, this Court observed that:

> Certainly nothing in the condition of probation suggests that it was confined to searches bearing upon probationary status and nothing more. The search condition provides that Knights will submit to a search "by any probation officer or law enforcement officer" and does not mention anything about purpose.

Id. at 116. In upholding the constitutionality of the search, the *Knights* Court held: "that the warrantless search of [defendant], supported by reasonable suspicion and *authorized by a condition of probation*, was reasonable within the meaning of the Fourth Amendment." *Id.* at 122 (emphasis added).

However, here, the Fourth Circuit panel's "reasonableness" analysis is at odds with controlling Fourth Circuit precedent, *United States v. Hill*, 776 F.3d 243 (4th Cir. 2015), discussing at length the implications of *Knights* as it relates to supervisees not subject to a warrantless search condition, and *United States v. Bradley*, 571 F.2d 787 (4th Cir. 1978)—relied on by the *Hill* Court. While of course not controlling on this Court, these two prior opinions are very persuasive and support Mr. Rocco's position here.

Briefly, in *Hill*, the defendant was on supervised release and was subject to the condition that he must permit probation officers to visit him at home at any time

and confiscate contraband in plain view. *Hill*, 776 F.3d at 245. The probation officer got a confidential tip that the defendant had changed residences without approval, and as a result, an arrest warrant was obtained. *Id.* To execute the supervised release warrant, the U.S. Marshals assembled a team that included both law enforcement and probation officials. *Id.* Once the team arrived at the residence, they arrested the defendants and then performed a walk-through of the home looking for evidence—along with sending a drug-detection dog. *Id.* at 246. In holding the walk-through and dog sniff unlawful, the Fourth Circuit held that: "law enforcement officers generally may not search the home of an individual on supervised release who is not subject to a warrantless search condition unless they have a warrant supported by probable cause." *Id.* at 249.

In support of its decision, the Fourth Circuit examined this Court's opinion in *United States v. Knights* at length. *Hill*, 776 F.3d at 248-249. Critically important, as this Fourth Circuit observed, was the fact that the defendant in *Knights* was subject to a warrantless search condition:

> To determine the search's reasonableness, [the *Knights* court] balanced the privacy intrusion against the government's need to conduct the search . . . Relevant to both was Knights's "status as a probationer subject to a search condition . . . The Court held that "the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. *In our view, however, the specific probation condition authorizing warrantless searches was critical to the Court's holding* . . . [The *Knights* court] underscored that the probation order

> clearly expressed the search condition and Knights was unambiguously informed of it. In contrast, the supervision condition to which the defendants agreed in this case required them to submit to a probation officer's visit and allowed an officer to confiscate contraband in plain view. But no condition authorized warrantless searches.

Id. at 249-250 (internal citations omitted) (emphasis added).

In ruling the warrantless search in *Hill* unlawful, the Fourth Circuit stated that the case before it was much more analogous to its previous case of *United States v. Bradley*, 571 F.2d 787 (4th Cir. 1978); where it held that "a parole officer must secure a warrant prior to conducting a search of a parolee's place of residence even where, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer." *Bradley*, 571 F.2d at 789. Indeed, while recognizing that "the governmental interest in supervision is great and the parolee's privacy interest is diminished[,]" *id.* and that society had an important "interest in having the parolee closely and properly supervised[,]" *id.* at 790, the *Bradley* court nevertheless found that these considerations did not excuse the parole officer from complying with the Fourth Amendment's warrant requirement. *Id.* Specifically, the *Bradley* court held that:

> While we recognize the important governmental interests at stake, we conclude that they have the effect of diminishing the rigorousness of the standard of cause which the parole

> officer must satisfy to obtain a warrant, not of removing the judicial protection which the warrant requirement interposes between the parole officer and the search . . . *abuse of discretion is more easily prevented by prior judicial approval than by post hoc judicial review.*

Bradley, 571 F.2d at 790 (internal citations omitted) (emphasis added).

Here, Mr. Rocco, like the defendants in *Hill* and *Bradley*, was not subject to a warrantless search/seizure condition for his phone. Indeed, "despite [Mr. Rocco's] reduced expectation of privacy, [he still] comes within the ambit of the Fourth Amendment's protection against unreasonable searches and seizures." *United States v. Bradley*, 571 F.2d 787, 789 n.2 (4th Cir. 1978). As such, the panel's rationale here must fail. "Rocco . . . was required to allow the probation officer to conduct at-home visits as a condition of his release[,]" *Rocco*, 2025 WL 2602537, at *2, but it was nevertheless unreasonable to permit the warrantless seizure of his phone outside the geographic scope of a residential search warrant—as both *Hill* and *Bradley* have held. Moreover, the probation officer was not conducting a "home visit"; this was just a farce concocted by law enforcement to use the probation officer's authority to bring Mr. Rocco back home.

The requirement that HSI obtain an independent search warrant for Rocco's device is especially important given the privacy protections we afford cellphones. *See Riley v. California*, 573 U.S. 373, 392 (2014) ("[t]he fact that an [individual] has diminished privacy interests does not

mean that the Fourth Amendment falls out of the picture entirely . . . To the contrary, when privacy-related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy of the [individual].") (internal citations omitted); *id.* 393-397 (" . . . a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.").

C. The Panel's Footnote Regarding Inevitable Discovery is Entitled to Little Weight.

In a footnote, the Fourth Circuit panel stated that it was affording the district court's decision regarding the applicability of the inevitable discovery doctrine "great deference," *United States v. Rocco*, 2025 WL 2602537, at *3 (4th Cir. Sept. 9, 2025) (unpublished *per curiam* decision). However, the underlying opinion of the district court was based on mere guesswork:

> . . . [probation] had the right to take possession of it and then seek a warrant. And in this circumstance, the evidence of the CSAM through that IP address and the search of the other devices . . . would have established probable cause and justified a warrant being issued for that phone had it been identified at a later time.

App. 54a.

It is black letter law that the doctrine of "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment," *Nix v. Williams*, 467 U.S. 431, n.5 (1984), and that "probable cause for a warrant, in and of itself and *without any evidence that the police would have acted to obtain a warrant*, does not trigger the inevitable discovery doctrine any more than probable cause, in and of itself, renders a warrantless search valid." *United States v. Allen*, 159 F.3d 832, 841 (4th Cir. 1998). The rationale for such a limitation of the doctrine is obvious, "[i]f evidence were admitted notwithstanding the officers' unexcused failure to obtain a warrant, simply because probable cause existed, then there would never be any reason for officers to seek a warrant." *United States v. Mejia*, 69 F.3d 309, 320 (9th Cir. 1995); *see also United States v. Brown*, 64 F.3d 1083, 1085 (7th Cir. 1995) ("what makes a discovery 'inevitable' is not probable cause alone . . . but probable cause plus a chain of events that would have led to a warrant (or another justification) independent of the search").

As such, the district court's assumption that, because there existed probable cause for a warrant, a warrant would have necessarily been issued is in clear contravention of established precedent and should be afforded no deference. This is because the government cannot establish, by a preponderance of the evidence, that there would have been an *inevitable chain* of events that would have inevitably led HSI agents (or probation) to search Rocco's phone. As such, the government cannot prove that the "illegal search played no real part in [the contraband's] discovery." *United States v. Whitehorn*, 813 F.2d 646, n.4. (4th Cir. 1987); *Hudson v. Michigan*,

547 U.S. 586, 616 (2006) ("inevitable" discovery refers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one.")

Indeed, this Court does not need to speculate on what the probation officer would have done had he learned that Mr. Rocco was suspected of a CSAM offense. The record is clear that on March 23, 2023, well before the April 21 search, PO Raymond was explicitly informed by HSI that Mr. Rocco was the subject of an ongoing investigation into CSAM. App. 15a. As such, it is hardly irrational to assume that PO Raymond would not have ordered a search of Mr. Rocco's phone after learning of the allegations against Rocco, because that is precisely what happened here; PO Raymond did nothing for a month in between being informed of the allegations and the April 21 search. App. 41a. Moreover, as stated above, the probation officer took no part in HSI's actions of following the seizure of the phone—the interview of Mr. Rocco or the actual search of the phone itself.

II. The Panel Opinion Conflicts with an Authoritative Decision of Another United States Court of Appeals.

Additionally, the Fourth Circuit panel opinion conflicts with the Ninth Circuit's opinion in *United States v. Ramirez*, 976 F.3d 946 (9th Cir. 2020); a case almost directly on point to the instant case, where the court held

that law enforcement's use of a third-party (like probation here) to trick a defendant back into the geographic scope of a search warrant (to create a *Summers*-type search/justification) rendered the search unreasonable and unlawful.[2]

As stated above, "[c]onducting a *Summers* seizure incident to the execution of a warrant is not the [g]overnment's right; it is an exception—justified by necessity—to a rule that would otherwise render the seizure unlawful." *Bailey v. United States*, 568 U.S. 186, 204 (2013) (internal citations omitted). Here, because Mr. Rocco had departed the residence before the execution of the warrant, law enforcement was not permitted to seize him under the *Summers*' justification. *Bailey*, 568 US at 201-202. Nor, as the Ninth Circuit made clear in *United States v. Ramirez*, 976 F.3d 946 (9th Cir. 2020), were law enforcement permitted to artificially create a *Summers*-type search/justification by tricking Mr. Rocco back onto the property to seize and search his phone. Such a ruse was designed to circumvent this Court's firmly established geographic rule, rendering it clearly unreasonable and requiring suppression of all derivative evidence.

In a case almost directly analogous to Rocco's, the Ninth Circuit in *Ramirez* had to grapple with law enforcement's use of a ruse to bring an individual, who had already departed the place to be searched, back into the *Summer*'s geographic boundary. There, just as in

2. The Supreme Court in *Michigan v. Summers*, 452 U.S. 692 (1981), and *Bailey v. United States*, 568 U.S. 186 (2013), created strict limitations on law enforcement's authority to detain individuals incident to the execution of a residence search warrant.

Rocco's case, FBI agents were conducting an undercover investigation into the file-sharing of CSAM through the BitTorrent file-sharing network, which eventually led them to an IP address registered to the defendant's address—during this undercover investigation, agents were able to pull 4,000 still images and 20 videos of suspected CSAM. *Ramirez*, 976 F.3d at 949. Again, as in *Rocco*, the FBI conducted surveillance of the defendant's residence on multiple occasions before seeking a warrant to search the premises. *Id.* Based on the foregoing, the agents in both *Rocco* and *Ramirez* obtained a search warrant for their respective subjects' homes. *Id.* The warrant in *Ramirez* only authorized agents to search the house and the car for the instrumentalities of the named offenses, just as in *Rocco*—with the exception that here, HSI agents did not seek permission to search Rocco's car.

Similar to *Rocco*, when the agents in *Ramirez* went to execute the warrant at the defendant's home, "no one was home, and the car was nowhere near. Instead of conducting the authorized search at that point, Agent Ratzlaff concocted a ruse to lure [defendant] home: he would call [defendant] at work, claim to be a police officer investigating a burglary at the residence, and tell [defendant] he needed to return home to confirm what was taken." *Id.* at 950. When the defendant did not answer his phone, the agents employed the defendant's mother in the ruse:

> Once [defendant]'s mother arrived at the [] residence, Agent Ratzlaff explained that he was not responding to a burglary but executing a search warrant in furtherance of a child

pornography investigation. [Defendant's mother] unlocked the door to allow the agents to conduct their search. Agent Ratzlaff then asked [defendant]'s mother to call her son and to continue the ruse about the burglary so that he would return home. [Defendant] promptly began driving home after his mother informed him of the burglary, returning the missed call from the FBI on the way. Agent Ratzlaff again identified himself as a police officer, told [defendant] there had been a burglary at his home, and said that they should wait until [defendant] arrived to discuss the matter further . . . It was not until [defendant] parked his car and approached the agents that Agent Ratzlaff finally revealed the true purpose of their investigation, explaining that he had used the ruse to induce [defendant] to come home and to speak to him about the FBI's child pornography investigation . . . After Agent Ratzlaff revealed that he had fabricated the burglary, he asked [defendant] to put his hands behind his back, placed [defendant] in a finger hold, frisked [him] [], and seized his phone, wallet, and keys. He then asked [defendant] if there was a private place where they could talk . . . The agents did not tell [defendant] that he was free to leave, although Agent Ratzlaff did inform him during the interview that he was not under arrest. By the end of the interview, [defendant] had confessed to viewing child pornography on his laptop . . . During this

> time, agents also searched [defendant]'s car and seized two laptops and two hard drives.

Id. at 950-951.[3]

The Ninth Circuit held that the aforementioned ruse ran afoul of the Fourth Amendment and found that the district court erred in failing to suppress the fruits of the search. Specifically, the Ninth Circuit held that:

> Permitting the agents' conduct [here] would eviscerate the limitations implemented by the *Summers* rule . . . "Conducting a *Summers* seizure incident to the execution of a warrant is not the [g]overnment's right; it is an exception . . . It also risks subverting the particularity requirements of the Fourth Amendment in future cases. *Law enforcement could turn a warrant to search a home into a warrant to search any number of items outside the home, so long as they could trick a resident into bringing those items to the home to be searched before the warrant was executed*. The deceit employed in this case opens a loophole that the Fourth Amendment does not condone.

Id. at 956 (emphasis added) (internal citations omitted). While the Ninth Circuit recognized that government

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3. In *Ramirez*, the district court held that the defendant's mother was acting at the behest of law enforcement when she communicated the purported burglary to her son. The situation here is identical. Clearly, Mr. Rocco's probation officer was, as the district court found, acting at the behest of HSI agents to bring Rocco within the ambit of the search warrant and the *Summers*' exception.

agents may deploy ruses: "[l]aw enforcement's use of deception is generally lawful when the chosen ruse hides the officer's identity as law enforcement and facilitates a search or seizure that is within its lawful authority[,]" *id.* at 946, however, "[a]ccess gained by a government agent, *known to be such by the person with whom the agent is dealing*, violates the fourth amendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation." *Id.* at 954 (emphasis in the original).

Here, the agents' exploitation of the relationship between Mr. Rocco and his probation officer—the fact that Rocco was required to follow the requests/instructions of his PO—is just as egregious as the abuse recognized in *Ramirez*. Indeed, as succinctly stated by Supreme Court Justice Marshall:

> . . . discussion[s] between a probation officer and a probationer is likely to be less coercive and intimidating than a discussion between a police officer and a suspect in custody. But it is precisely in that fact that the danger lies. In contrast to the inherently adversarial relationship between a suspect and a policeman, the relationship between a probationer and the officer to whom he reports is likely to incorporate elements of confidentiality, even friendship. . . . Through abuse of that trust, a probation officer can elicit admissions from a probationer that the probationer would be unlikely to make to a hostile police interrogator.

Minnesota v. Murphy, 465 U.S. 420, 559-460 (1984) (Marshall, J., dissenting opinion) (internal citations omitted).

Plainly, "[Rocco's] Fourth Amendment interest is near its zenith in this case because the agents betrayed [Rocco]'s trust in [his probation officer] in order to conduct searches and seizures beyond what they were lawfully authorized to do." *United States v. Ramirez*, 976 F.3d 946, 959 (9th Cir. 2020). Indeed, it was precisely this relationship that HSI agents sought to exploit by inviting Mr. Rocco's probation officer to the search on April 21. As made abundantly clear in the preceding section, PO Raymond was not part of the task force that was investigating the Rocco residence, and the search was not conducted on behalf of probation. As such, the only conceivable purpose that HSI agents would have in inviting PO Raymond, an outside third party, to the scene that day was to exploit the admittedly good relationship enjoyed between Rocco and Raymond should the need arise. This relationship also had the added benefit of being implicitly coercive, as Mr. Rocco had to comply with his probation officer's instructions and answer questions put to him truthfully.

In contrast to *Rocco*'s strong Fourth Amendment interests, like in *Ramirez*, the government's interest in employing such a ruse is plainly insufficient (or simply illusory), rendering the subsequent search unreasonable. As in *Ramirez*, HSI agents here did not need to deploy the ruse to avoid breaking down the residence's door, as it is undisputed that Mr. Rocco's father was home at the time and could have given agents entry into the home. *See Ramirez*, 976 F.3d. at 957. Moreover, there is no support for the proposition that, absent the use of the ruse, Rocco was

intending or preparing to destroy evidence located on the phone itself. As such, here the government can articulate

> no reason why the agents could not have simply waited to execute the warrant until [defendant] returned home of his own accord, or waited to approach [defendant] at a different time or on a different day entirely . . . We have never recognized inconvenience or impatience as justification for exceeding the scope of a lawfully issued warrant. *See Bailey*, 568 U.S. at 199; *McDonald*, 335 U.S. at 455 ("[I]nconvenience of the officers and delay in preparing papers and getting before a magistrate . . . are no justification for by-passing the constitutional requirement.").

Ramirez, 976 F.3d at 957; *compare with United States v. Harris*, 961 F. Supp. 1127 (S.D. Ohio 1997) (where the court approved the use of a ruse to lure a defendant out of his home as it was reasonable and necessary for the protection of the officers; law enforcement had learned that the defendant had ordered and received vials of the bacteria that caused the bubonic plague).

Simply stated, "[l]aw enforcement does not have *carte blanche* to use deception to effect a search and seizure. A ruse that reveals the officers' identity as law enforcement but misrepresents the purpose of their investigation so that the officers can evade limitations on their authority[,]" *Ramirez*, 976 F.3d at 955, runs afoul of the Fourth Amendment's prohibition on unreasonable searches and seizures and any evidence obtained by such a search must be excluded from the government's case-in-chief.

As such, the government's deployment of a ruse to obtain Mr. Rocco's cellphone was an unconstitutional end-run around the mandates set out in *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (holding that a warrant to search for contraband founded on probable cause implicitly carries with it the *limited authority* to detain the occupants of the premises while a proper search is conducted) and *Bailey v. United States*, 568 U.S. 186, 199 (2013) (holding that "[t]he categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched.").

CONCLUSION

Based on the foregoing, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 9, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-4609

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MATTHEW SCOTT ROCCO,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Michael Stefan Nachmanoff, District Judge. (1:24-cr-00025-MSN-1)

Submitted: September 2, 2025 Decided: September 9, 2025

Before THACKER and HEYTENS, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

Appendix A

PER CURIAM:

Matthew Scott Rocco appeals his convictions for receiving child pornography, in violation of 18 U.S.C. § 2252(a)(2), (b)(1), and possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4), (b)(2). Rocco challenges only the district court's denial of his motion to suppress evidence from a cellular telephone that law enforcement seized during its execution of a valid search warrant for Rocco's residence. According to Rocco, law enforcement violated the Fourth Amendment and the "spatial constraint" the Supreme Court pronounced in *Bailey v. United States*, 568 U.S. 186, 199, 201 (2013), when his probation officer directed him to return home so he would be present while law enforcement executed the warrant. Finding no error, we affirm.

"We review factual findings underlying a motion to suppress for clear error and legal determinations de novo." *United States v. Davis*, 94 F.4th 310, 316 (4th Cir. 2024). Where, "as here, the district court denies the motion to suppress, this [c]ourt construes the evidence in the light most favorable to the government." *United States v. Fall*, 955 F.3d 363, 370 (4th Cir. 2020) (internal quotation marks and brackets omitted).

Moreover, clear error occurs only "when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Cox*, 744 F.3d 305, 308 (4th Cir. 2014) (internal quotation marks and ellipses). Thus, "[i]f the district court's account of the evidence is plausible in

light of the record viewed in its entirety," *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985), "we will not reverse the district court's finding simply because we have become convinced that we would have decided the fact differently," *United States v. Stevenson*, 396 F.3d 538, 542 (4th Cir. 2005).

The Supreme Court has explained that "[t]he touchstone of the Fourth Amendment is reasonableness, and . . . is determined by assessing, on the one hand, the degree to which [law enforcement] intrudes upon an individual's privacy and, on the other, the degree to which [a search or seizure] is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (internal quotation marks omitted); *see Bailey v. United States*, 568 U.S. 186, 192-99 (2013) (conducting same balancing analysis to determine legality of law enforcement's seizure of defendant's person). In conducting this balancing analysis, courts must "examin[e] the totality of the circumstances." *Knights*, 534 U.S. at 118 (internal quotation marks omitted).

In *Knights*, for instance, the Supreme Court was faced with determining the reasonableness of law enforcement's warrantless search of a probationer subject to a general search condition that required the defendant to "submit to a search 'by any probation officer or law enforcement officer.'" *Id.* at 116. In conducting its balancing analysis to decide the defendant's motion to suppress seized evidence, the Supreme Court explained that a court must "examin[e] the totality of the circumstances, with the probation

search condition being a salient circumstance."[1] *Id.* at 118 (internal quotation marks and citation omitted).

As the Supreme Court explained, the defendant's "status as a probationer subject to a search condition informs both sides of that balance" because "[p]robation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." *Id.* at 119 (internal quotation marks omitted). Thus, "[i]nherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." *Id.* (internal quotation marks omitted). And "[j]ust as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Id.*

On the other hand, the Supreme Court has unequivocally held that the government's interests in

1. Courts consistently analyze probation, supervised release, and parole searches and seizures under the same framework and treat them generally interchangeably, although parolees have lower privacy interests than probationers. *See, e.g.*, *Samson v. California*, 547 U.S. 843, 850 (2006) (analyzing legality of search of probationer under its holding in *Knights*, and observing that "parolees have fewer expectations of privacy than probationers[] because parole is more akin to imprisonment than probation is to imprisonment"); *United States v. Reyes*, 283 F.3d 446, 461 (2d Cir. 2002) (applying same principles to search of federal supervised releasee because "[a] convicted person serving a term of supervised release must comply with certain conditions, enforced by federal probation officers, or face further penal sanctions").

conducting searches on supervisees and parolees, for instance, "are substantial" because such individuals "are more likely to commit future criminal offenses." *Samson*, 547 U.S. at 853 (internal quotation marks omitted). The Supreme Court has also acknowledged the government's "interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees," which "warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Id.* Accordingly, when conducting the totality of the circumstances balancing analysis, courts have upheld intrusions on the privacy interests of persons under court supervision under lower standards than the Fourth Amendment normally requires. *See, e.g.*, *Knights*, 534 U.S. at 121 ("When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable."); *Reyes*, 283 F.3d at 462 (concluding that, because "home visits 'at any time'" conducted pursuant to a supervised release condition are "far less intrusive than a probation search, probation officers conducting a home visit are not subject to the reasonable suspicion standard" (emphasis omitted)).

Rocco asserts that law enforcement's seizure of his telephone during the execution of a search warrant on his residence was unconstitutional because, working in conjunction with law enforcement, his probation officer instructed him to return to his home, which brought him within the geographical location of law enforcement's

search. However, Rocco, who was on supervised release at the time of law enforcement's search, was required to allow the probation officer to conduct at-home visits as a condition of his release. Thus, the probation officer's instruction that Rocco return home was only a minimal impingement on Rocco's privacy.

Regarding the Government's interests, "[i]t was reasonable to conclude that the [imposed] condition[s] would further the two primary goals of [supervised release]—rehabilitation and protecting society from future criminal violations." *Knights*, 534 U.S. at 119; *see United States v. Hamilton*, 986 F.3d 413, 418 (4th Cir. 2021) ("Key among [the primary goals of federal supervised release] are protection of the public and rehabilitation of the defendant." (internal citations omitted)). Indeed, the probation officer had a significant interest in ensuring that Rocco was complying with the terms of his release and was not harming the public by engaging in further crimes. Notably, Rocco is a recidivist who had already violated the terms of his supervised release and, given law enforcement's possession of a residential search warrant, there was probable cause to believe that Rocco was violating again.

We therefore conclude that the district court did not err when it denied Rocco's motion to suppress and, thus, affirm the criminal judgment.[2] We dispense with oral

2. Given law enforcement's investigation into Rocco's conduct while on supervised release, as well as the probation officer's full knowledge of that investigation, we also defer to the district court's alternative finding that inevitable discovery doctrine

argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

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applies in this case. *See United States v. Alston*, 941 F.3d 132, 137 (4th Cir. 2019) (explaining that evidence obtained illegally is admissible pursuant to the inevitable discovery doctrine "if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means" (internal quotation marks and brackets omitted)); *see also United States v. Bullette*, 854 F.3d 261, 265 (4th Cir. 2017) (explaining that "[w]hether law enforcement would have inevitably discovered the evidence by lawful means is a question of fact," and that this court "accord[s] great deference to the district court's findings").

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 9, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-4609
(1:24-cr-00025-MSN-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MATTHEW SCOTT ROCCO,

Defendant-Appellant.

Filed: September 9, 2025

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED JUNE 6, 2024

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case Number 1:24-cr-25

UNITED STATES OF AMERICA

v.

MATTHEW SCOTT ROCCO,

Defendant.

Filed June 6, 2024

ORDER

This matter came before the Court on three motions filed by the defendant: (1) a motion to suppress the fruits of the search of defendant's cell phone (ECF 30), to which the government filed an opposition (ECF 40) and the defendant filed a reply (ECF 41); (2) a motion in limine to exclude evidence of the defendant's prior conviction and supervised release status (ECF 32), to which the government filed an opposition (ECF 39); and (3) a motion to issue a subpoena for defendant's probation file (ECF 42). The Court reviewed the pleadings and heard oral argument at the motions hearing on June 6, 2024. For the reasons stated from the bench, it is hereby

ORDERED that defendant's motion to suppress (ECF 30) is DENIED; it is further

ORDERED that defendant's motion in limine (ECF 32) is DENIED in part and RESERVED in part; and it is further

ORDERED that defendant's motion for a subpoena (ECF 42) is DENIED AS MOOT.

It is so ORDERED.

/s/
Michael S. Nachmanoff
United States District Judge

June 6, 2024
Alexandria, Virginia

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED OCTOBER 7, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-4609 (1:24-cr-00025-MSN-1)

UNITED STATES OF AMERICA

Plaintiff-Appellee ,

v.

MATTHEW SCOTT ROCCO

Defendant-Appellant.

Filed October 7, 2025

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Thacker, Judge Heytens, and Senior Judge Keenan.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

24-4609

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

– v. –

MATTHEW SCOTT ROCCO,

Defendant/Appellant.

Filed September 22, 2025

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

[TABLES OMITTED INTENTIONALLY]

STATEMENT OF PURPOSE

Matthew Rocco petitions for a panel rehearing and for a rehearing *en banc*. The panel's prior *per curiam* opinion

conflicts with firmly established precedent of this Court and another Court of Appeals. *See* Fed. R. App. P. 40(b)(1) and (2)(A) and (C).

While it is true that courts have held that persons under court supervision enjoy lower Fourth Amendment protections than the average citizen, *United States v. Knights*, 534 U.S. 112, 121 (2001); the panel opinion fails to recognize that the degree of Fourth Amendment protection owed to a court supervisee is on a continuum. Here, the panel opinion fails to acknowledge that Mr. Rocco was not subject to any condition of release that permitted law enforcement to warrantlessly seize and search his cellphone. As such, the degree of privacy that Mr. Rocco could expect in relation to his cellphone was higher than that of a supervisee who was subject to a warrantless search condition.

Specifically, while the panel opinion primarily relied on the Supreme Court case of *United States v. Knights*, 534 U.S. 112 (2001), wherein the Court upheld the warrantless search of a supervisee's residence, who was subject to a warrantless search condition of release. *Id.* at 114. The panel opinion here is nevertheless in conflict with this Court's later published and controlling opinions in *United States v. Hill*, 776 F.3d 243 (4th Cir. 2015) and *United States v. Bradley,* 571 F.2d 787 (4th Cir. 1978). Indeed, the *Hill* Court specifically addressed the reach of *Knights* and held unconstitutional the warrantless search of a supervisee's property, who, like Mr. Rocco, was not subject to a warrantless search condition of release. As such, the panel's decision—that because Rocco was subject

to home visits, law enforcement could warrantlessly seize his phone—is directly "in conflict with a decision of [] this Court []," 4th Cir. Rule 40(b)(iii).

Separately, the panel decision's Fourth Amendment reasonableness analysis—regarding the use of a ruse to lure Mr. Rocco back into the geographic scope of a residential search warrant—is in direct conflict with another circuit's authority, namely *United States v. Ramirez*, 976 F.3d 946, 956 (9th Cir. 2020) (holding that employed ruse would "eviscerate the limitations implemented by the *Summers* rule, allowing law enforcement to seize people located away from the premises to be searched."). Thus, further supporting Mr. Rocco's petition for a rehearing. Fed. R. App. P. 40(b)(2)(C).

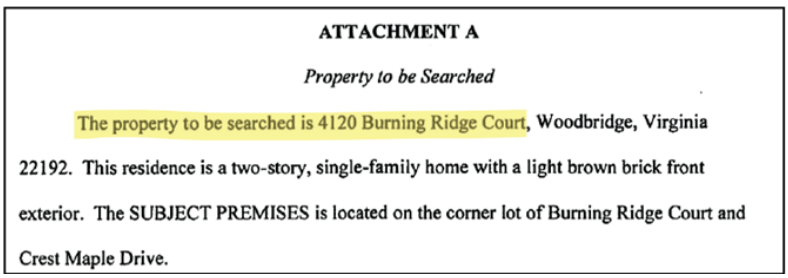
STATEMENT OF THE CASE

In the months and weeks preceding the April 2023 search at issue here, the Virginia State Police conducted an online undercover investigation into the online sharing of Child Sexual Abuse Material ("CSAM"). JA345. During this investigation, a number of suspected CSAM files were allegedly downloaded via a law enforcement version of the BitTorrent program from the IP address associated with the Rocco home. JA370. The affidavit does not state what particular device within the home hosted these files or who they belonged to; it merely shows that the referenced whole-home IP address hosted these files. JA346-347. At some point, the investigation was turned over to Homeland Security Investigations ("HSI").

On March 23, 2023, Mr. Rocco's Probation Officer—PO Raymond—received a call from SA Collins—the lead

HSI agent in charge of the home search—informing him that SA Collins' task force was investigating Mr. Rocco for potential CSAM violations. JA80-81, ¶4. Besides being informed of Rocco's status as the subject of an active CSAM investigation, PO Raymond did not know anything further about the HSI investigation, and importantly, took no action as a result of SA Collins' call. JA81.

On April 19, 2023, based on the information detailed above, HSI agents obtained a search warrant for Mr. Rocco's home. JA376. The search warrant that the task force received only authorized law enforcement to search the Rocco residence; the warrant *did not* provide the authority for an independent seizure and/or search of Mr. Rocco's cellphone, or anything else, outside the presence or curtilage of his home:



ATTACHMENT A

Property to be Searched

The property to be searched is 4120 Burning Ridge Court, Woodbridge, Virginia 22192. This residence is a two-story, single-family home with a light brown brick front exterior. The SUBJECT PREMISES is located on the corner lot of Burning Ridge Court and Crest Maple Drive.

JA382 (Search Warrant for Rocco Residence) (highlight added).[1]

A day or two before the search warrant was set to be executed, SA Collins telephoned PO Raymond again and asked him to be present at the search of the Rocco

1. The search warrant also allowed for the seizure and search of electronic devices found within the Rocco home. JA384.

home, due to the fact that he (PO Raymond) had a good relationship with the Rocco family, and he (SA Collins) thought it would make the search go by smoothly. JA81, ¶5.

On the day of the search, at approximately 5:05 a.m., state law enforcement officials arrived on scene and began conducting surveillance of the Rocco home. JA376. Other members of the task force—which included Mr. Rocco's probation officers—waited at a staging location a few miles away. JA48. Almost an hour later, these officers observed Mr. Rocco exit his home and drive away. JA376.

As the district court found, a short time after Mr. Rocco left his residence, SA Collins called PO Raymond and directed that he (PO Raymond) order Mr. Rocco to return home for a "probation matter." JA81; JA376; JA120 ("the Court is, for the purposes of this motion, finding, for purposes of argument, that [PO] Raymond was directed by HSI to bring Mr. Rocco back or to make that call."). Being ordered back to his home by his Probation Officer—under the ruse of a home visit which he was required to comply with—Mr. Rocco followed his probation officer's instructions, terminated his commute to work, and returned to his residence.

At approximately 6:10 a.m., "HSI special agents and US Probation personnel arrived on-scene of the [Rocco] residence to serve the search and seizure warrant… as personnel were approaching the residence, [Mr. Rocco] exited the garage and greeted [PO] Raymond [who was then joined] by HSI [SA] Collins on the driveway of the residence." JA376. Within a matter of minutes, Mr. Rocco

saw nearly a dozen law enforcement officers approach his residence, detain him, and subject him to a pat-down search of his person—wherein SA Collins confiscated a utility knife, a wallet, and a Samsung cellphone. JA376. Probation never touched Mr. Rocco's phone that day. Immediately following this, Mr. Rocco complied with SA Collins' request to sit down for an interview; probation was not present for the interview. JA393.

Later, an HSI computer forensic examination of the electronic devices seized showed that there was no CSAM stored on these devices, with the exception of Mr. Rocco's cellphone. JA312. On the cellphone, the HSI examiner found approximately ten files in the phone's cache of possible CSAM. JA401. Before the forensic examination, the Probation Officer's robust monitoring software installed on Mr. Rocco's cellphone detected no signs of CSAM. JA108. Importantly, as the related SRV Petition makes clear, the April 21 search of the home was not done at the behest Mr. Rocco's probation officer:

On March 23, 2023, this officer received a telephone call from Special Agent Jeffrey Collins with Homeland Security Investigations (HSI). Special Agent Collins advised this officer that Mr. Rocco was currently being investigated by the Northern Virginia/Washington D.C. Internet Crimes Against Children Task Force for allegedly downloading and distributing numerous files of child sexual abuse material and/or child pornography. Special Agent Collins stated that a search warrant was being sought and that he would keep the probation office informed as to the status of the investigation and warrant request.

Subsequent to serving a search warrant on April 21, 2023, Special Agent Collins notified this officer that ten (10) videos were retrieved from an SD/MicroSD card located in Mr. Rocco's personal smart phone and that after review of the videos, all contained sexually explicit material, to include child pornography. Although it cannot be determined when the videos were uploaded to the SD card, they were last modified in April 2022.

JA401 (highlights added).

Finding the search and seizure proper, the district court denied Mr. Rocco's motion to suppress, and Mr. Rocco was convicted of receiving child pornography, in violation of 18 U.S.C. § 2252(a)(2), (b)(1), and possession of

child pornography, in violation of 18 U.S.C. § 2252(a)(4), (b)(2). In upholding the district court's decision, the panel affirmed in a five-page *per curiam* opinion:

> Rocco asserts that law enforcement's seizure of his telephone during the execution of a search warrant on his residence was unconstitutional because, working in conjunction with law enforcement, his probation officer instructed him to return to his home, which brought him within the geographical location of law enforcement's search. However, Rocco, who was on supervised release at the time of law enforcement's search, was required to allow the probation officer to conduct at-home visits as a condition of his release. Thus, the probation officer's instruction that Rocco return home was only a minimal impingement on Rocco's privacy.

United States v. Rocco, 2025 WL 2602537, at *2 (4th Cir. Sept. 9, 2025).

ARGUMENT

I. The Panel Opinion is in Conflict with Controlling Fourth Circuit Precedent Regarding Supervisee's Fourth Amendment Protections.

In holding that the seizure and search of Mr. Rocco's cellphone was reasonable—balancing Rocco's privacy rights against that of the government's interest

in performing the search—the panel opinion relied almost exclusively on *United States v. Knights*, 534 U.S. 112 (2001); wherein the Supreme Court examined the constitutionality of a warrantless search by law enforcement of a probationer's apartment. There, the probationer was subject to the explicit condition that he "'[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at *anytime*, *with or without a search warrant*, warrant of arrest or reasonable cause *by any probation officer or law enforcement officer*.'" *Id.,* at 114 (emphasis added). Specifically, several days after the defendant in *Knights* had been placed on probation, police suspected that he had been involved in several incidents of arson/vandalism. *Id.,* at 115. Based upon that suspicion and pursuant to the search condition of his probation, the police conducted a warrantless search of the defendant's apartment and found arson and drug paraphernalia. *Id.,* at 115–116. Importantly, the Court observed that:

> Certainly nothing in the condition of probation suggests that it was confined to searches bearing upon probationary status and nothing more. The search condition provides that Knights will submit to a search "by any probation officer or law enforcement officer" and does not mention anything about purpose.

Id., at 116. In upholding the constitutionality of the search, the Supreme Court held: "that the warrantless search of [defendant], supported by reasonable suspicion and

authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." *Id.*, at 122 (emphasis added).

However, here, the panel's "reasonableness"/privacy analysis is at odds with controlling Fourth Circuit precedent, *United States v. Hill*, 776 F.3d 243 (4th Cir. 2015), discussing at length the implications of *Knights* as it relates to supervisees not subject to a warrantless search condition, and *United States v. Bradley,* 571 F.2d 787 (4th Cir.1978)—relied on by the *Hill* Court.

Briefly, in *Hill,* the defendant was on supervised release and was subject to the condition that he must permit probation officers to visit him at home at any time and confiscate contraband in plain view. *Hill*, 776 F.3d at 245. The probation officer got a confidential tip that the defendant had changed residences without approval, and as a result, an arrest warrant was obtained. *Id.* To execute the supervised release warrant, the U.S. Marshals assembled a team that included both law enforcement and probation officials. *Id.* Once the team arrived at the residence, they arrested the defendants and then performed a walk-through of the home looking for evidence—along with sending a drug-detection dog. *Id.*, at 246. In holding the walk-through and dog sniff unlawful, this Court held that: "law enforcement officers generally may not search the home of an individual on supervised release who is not subject to a warrantless search condition unless they have a warrant supported by probable cause." *Id.*, at 249.

Appendix E

In support of its decision, this Court examined *United States v. Knights* at length. *Hill*, 776 F.3d at 248-249. Critically important, as this Court observed, was the fact that the defendant in *Knights* was subject to a warrantless search condition:

> To determine the search's reasonableness, [the *Knights* court] balanced the privacy intrusion against the government's need to conduct the search ... Relevant to both was Knights's "status as a probationer subject to a search condition… The Court held that "the balance of these considerations requires no more than reasonable suspicion to conduct a search of *this* probationer's house. *In our view, however, the specific probation condition authorizing warrantless searches was critical to the Court's holding*… [The *Knights* court] underscored that the probation order clearly expressed the search condition and Knights was unambiguously informed of it. In contrast, the supervision condition to which the defendants agreed in this case required them to submit to a probation officer's visit and allowed an officer to confiscate contraband in plain view. But no condition authorized warrantless searches."

Id., at 249-250 (emphasis added).

In ruling the warrantless search in *Hill* unlawful, the court stated that the case before it was much more

analogous to its previous case of *United States v. Bradley*, 571 F.2d 787 (4th Cir. 1978); where it held that "a parole officer must secure a warrant prior to conducting a search of a parolee's place of residence even where, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer." *Bradley,* 571 F.2d at 789. Indeed, while recognizing that "the governmental interest in supervision is great and the parolee's privacy interest is diminished[,]" *id.*, and that society had an important "interest in having the parolee closely and properly supervised[,]" *Id.* at 790, the *Bradley* court nevertheless found that these considerations did not excuse the parole officer from complying with the Fourth Amendment's warrant requirement. *Id.* Specifically, the *Bradley* court held that:

> While we recognize the important governmental interests at stake, we conclude that they have the effect of diminishing the rigorousness of the standard of cause which the parole officer must satisfy to obtain a warrant, not of removing the judicial protection which the warrant requirement interposes between the parole officer and the search … *abuse of discretion is more easily prevented by prior judicial approval than by post hoc judicial review.*

Bradley, 571 F.2d at 790 (internal citations omitted) (emphasis added).

Here, Mr. Rocco, like the defendants in *Hill* and *Bradley*, was not subject to a warrantless search/seizure condition for his phone. Indeed, "despite [Mr. Rocco's] reduced expectation of privacy, [he still] comes within the ambit of the Fourth Amendment's protection against unreasonable searches and seizures." *United States v. Bradley*, 571 F.2d 787, 789 n.2 (4th Cir. 1978). As such, the panel's rationale here that because "Rocco, who was on supervised release at the time of law enforcement's search, was required to allow the probation officer to conduct at-home visits as a condition of his release[,]" *Rocco*, 2025 WL 2602537, at *2, was grounds enough to permit the warrantless seizure of a phone outside the geographic scope of a residential search warrant must fail—as it did in both *Hill* and *Bradley*.

The requirement that HSI obtain an independent search warrant for Rocco's device is especially important given the privacy protections we afford cellphones. *See Riley v. California*, 573 U.S. 373, 392 (2014) ("[t]he fact that an [individual] has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely… To the contrary, when privacy-related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy of the [individual].") (internal citations omitted); *id.*, 393-397 ("… a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.").

II. The Panel Opinion Conflicts with an Authoritative Decision of Another United States Court of Appeals.

Additionally, the panel opinion is in conflict with the Ninth Circuit case of *United States v. Ramirez*, 976 F.3d 946 (9th Cir. 2020). A case almost directly on point, where the court held that law enforcement's use of a third-party (like probation here) to trick a defendant back into the geographic scope of a search warrant (to create a *Summers*-type search/justification) rendered the search unreasonable and unlawful.[2]

Briefly, in *Ramirez,* just as in Rocco's case, FBI agents were conducting an undercover investigation into the file-sharing of CSAM through the BitTorrent file-sharing network, which eventually led them to an IP address registered to the defendant's address. *Ramirez*, 976 F.3d at 949. Again, like in Rocco, the FBI conducted surveillance on the defendant's residence on multiple occasions prior to them seeking a warrant to search the premises. *Id.* Based on the foregoing, the investigators in both Rocco and *Ramirez* obtained a search warrant for their respective subjects' homes. *Id.* The warrant in *Ramirez* only authorized agents to search the house and the car for the instrumentalities of the named offenses,

2. The Supreme Court in *Michigan v. Summers*, 452 U.S. 692 (1981), and *Bailey v. United States*, 568 U.S. 186 (2013), created strict limitations on law enforcement's authority to detain individuals incident to the execution of a residence search warrant.

just as in Rocco—with the exception that here, HSI agents did not seek permission to search Rocco's car. *Id.* at 949-950; JA 364.

Similar to Rocco, when the agents in *Ramirez* went to execute the warrant at the defendant's home, "no one was home … [and] [i]nstead of conducting the authorized search at that point, Agent Ratzlaff concocted a ruse to lure [defendant] home: he would call [defendant] at work, claim to be a police officer investigating a burglary at the residence, and tell [defendant] he needed to return home to confirm what was taken." *Id.* at 950. When the defendant did not answer his phone, the agents employed the defendant's mother in the ruse:

> Once [defendant]'s mother arrived at the [] residence, Agent Ratzlaff explained that he was not responding to a burglary but executing a search warrant… Agent Ratzlaff then asked [defendant]'s mother to call her son and to continue the ruse about the burglary so that he would return home. [Defendant] promptly began driving home after his mother informed him of the burglary, returning the missed call from the FBI on the way. Agent Ratzlaff again identified himself as a police officer, told [defendant] there had been a burglary at his home… It was not until [defendant] parked his car and approached the agents that Agent Ratzlaff finally revealed the true purpose of

> their investigation… After Agent Ratzlaff revealed that he had fabricated the burglary, he asked [defendant] to put his hands behind his back, placed [defendant] in a finger hold, frisked [him] [], and seized his phone, wallet, and keys…

Id. at 950-951.

The Ninth Circuit held that the aforementioned ruse ran afoul of the Fourth Amendment and found that the district court erred in failing to suppress the fruits of the search. Specifically, the Ninth Circuit held that:

> Permitting the agents' conduct [here] would eviscerate the limitations implemented by the *Summers* rule… "Conducting a *Summers* seizure incident to the execution of a warrant is not the [g]overnment's right; it is an exception… It also risks subverting the particularity requirements of the Fourth Amendment in future cases. *Law enforcement could turn a warrant to search a home into a warrant to search any number of items outside the home, so long as they could trick a resident into bringing those items to the home to be searched before the warrant was executed.* The deceit employed in this case opens a loophole that the Fourth Amendment does not condone.

Id. at 956 (emphasis added) (internal citations omitted). While the Ninth Circuit recognized that government agents may deploy ruses: "[l]aw enforcement's use of deception is generally lawful when the chosen ruse hides the officer's identity as law enforcement and facilitates a search or seizure that is within its lawful authority[,]" *id.* at 946, however, "[a]ccess gained by a government agent, *known to be such by the person with whom the agent is dealing*, violates the fourth amendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation." *Id.* at 954 (emphasis in the original).

Here, the agents' exploitation of the relationship between Mr. Rocco and his probation officer—the fact that Rocco was required to follow the requests/instructions of his PO—is just as egregious as the abuse recognized in *Ramirez.* Indeed, as succinctly stated by Supreme Court Justice Marshall:

> … discussion[s] between a probation officer and a probationer is likely to be less coercive and intimidating than a discussion between a police officer and a suspect in custody. But it is precisely in that fact that the danger lies. In contrast to the inherently adversarial relationship between a suspect and a policeman, the relationship between a probationer and the officer to whom he reports is likely to incorporate elements of confidentiality, even friendship…. Through

> abuse of that trust, a probation officer can elicit admissions from a probationer that the probationer would be unlikely to make to a hostile police interrogator."

Minnesota v. Murphy, 465 U.S. 420, 559-460 (1984) (Marshall, J., dissenting opinion).

Plainly, "[Rocco's] Fourth Amendment interest is near its zenith in this case because the agents betrayed [Rocco]'s trust in [his probation officer] in order to conduct searches and seizures beyond what they were lawfully authorized to do." *United States v. Ramirez*, 976 F.3d 946, 959 (9th Cir. 2020).

III. The Panel's Footnote Regarding Inevitable Discovery is Entitled to Little Weight.

In a footnote, the panel states that it was affording the district court's decision regarding the applicability of the inevitable discovery doctrine "great deference," *United States v. Rocco*, 2025 WL 2602537, at *3 (4th Cir. Sept. 9, 2025) (unpublished *per curiam* decision). However, the underlying opinion of the district court was based on mere guesswork:

> And even if Mr. Rocco had not consented to the search of the device, [probation] had the right to take possession of it and then seek a warrant. And in this circumstance, the evidence of the CSAM through that IP address and the search of the other devices … would have established

> probable cause and justified a warrant being issued for that phone had it been identified at a later time.

JA122.

It is black letter law that the doctrine of "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *United States v. Allen*, 159 F.3d 832, 839 (4th Cir. 1998), and that "probable cause for a warrant, in and of itself and *without any evidence that the police would have acted to obtain a warrant*, does not trigger the inevitable discovery doctrine any more than probable cause, in and of itself, renders a warrantless search valid." *Allen*, 159 F.3d at 841. As such, the district court's assumption that, because there existed probable cause for a warrant, a warrant would have been issued is in clear contravention of established Fourth Circuit precedent and should be afforded no deference.

More to the point, we do not need to speculate what the probation officer would have done if he had learned that Mr. Rocco was suspected of a CSAM offense. It is not disputed that on March 23, 2023, well before the April 21 search, PO Raymond was explicitly informed by HSI that Mr. Rocco was the subject of an ongoing investigation into CSAM. *See* JA401; JA47, ¶2. As such, it is hardly irrational to assume that PO Raymond would not have ordered a search of Mr. Rocco's phone after learning of the allegations against Rocco, because that is *precisely what*

happened here; PO Raymond did nothing for a month in between being informed of the allegations and the April 21 search.

CONCLUSION

Based on the foregoing, Mr. Rocco respectfully requests that the panel order rehearing. Alternatively, Mr. Rocco respectfully requests that the full Court rehear this matter *en banc*.

Respectfully submitted,

MATTHEW ROCCO,

By Counsel

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APPENDIX F — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, TAKEN JUNE 6, 2024

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal Action
No. 1:24-cv-00025-MSN-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

MATTHEW SCOTT ROCCO,

Defendant.

June 6, 2024
10:43 a.m. – 11:29 a.m.

TRANSCRIPT OF MOTION PROCEEDINGS BEFORE THE HONORABLE MICHAEL S. NACHMANOFF, UNITED STATES DISTRICT JUDGE

* * *

[2]THE COURTROOM DEPUTY: *United States v. Matthew Rocco*, Case Number 24-cr-25.

Appendix F

MS. SERANO: Good morning, Your Honor. Alessandra Serano and Nadia Prinz on behalf of the United States.

THE COURT: Good morning.

MR. ELLIS: Good morning, sir. Yancey Ellis and Zachary Deubler on behalf of Mr. Rocco.

THE COURT: Good morning. Let's wait a moment until he is available before we begin.

All right. Mr. Rocco, good morning. Mr. Rocco is now present and we may begin.

We have three motions on the docket this morning: A motion to suppress, a motion *in limine*, and a motion for the issuance of a subpoena which is related to the motion to suppress. Let me address that as a preliminary matter. Have the parties discussed that? Is that issue resolved? Do the parties believe we can go forward with the motion to suppress before that issue is resolved?

MR. PRINZ: Your Honor, if I may just speak for the government, we have not had further discussions with defense counsel with regard to their motion, not since the motion was filed.

THE COURT: But I don't believe I've received an opposition to the motion or a pleading filed, have I?

MS. PRINZ: No, Your Honor. We are not objecting to [3]the motion.

THE COURT: Well, have you provided the materials? The motion is for the production of the materials; is it not?

MS. PRINZ: Your Honor, my understanding is that defense counsel's motion is for production of the probation file. We are not able to provide that. We had actually spoken with probation about that matter, and we had made clear to defense counsel that that is in the custody of the Court and not in the custody of the government, and for that reason, defense counsel would have to petition the Court as it is our understanding that we would have to as well were we seeking this material.

THE COURT: All right.

MR. ELLIS: That is the response I received, Your Honor. I would say, Your Honor, I think we can move forward today on the motion to suppress. Should there be any issues that the Court is unclear about that could be relevant from the probation files, we would, perhaps, ask for an opportunity to inspect them and submit an additional brief to the Court, but we were told that the United States didn't have access to it, and that's why we submitted the motion to the Court.

THE COURT: All right. Well, I agree that I think we can go forward, and to the extent you think there's something that needs to be addressed that has been insufficiently [4]addressed through the process of the motion to suppress, we can address it at that time.

So I've received the briefing and I've received the exhibits, and I believe you've provided a courtesy copy of the exhibits here. How would you like to proceed?

MR. ELLIS: Your Honor, I think it would be, I guess, sufficient now to say that we have no further argument on our motion *in limine*. We would rest on our briefs on that, and we don't have anything additional to argue on the motion *in limine* today.

THE COURT: I wanted to address the motion to suppress first. We can address the motion *in limine* second.

MS. PRINZ: Your Honor, the government, this morning, it's our position that there's no evidentiary hearing needed today and that the Court can decide based on the filings of the parties, including the exhibits. So for that reason, I won't belabor the arguments in our filings, but I would just like to reiterate a few key points.

Ultimately, the conduct of probation and HSI do not rise to a Fourth Amendment violation. Probation was the entity who called Mr. Rocco, the defendant, back to the scene on the date in question, the date of the search warrant. But, ultimately, it doesn't matter who made that request since that request was all pursuant to a valid and lawful authority, and all the actions of law enforcement were eminently reasonable [5]here. Here, other than as suggested by the defense, there was no lawyer. There was simply a request based on the valid authority of the probation officer. Such a request or order, even, is not

tantamount to a seizure. There was no arrest and there was no lack of authority for that request.

Moreover, the phone in question, the fruits of which are the subject for the suppression motion here, was a phone that was being monitored by probation and, therefore, the defendant already had a lesser expectation of privacy in that phone. The fact that he, for a time, successfully subverted that monitoring is actually irrelevant to whether or not it could be searched and to his expectation of privacy. Although the paperwork isn't perfect here, Probation Officer Olson's declaration makes clear the defendant's Samsung phone was subject to search by probation; otherwise, he would not have been permitted to possess it, and that was also the condition for which it was subject to monitoring. It had to be searched in order for him to receive the permission for it to be monitored, and that was all the understanding of both parties, probation and Mr. Rocco.

Defense counsel has relied on a few cases that I'd like to distinguish. First, their argument with regard to *United States v. Ramirez*, *Ramirez*, obviously, is a Ninth Circuit case and, therefore, not binding here; but, more importantly, it's completely distinguishable. In that case, [6]there was an actual lure, a ruse, used, and it was the law enforcement officer's idea. There was no valid authority or request subject for which the defendant was called back to the residence at that scene. Instead, there was true deception, and true deception to more parties than the defendant. They invented a burglary in order to contact the defendant and bring him back; and in doing

so, they played upon concerns that would make any citizen feel vulnerable -- the idea of a burglary -- and created a false relationship with the officer in terms of the trust or cooperation that a normal person or a reasonable person would assume when being heard that they're being contacted with regard to a burglary.

In our case, probation wasn't inventing a reason to call the defendant back to the scene. They were also not establishing any kind of new relationship. It was a preexisting relationship with clearly defined parameters, and there were no false pretenses here. It was always clear to the defendant that he had to cooperate with probation. He was told he was being called back for a probation matter, and this investigation was relevant to probation. It was under probation's purview and, therefore, was a probation matter.

THE COURT: Well, does it matter whether or not probation was calling him back for a probation matter or whether they were calling him back at the request of HSI in order for HSI to be able to take possession of the phone?

[7]MS. PRINZ: Well, Your Honor, I would answer that by saying that, first of all, it was not at HSI's request; but, no, I do not believe that it matters even if it had been at HSI's request, because in asking the defendant to come back, they weren't leaving the -- probation was asking the defendant to return pursuant to their authority to be able to order him.

The cases that talk about the limited ability to detain a person subject to seizure rely on -- or sometimes even

assume that there was no probable cause for that detention or rely on the facts that the purposes were -- the purposes of the search specifically, and probation has the ability to call the defendant back pursuant to their own valid authority apart from law enforcement authority. And so because it was reasonable for them to rely on that authority, that would make this distinguishable here. So I don't think it matters who made the request, but the facts clearly show, according to affidavits, that probation -- that HSI did not make that request, that it was actually probation who instigated the calling back.

Furthermore, the phone was not necessarily in the contemplation of the probation officer. There was no evidence to suggest that the defendant had departed with that particular phone or that that particular phone was going to be what contains the evidence. The search warrant was focused towards all digital devices in the residence. The probable cause for that search warrant was giving rise to -- was giving rise from [8]devices potentially being used within the residence, their location, you know, not being determined; and, therefore, there was no thought in the mind of HSI or probation -- couldn't have been that, you know, the defendant is going to be carrying the devices that we, in particular, need. That couldn't have been in contemplation. They didn't know which devices were going to be the ones that would give -- that contain CSAM.

THE COURT: Well, let me just back up and stop you there. I mean, the reason to bring him back to the house was to get his phone, wasn't it?

MS. PRINZ: I don't believe that the reason that probation called him back was to get the phone specifically. I think they decided that it would be easier to effectuate the search warrant; and to get the devices and to have effective communication with the defendant would be to have him present at the scene for the search warrant, which was how they had contemplated going through the search. I don't know that we know all the reasons for which they called him back to the house, but there's no allegation here that the reason for calling him back to the house was to -- there's nothing to indicate that the reason for bringing him back to the house had to do with that phone specifically as opposed to any other device or the beneficial effect of knowing where the defendant is during the time of the search, knowing what devices he may or may not be accessing, being able to facilitate going through [9]devices at the scene. There are many reasons why it's beneficial to have the defendant present at the scene of a search warrant, and I don't believe that there's any indication here that any one of those reasons was trumping any other one. Probation asked him to return to the house.

THE COURT: All right.

MS. PRINZ: Your Honor, I would also indicate that defense counsel -- defense's argument relies, to a certain degree, on *United States v. Bailey*, and I would also indicate that *Bailey* is distinguishable. In *Bailey*, the Court put a spacial limitation on the ability to detain defendant at the scene. But the *Bailey* court even says that had the defendant returned to the scene -- rushed back

to the scene, I think, is the wording the court uses there -- he could have been detained and apprehended according to the *Summers* rule. And much more significantly, the officers in *Bailey* had no other authority, apart from the authority of the search warrant, to detain the defendant, and they also went themselves, not with probation, and pulled him over, pulled him over in a vehicle a mile from the search. That's very different from simply calling him back to the scene, particularly where probation has the authority to do so. And the Court even went into the circumstances of how being pulled over publicly away from the home was a larger intrusion than having been detained at home or closer to the scene.

[10]So, in sum, I don't think *Ramirez* or *Bailey* suggests that what happened here, which was a lawful exercise of authority by probation to facilitate the search warrant in general, is in any way unlawfully deceptive or rises to an unlawful seizure. And, regardless, the evidence would have been admissible pursuant to the inevitable discovery doctrine because, ultimately, that phone was going to be searched. Probation Officer Olson's declaration indicates that they would have searched the phone, probation knew about the existence of that particular phone, and it was contemplated within the warrant because it's an electronic device that they were expecting would be present in the home when the defendant would be present in the home. They assumed that all his electronic devices would be present in the home.

We don't dispute that the initial PC for the warrant was general enough for all those digital devices, however,

upon clearing the other devices at that seizure and realizing that those devices were not the ones giving rise to the IP address, hits, or the probable cause, then logical and inevitable next step would have been to look at the phone that they knew existed, that they knew was being used, and of which probation was already aware that the defendant had been using it to commit prior violations and continuous violations. The warrant was broad enough for all the devices, and once they had ruled out those other devices, the next natural step would have been [11]to turn to the phone, and that's what Probation Officer Olson's affidavit even states.

Also, the probation officer's position was that this was the approved phone that they could search regardless anyway. So if they had collaborated with HSI at that point, then there would have been an overly search warrant, but -- however, probation could have looked at the phone, according to the monitoring agreement, at any point anyway; and, therefore, the phone was absolutely within the purview of both probation and within the contemplation of any logical next steps if the search warrant didn't return the device that was -- if the search warrant, aside from the phone, did not return evidence that the device at issue, the device being used gave rise to the warrant.

THE COURT: Anything else?

MS. PRINZ: That's it, Your Honor. Thank you.

THE COURT: Thank you.

MR. ELLIS: May it please the Court.

Your Honor, I would just like to summarize what we believe to be the facts that are not really in dispute: that Probation Officer Raymond was contacted about a month ahead of time; he knew that HSI was investigating Mr. Rocco; he knew the general reason they were investigating Mr. Rocco; and in that time between when he was contacted, approximately May 23rd up to April 21st, Probation Officer Raymond took no action. [12]Mr. Rocco's phone was subjected to monitoring software through that whole time. It didn't produce any information that caused Mr. Raymond to take any action.

THE COURT: Well, because Mr. Rocco, presumably, had done something to the phone, right, to --

MR. ELLIS: I don't know that that --

THE COURT: -- that would be Mr. Raymond's view of this, right?

MR. ELLIS: Well, Your Honor, I don't know that -- you know, this is not before the Court, but I have had discussions with Mr. Raymond, and the monitoring software was not circumvented. The monitoring software, it logs internet history, it logs search history, has screenshots from time to time. None of that turned up anything that caused him to submit a petition until the day of the search warrant.

The government has not disputed that probation took no steps until the search warrant day. They haven't

disputed that Probation Officer Raymond was contacted by HSI before the search, asked to be present for the search. He agreed to be present for the search. He arrived at the staging location at 5:00 a.m. that morning, and he would have only known about the staging location from HSI and Agent Collins; that almost an hour later, officers on the scene of the search saw Mr. Rocco leave the residence. He was not stopped at that time. And a short time later, Special Agent Collins and probation were [13]informed that he had left and that Probation Officer Raymond called Mr. Rocco, told him that he was in the area and needed to meet him at his home for a probationary matter. And herein lies the deception, Your Honor, because there was no probationary matter that day. The only matter that was being handled by any law enforcement officer that day at Mr. Rocco's residence was the search warrant.

THE COURT: Let me ask you this: Why wouldn't it have been totally appropriate for probation to have had an interest in what was happening at Mr. Rocco's house, having been informed that they were investigating potential criminal activity? Why would that not be within probation's interest and mission?

MR. ELLIS: Well, I wouldn't say that it would not be in their interest, Your Honor. I think the point of that fact is that they did not say that to Mr. Rocco.

THE COURT: Well, let's break this down. You're not asserting that it was a deceptive statement to say, I'm in the area, I want you to come back, right? Because he was in the area.

MR. ELLIS: Well, Your Honor, he made the statement as happenstance, that I happen to be -- but he was specifically there. So, yes, we are saying that was a deceptive statement.

THE COURT: Because he was obliged to tell him the reason he had come to the neighborhood?

[14]MR. ELLIS: As his probation officer who had a ward relationship with Mr. Rocco? Essentially, Your Honor, our argument is it's deceptive because he's acting on law enforcement's behalf that day. And the Court's question, I think, was correct. They had access to the residence. Mr. Rocco's father was home that day. They could have easily conducted their search without Mr. Rocco being present. They wanted him to come back because they wanted his phone; and in that way, Probation Officer Raymond is acting as an arm of law enforcement, as an agent of law enforcement. He's not acting as a probation officer that day.

THE COURT: But as a probation officer, he had every right to ask for the phone, didn't he?

MR. ELLIS: He would have every right to ask for the phone and inspect the phone, and he had done that on a regular basis, Your Honor.

THE COURT: And so I'm trying to understand what was improper about him asking for his supervisee to come to the home on that occasion. In other words, let's assume that law enforcement wasn't there; there's nothing about what Officer Raymond did that was improper, was there?

MR. ELLIS: Assuming that law enforcement was not there, perhaps, Your Honor, but --

THE COURT: Well, what's the perhaps? What's the caveat?

[15]MR. ELLIS: Well, again, I'm not trying to get into hypotheticals, I guess; I'm trying to rely on the facts of this case, and the facts of this case is that law enforcement was there and the call was made to assist them with the execution of their search warrant that day. It wasn't made for a probationary matter, and that's why that statement is deceptive. There was no probationary matter, and we know that, Your Honor, because of what happened when Mr. Rocco actually returned to the residence. HSI met him when he came out of the house, immediately did a pat-down search and took his phone from him, immediately began searching his phone and other electronic devices, interrogated Mr. Rocco that day. Probation did nothing on the scene that day, nothing at all. They stood by and just observed, and that's why he was acting on law enforcement's behalf, and that's why it's improper, because Mr. Rocco had left that day, and the only way to search his phone pursuant to the warrant that was obtained by HSI -- and that was a warrant for his home because it was linked to an IP address. There was nothing specific about Mr. Rocco. There was nothing specific about Mr. Rocco's phone. There was only the IP address, and that's why they had the warrant to search the home.

THE COURT: And it's your position that probation couldn't have two motives, in other words, that they could be assisting law enforcement and also doing their own job?

[16]MR. ELLIS: Well, Your Honor, if one of those motives is true and that they're assisting law enforcement and they're lying to Mr. Rocco about that, then that, I think, qualifies as a ruse under the logic of the opinion of *Ramirez*.

THE COURT: So probation officers often will call supervisees in to the courthouse when there's an outstanding warrant for their arrest, and they don't advise the supervisee that upon coming to the courthouse, the marshals will effectuate the arrest warrant. Do you take the position that that is improper?

MR. ELLIS: No, Your Honor, but I don't think that's the point we're making. The point we're making is that he was brought back to the home that day to bring another thing or another place to be searched within the circumference of a lawful search warrant when it otherwise would not have been, and I think the example the Court gave is just not on point with what we're arguing in this case.

THE COURT: Well, no, it goes to the authority of the probation officer, doesn't it? In other words, the probation officer has an obligation to supervise those that the Court has ordered the probation office to supervise, and in particular circumstances, that means knowing where they are or making them show up at their home for a home visit

or looking at their devices if the nature of the supervision relates to something that makes the Court concerned about their ability to access [17]the internet, which was the case here based on Mr. Rocco's prior conviction and the specific agreements that he'd entered into it. So what I guess what I'm trying to understand is -- and I understand what you're saying -- let's just assume, for the sake of this argument -- and I understand the record has some differing views as to whether this was the idea of probation to call him back or whether this was just a request, Boy, he's left; now we need to get him back; if you call him, it will be easier to get him back that way -- so let's assume that it just came from HSI --

MR. ELLIS: HSI had no authority to bring him back that day, Your Honor.

THE COURT: Well, presumably, HSI could have called him and said, Hey, I'm a police officer, come back to your house, we're going to search it, and he could have complied with that or not. But let's assume they thought he was more likely to listen to Officer Raymond; how does that take away from Officer Raymond's fundamental mission?

MR. ELLIS: Because I would say -- first, Your Honor, because in that situation, under *United States v. Ellyson*, he's acting as an agent of law enforcement, and the Fourth Amendment still applies in that situation. A private citizen can be deemed to be a *de facto* agent of law enforcement, as was in the *Ramirez* case when the mother was working on law enforcement's behalf. In this situation, it's no different

that Probation [18]Officer Raymond was his probation officer. In this instance, based on these facts, he's acting at the behest of law enforcement.

THE COURT: But the mother didn't have an independent responsibility to supervise her son for the court, right? In other words, Officer Raymond is coming to this with his own job and his own responsibilities. So even if he's asked to do something or use a method that you've characterized as using deception, he has his own mandate.

MR. ELLIS: He does, Your Honor. And in the month leading up to the search, he had taken exactly zero actions with regard to that mandate, and that shows the Court that he wasn't taking any action on April 21, 2023, with regards to that mandate.

THE COURT: But I'm not sure that's a persuasive argument. I mean, if a probation officer gets a call from a law enforcement agency and they say, We think there's some evidence that someone you're supervising is involved in new criminal activity, don't you think that probation officer is often going to say, Okay, you do your job, and when you know more, let me know, because first of all, they don't want to interfere with an ongoing criminal investigation; and, secondly, they don't want to run to court and allege a violation before there's sufficient evidence to find that the supervisee has violated. So wasn't that exactly what was going [19]on --

MR. ELLIS: Well, he --

THE COURT: -- there is some evidence that makes us really suspicious because we think there's something going on at this house, he has a prior history with exactly this thing, and so it's extremely likely that if someone in the house is doing it, it's going to be him, but we need to develop more evidence, so we'll let you know?

MR. ELLIS: Yes, Your Honor. So I would say that, again, in the days leading up, the mandate still existed, Mr. Rocco was still under the monitoring software, and no actions were taken until the day the search warrant was going to be executed. And probation may have had an independent reason or interest, but they never acted on that, and the reason they didn't act on that is because they were arm in arm with law enforcement the entire time, including meeting with them that morning at 5:00 a.m. at a staging location where all the task force was located. They were acting arm and arm with law enforcement the entire way, and even stepped back when Mr. Rocco was brought back to the house. Their entire function that day was to bring him back within the circumference of that lawful search warrant. They could have had an interest in doing something else, but they didn't that day. They were acting as law enforcement's arm to bring him back to make sure that a device they were interested in could be searched [20]forensically by HSI agents.

THE COURT: I know there's an issue with regard to the iPhone which is listed on the monitoring agreement, but they discovered, apparently, that they couldn't put the monitoring software on the iPhone, and so they permitted him to buy the Samsung. I just want to make sure whether

you think that's a significant issue or whether that's just sort of a technicality that was addressed by probation even though the paperwork doesn't --

MR. ELLIS: Your Honor, again, I don't know that it's significant under these facts, again, because if we're talking about -- one more point -- I'm sorry, Your Honor; I want to answer the Court's question, but one last point on the prior question. I would cite for the Court *South Dakota v. Opperman* -- that's a U.S. Supreme Court case from 1976 -- and that states that other types of special needs searches -- i.e., probation searches -- related to noncriminal procedures cannot be subterfuge for criminal investigations. And, again, that's essentially what we're arguing today, is that this, quote-unquote, probationary matter was just subterfuge for the actual HSI search warrant that was being executed that day.

If the Court is now asking about inevitable discovery and the fact that he was under monitoring software, I would say that, number 1, the standard, obviously, Your Honor, is that they could have and they would have. And I would say it's a [21]closer call, but I don't concede that they could have, specifically with regards to a search warrant with regards to Mr. Rocco's cell phone, because they did not know anything about where the alleged material was coming from. They knew it was coming from an IP address, and that's all. They didn't know whether it was a laptop, some other type of electronic device or, particularly, Mr. Rocco's cell phone. So I don't know that they could have.

And, certainly, Your Honor, the facts belie the argument that they would have and forensically search. And I would point out that the government discussed Probation Officer Olson's declaration. He didn't say that he would have conducted a search of Mr. Rocco's cell phone. He said had he not consented to a search, probation would have been within their rights to get a search warrant and have it forensically searched. Your Honor, we're talking about alleged CSAM material that were found in the cache and temporary files which can change in ten minutes, let alone ten hours had Mr. Rocco been gone for a full day of work. These are files that are overwritten constantly by the phone and the operating system itself as distinguishable from one of the cases the government cites where a flash drive was stolen from somebody's house. A flash drive is a static device. It doesn't change. The police had it in their custody. They found that, inevitably, they would have searched the flash drive, and that makes sense. But [22]a cell phone is an entirely different animal, and probation in that case took immediate steps to chart the search process. I forget the name right now, Your Honor. I believe that case was *Chapman-Sexton*. The probation officer took immediate steps. He didn't wait 30 days while some independent investigation was happening apart from him. In this case, we have the complete opposite. We have probation stepping back, even in light of their mandate and their interest in supervising Mr. Rocco, stepping back, letting HSI do an investigation, and doing nothing on the day of the search besides getting Mr. Rocco back to the residence.

Your Honor, the Fourth Amendment applies to the entire community whether the people are good, whether

they're bad. No matter what they've done in their past, it applies to them equally, and the Court should grant this motion.

THE COURT: Thank you.

Do you wish to be heard?

MS. PRINZ: If I may just make a very brief point.

THE COURT: You may.

MS. PRINZ: Your Honor, I just want to point out that when probation asked him to return, they said nothing about the phone and they had no knowledge of whether he would bring it back or leave it where he was or do otherwise with it, perhaps, put it in his car and park his car around the corner. They had no way of knowing that. And so I would just indicate that [23]probation asked him to return, not for the purposes of bringing the phone, but to have him at the scene. And based on what defense counsel has just argued, which we agree with, at the time of the search warrant, they knew about the IP address, giving probable cause for the residence, so it's not reasonable to believe that HSI then has this ulterior motive of, Oh, we've got to get the phone, the phone needs to come back here, when what they're focused on anyway is within the residence, and they have no knowledge of whether he has the phone with him or not or whether that phone is even what's giving rise, because if they were aware of the phone, they would have also been aware of the fact that it was monitored. Again, the fact that defendant was

subverting the monitoring program sort of complicates the facts, but doesn't actually change any of the legal analysis. They had no -- it's not reasonable to think that they had any motive to get the phone when there was no reason to suspect at that time, until the devices were cleared within the residence, that that phone was more likely than any other device. And I just wanted to reiterate that. Thank you, Your Honor.

THE COURT: Well, this matter comes before the Court on Defendant's motion to suppress, and I've listened carefully to the arguments of counsel and appreciate the briefing, and I've looked at the exhibits. I don't believe that further evidence is necessary to resolve this matter.

[24]I do find that, ultimately, the search was reasonable and did not violate the Fourth Amendment, and I will deny the motion to suppress. There clearly was a lawful search warrant for the house and any devices found in the house relating to the investigation of potential CSAM material. And it is an interesting twist of fate that at 5:59 a.m., Mr. Rocco left the residence, and not at 6:00 a.m., and that was the time on the warrant that was permitted to execute the warrant. And the Court is, for the purposes of this motion, finding, for purposes of argument, that Mr. Raymond was directed by HSI to bring Mr. Rocco back or to make that call. Again, I understand there's some evidence in the record that suggests it was Mr. Olson's idea. I know that Ms. Ginsberg had a conversation. There's an affidavit in the record that suggests that he said he was told to bring them back; but either way, I don't find that that factual determination is meaningful because Officer Raymond

had the authority to do a home visit, to require him to come back at any time, and the fact that it was beneficial to HSI doesn't change or make that authority improper in any way.

I also don't find that it was deceptive and that he had every right, in exercising his duties of supervision, to ask him to come to that residence. And the fact that Mr. Rocco chose to bring the phone back was Mr. Rocco's decision. Nothing in the record suggests that HSI or Mr. Raymond was [25]responsible for the decision to bring the phone. If Mr. Rocco had decided to throw the phone in the river or leave it at the office, presumably, we would be in a different position, but he chose to leave the house, and when he came back, at the direction of probation, he chose to bring the phone; and the phone, accordingly, was within the ambit of the search warrant. In other words, none of the facts here have in any way expanded the scope of the search warrant beyond that which was authorized by the magistrate judge.

And, again, I don't find persuasive the notion that because probation was advised that there was an ongoing investigation, they were obliged to immediately alert the Court or take action, frankly, that might otherwise disturb that investigation, and that they had an independent responsibility to supervise Mr. Rocco and, ultimately, cooperate in the way that they did.

So I find that it simply was not unreasonable, that *Ramirez* does not control. I would note that *Ramirez* is not binding on the Court, that it was a two-to-one decision.

There was a strong dissent. And so the Court does not necessarily find that it would be persuasive even if the facts aligned, which they do not.

I also find that there would be inevitable discovery in this case. It is clear that although a defendant on supervision retains his Fourth Amendment rights, that those [26]rights are diminished, and they are diminished in particular in a case where the defendant is on supervision related to offenses that involved CSAM materials and accessing the internet, and the Court has a particular interest in knowing what devices he has and under what circumstances he can access the internet. So although I am by no means suggesting that he had no Fourth Amendment rights, those rights and expectations of privacy in that device were diminished, and that is an appropriate consideration, especially since Mr. Raymond clearly had the right to take possession of that device. And even if Mr. Rocco had not consented to the search of the device, he had the right to take possession of it and then seek a warrant. And in this circumstance, the evidence of the CSAM through that IP address and the search of the other devices -- finding that there was no CSAM material on those other devices -- would have established probable cause and justified a warrant being issued for that phone had it been identified at a later time.

And so for all of those reasons, I find that the motion to suppress should be denied and that, accordingly, the motion to issue the subpoena is moot in light of the Court's ruling.

Appendix F

That leaves us with the motion *in limine* to exclude evidence of prior convictions, the supervised release status.

Mr. Ellis, do you wish to be heard on that at this time?

[27]MR. ELLIS: No, sir.

THE COURT: All right. Are you asking the Court to rule on it or to --

MR. ELLIS: Yes, Your Honor.

THE COURT: -- to defer ruling? All right.

Well, I have had an opportunity to review the materials, and I do find that Federal Rule of Evidence 414 governs the prior conviction, qualifies as a child molestation offense that qualifies, and would otherwise be inadmissible but for FRE 414. I will tell you, frankly, I find the rule very difficult and troubling. We have a basic rule that propensity evidence is not permitted, and the rules have been altered with regard to these kinds of cases. We've had this issue arise before. There is still a balancing test that must be done under 403; but following *United States v. Kelly*, given the timing of his prior conviction, which is ten years ago -- *Kelly* was 20 years ago -- the similarity of the crimes, and the reliability of the information in that it was a conviction and he pled guilty to it, I find that 403 does not outweigh the admissibility under 414 and, accordingly, I will deny the motion *in limine* to exclude that evidence.

The 404(b) argument is a closer argument. I will tell you, I'm not sure I'm persuaded that it would be admissible under 404(b) unless the defendant were to open the door by testifying in a way that brought into question the issue of [28]knowledge, and I'm not persuaded that it's intrinsic, and so I will suggest that the government think very carefully about whether or not it decides it wants to inject the prior conviction into the case, even if the rules permit it, but that is a decision that can be made at a later time.

Likewise, with regard to the fact that he was on supervised release, I think the primary argument is that in order to tell the story of what happened, the government may need to explain the probation officer's role in it. Frankly, I'm not sure that that is necessary. It's certainly relevant to the issue of the motion to suppress, but whether or not it's relevant, ultimately, to proving his possession of the CSAM material, I don't know. I'm not going to grant the motion in full, but I will say this: To the extent the government seeks to introduce anything regarding his status on supervision or the probation officer, I would limit that to sanitize that information, potentially, to not provide, necessarily, the details of the terms of supervision or even the reason for supervision. Again, it would have to be in the context of why the government seeks to introduce that evidence. So I'm not granting it in part, and I'll reserve ruling until such time as the government articulates whether it seeks to introduce that evidence.

Is there anything else I need to address with regard to that motion, Mr. Ellis?

[29]MR. ELLIS: No, sir.

MS. SERANO: Your Honor, can I just put something on the record for clarification?

THE COURT: You may.

MS. SERANO: What the United States intends to use with regard to that motion is the defendant's prior plea colloquy and his admissions and the Statement of Facts, not necessarily the fact of the conviction. I think under 609, that would be relevant if the defendant decides to take the stand, that he was actually convicted of it, but his admissions involving his prior use or involvement in CSAM would be relevant under 414, which the Court has already ruled on, and, arguably, under 404(b) because knowledge and lack of motive or lack of mistake would be relevant to address those things. So I just want to make that clear, that at this time, the United States would use the Statement of Facts and the plea colloquy in its case in chief, and if the defendant decides to take the stand, then we can certainly discuss the relevancy of his conviction under 609.

THE COURT: Thank you for that clarification. And the Court has ruled and denied the motion *in limine*, but depending on what the exhibit list looks like or how that issue is raised prior to the introduction of those materials, I'll certainly give the defense the opportunity to address whether or not it is appropriate or exceeds the scope of 414.

[30]MS. SERANO: I have one other housekeeping matter if the Court is open to it.

THE COURT: Okay.

MS. SERANO: The United States asked defense counsel if they would be amenable to moving -- this is regarding the Court's pretrial order for exhibits. Right now, given the Juneteenth holiday, our exhibits are due June 13th, which would be seven court days. We'd asked defense counsel, and they have agreed, if we could have seven calendar days so they would be due to the Court on the 18th. The primary reason for that is, one, that our paralegal is in another trial, and we need her help -- she's indispensable in this -- and so we would ask the Court to give us seven calendar days versus seven court days. Likewise, defense counsel has asked for an extra day to file their objections, and we have no objection to that. So the date would be -- our exhibits would be due on June 18th and their responses would be due on the 21st of June.

THE COURT: The 21st, all right. And then do we have -- I don't have it in front of me -- a status to resolve those issues pretrial?

MS. SERANO: We do not have a status date, Your Honor.

MR. ELLIS: I believe it's on Monday, Your Honor, before trial, the 24th.

THE COURT: And you are going to file your objections on the 21st, you said?

[31]MR. ELLIS: Yes, sir.

THE COURT: That's fine. I think that gives the Court enough time to look at all of that information, so I will grant that relief as requested.

Is there anything else?

MS. SERANO: No, Your Honor.

THE COURT: Thank you.

You'll be returned to the custody of the marshals at this time, Mr. Rocco.

Court will be in recess briefly.

* * * * *