No. 19-50231

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NIKISHNA POLEQUAPTEWA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California
The Honorable Cormac J. Carney, Presiding
No. CR-16-00036-CJC

Appellant's Motion for Release Pending Appeal

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Motion for Release Pending Appeal

Appellant Nikishna Polequaptewa, by and through his attorney of record, Deputy Federal Public Defender James H. Locklin, hereby respectfully moves the Court to order that he be released pending the resolution of this appeal. This motion is made pursuant to 18 U.S.C. §3143(b), Fed. R. App. P. 9 and 27, and Circuit Rule 9-1.2. It is based on the attached memorandum of points and authorities, the attached declaration and exhibits, the files and records of this case, and any further information that the Court may request.

The district court denied Polequaptewa's motion for release pending appeal without a hearing, so there's no transcript to order for purposes of Circuit Rule 9-1.2(a). In accordance with Circuit Rule 9-1.2(b), all other transcripts pertaining to this appeal have been designated, ordered, and filed by the court reporters. In fact, Polequaptewa has already filed his opening brief and excerpts of record.

September 11, 2020

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

/s/ *James H. Locklin*
JAMES H. LOCKLIN
Deputy Federal Public Defender

Counsel for Defendant-Appellant

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Memorandum of Points and Authorities

After a jury convicted Nikishna Polequaptewa on one count of unlawfully damaging a computer, the district court imposed a 27-month sentence. Polequaptewa appealed, and in July he filed his opening brief.[1] Thereafter, he filed a motion for release pending appeal, which the district court denied.[2] Neither the government nor the district court disputed the first requirement for release pending appeal—that Polequaptewa, who was on pretrial, presentencing, and post-sentencing release for 3⅓ years without incident until he self-surrendered to the Bureau of Prisons to begin serving his sentence, is not likely to flee or pose a danger to the community if released while his appeal is pending. The only dispute concerned the other requirement—whether, as a matter of law, Polequaptewa's appeal raises at least one substantial (in other words, fairly debatable) question likely to result in reversal. Because each of the issues raised in his opening brief

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[1] The opening brief is attached as Exhibit 1.

[2] Polequaptwa's district-court motion is attached as Exhibit 2, the government's opposition is attached as Exhibit 3, Polequaptewa's reply is attached as Exhibit 4, and the district court's order is attached as Exhibit 5. The district court did not hold a hearing, so there's no transcript related to the motion.

clears that low bar, Polequaptewa respectfully requests that the Court order his release pending appeal.

The Court should order the release of Nikishna Polequaptewa pending resolution of his appeal.

Polequaptewa is entitled to release pending appeal if the Court finds (a) by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of any other person or the community, and (b) that the appeal is not for the purpose of delay and raises at least one substantial question of law or fact likely to result in reversal. 18 U.S.C. §3143(b); *see generally United States v. Handy*, 761 F.2d 1279, 1280-84 (9th Cir. 1985). As explained below, there's no dispute that Polequaptewa is neither a flight risk nor a danger to the community. But the district court erred as a matter of law in concluding that his appeal will not raise a substantial question likely to result in reversal. This Court should therefore grant Polequaptewa's motion and order his release pending appeal. *See United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003) (this Court reviews district court's legal determinations de novo).

A. There is no dispute that Polequaptewa is not likely to flee or pose a danger.

With regard to the first requirement for release pending appeal, the relevant question is whether there are release conditions that will reasonably assure that Polequaptewa will appear as required and will not endanger any person or the community. 18 U.S.C. §§3142(b) & (c), 3143(b)(1)(A); Fed. R. App. P. 9(c). There clearly are because he complied with such conditions during the 40 months he spent on pretrial, presentencing, and post-sentencing release.[3]

At his initial appearance in May 2016, the magistrate judge (with the concurrence of the government and the Pretrial Services Agency) released Polequaptewa on a $25,000 appearance bond (signed by his wife) under certain conditions, including supervision by the PSA.

At the end of his trial in November 2018, the government had no objection to Polequaptewa remaining released under the same conditions until sentencing, and the Court allowed that. That neither the Court nor the government thought he should be remanded after the guilty verdict is significant because, at that point, release pending sentencing required the Court to find by clear and convincing

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[3] The facts in this section are from the *uncontested* part of Polequaptewa's motion below. *See* Exhibit 2 at 2-3.

evidence that he is not likely to flee or pose a danger. 18 U.S.C. §3143(a)(1); Fed. R. Crim. P. 46(c). This is the same standard that applies to release pending appeal. 18 U.S.C. §3143(b)(1)(A).

In the presentence report, the probation office noted: "Pretrial Services records indicate Polequaptewa has complied with all Court-ordered conditions of release."

Even after the Court imposed a 27-month sentence in July 2019, it gave Polequaptewa two months to surrender to the Bureau of Prisons, again with concurrence of the government. The Court stated: "This finding of self-surrender is based on Mr. Polequaptewa's full compliance with the conditions of his pretrial release as well as the nature of this offense and the government's nonopposition to a self-surrender."

During the **3⅓ years** he was on pretrial, presentencing, and post-sentencing release without incident, Polequaptewa attended every one of the 15 court hearings in this case. Moreover, his only prior criminal convictions (both ultimately expunged) were for two misdemeanor offenses committed when he was just 18 and 20 years old. Furthermore, Polequaptewa is a 38-year-old married father of three young children who has the strong support of his family.

Below, the government did "not object to a finding as to flight risk and danger supporting release"—it disputed only that Polequaptewa's appeal raises a

substantial question (the requirement discussed in the next section). *See* Exhibit 2 at 3, 7; Exhibit 3 at 6 n.2; Exhibit 4 at 1. The district court also did not dispute that Polequaptewa is neither a flight risk nor a danger. *See* Exhibit 5 at 5. This Court should therefore conclude that the previously-imposed conditions are sufficient to reasonably assure that Polequaptewa will appear as required and will not endanger any person or the community.

B. The district court erred as a matter of law in concluding that Polequaptewa's appeal will not raise at least one substantial—in other words, fairly debatable—question that, if decided in his favor, will likely result in reversal.

With regard to the second requirement for release pending appeal, the relevant question is whether Polequaptewa's appeal is not for the purpose of delay and will raise a substantial question likely to result in reversal. 18 U.S.C. §3143(b)(1)(B). There's no dispute that the appeal is not for the purpose of delay. *See* Exhibit 2 at 4; Exhibit 3 at 6 n.2; Exhibit 4 at 1; Exhibit 5 at 5. With regard to the rest of this requirement, the "word 'substantial' defines the level of merit required in the question raised on appeal, while the phrase 'likely to result in reversal' defines the type of question that must be presented." *Handy*, 761 F.2d at 1281. There's also no dispute that each of Polequaptewa's issues is a type that, if successful on

appeal, will result in reversal. *See* Exhibit 1 at 62-64, 71-73; Exhibit 3 at 6 n.2; Exhibit 4 at 2; Exhibit 5 at 5. Thus, the only contested issue is whether Polequaptewa's appeal presents at least one substantial question.

A "substantial question" is one that is "fairly debatable" or "fairly doubtful." *Handy*, 761 F.3d at 1283.[4] For purposes of this provision, Polequaptewa does not have to show that reversal is more likely than not. *Id*. at 1280-81. And the Court may find a question to be "substantial" even though it would affirm on the merits of the appeal. *Id*. at 1281. Included within the fairly-debatable standard are "questions that are novel and not readily answerable." *Id*. Also covered are issues that "present unique facts not plainly covered by the controlling precedents." *Id*. (quotation marks omitted). Even "application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable." *Id*. (quotation marks omitted). To put it another way, an issue is fairly debatable if there's a "school of

[4] Although this requires "something more that the absence of frivolity," the "difference between the terms 'not frivolous' and 'substantial' is perhaps one of art" that's "subject to subtle analysis." *Id*. at 1282 & n.1 (quotation marks omitted). Thus, any difference is minor. *See Garcia*, 340 F.3d at 1020 n.5 ("The defendant, in other words, need not, under *Handy*, present an appeal that will likely be successful, only a non-frivolous issue that, if decided in the defendant's favor, would likely result in reversal or could satisfy one of the other conditions.").

thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail." *Id*. (quotation marks omitted).

In his opening brief, Polequaptewa contends that a retrial is required for two reasons: (1) the district court erred in denying his motion to suppress evidence, and (2) that court erred in instructing the jury about the element that increased the charged crime from a misdemeanor to a felony. *See* Exhibit 1 at 41-73. Because the relevant facts and legal authority pertaining to those arguments are set forth in the attached brief, they will not be repeated here. After reading that brief, the Court should conclude that both questions Polequaptewa has presented—or at least one of them—are, at a minimum, fairly debatable. The district court's contrary conclusion does not withstand scrutiny.

With regard to the first issue, the district court didn't even try to refute Polequaptewa's argument that it erred in failing to understand that he had standing to challenge the unlawful entry into his hotel room, and the seized laptop was suppressible as the fruit of that constitutional violation regardless of whether it was stolen. *See* Exhibit 1 at 43-48. Instead, *for the first time*, it came up with *an entirely new reason* for denying the suppression motion—the independent-source doctrine. *See* Exhibit 5 at 5-7. In doing so, the district court failed to respond

Polequaptewa's argument that the government did not present any evidence supporting its conclusory invocation of that doctrine and the district court made no findings on that issue when denying the suppression motion, so (at most) there must be an evidentiary hearing on the matter before any court could validly conclude that the independent-source doctrine applies. *See* Exhibit 1 at 61-62; Exhibit 4 at 5-6. Even more troubling is the district court's attempt to *change* its suppression-motion ruling in response to Polequaptewa's appeal. This Court recently rejected a similar effort in *United States v. Litwin*, __ F.3d __, 2020 WL 5050383 (9th Cir. Aug. 27, 2020). In response to this Court's request for appellate briefing from the parties concerning the dismissal of a juror in that case, the district court sua sponte entered an order purportedly supplementing the record on that issue. *Id*. at *10. The Court refused to consider that, noting that Fed. R. App. P. 10(e) "cannot be used to supplement the record with material not introduced *or with findings not made*[.]" *Id*. at *15 (emphasis added) (quotation marks omitted). To allow otherwise "would pose serious due process concerns." *Id*.; *see also United States v. Gardenhire*, 784 F.3d 1277, 1284 (9th Cir. 2015) (district court's statement at bail-motion hearing that it would likely impose same sentence even if this Court reversed not only didn't render its procedural error moot; it required reassignment to a different judge). At the very least, the district court's changed

ruling—and refusal to defend its earlier ruling—in response to Polequaptewa's motion reflects that whether it properly denied the suppression motion is fairly debatable.

On appeal, Polequaptewa argues that the district court's suppression-motion analysis was also erroneous for a second independent reason—to the extent it matters whether he had standing to directly challenge the seizure and search of the laptop (separate from his standing to challenge the unlawful entry into his hotel room), that court erred in not holding an evidentiary hearing on that disputed issue. *See* Exhibit 1 at 48-57. On that point, the district court (in its order denying release pending appeal) asserted in a conclusory fashion that no hearing was necessary because, supposedly, Polequaptewa's "moving papers did not sufficiently allege that [he] owned the Laptop[.]" *See* Exhibit 5 at 7. The district court simply ignored the particular facts Polequaptewa cites to establish the contrary, nor did it address the considerable authority he cites establishing that once the government proffered declarants to dispute his ownership, he had the constitutional right to cross-examine them about their assertions before those assertions could be

accepted as true. *See* Exhibit 1 at 49-55.[5] At a minimum, whether an evidentiary hearing was required is fairly debatable.

Polequaptewa's second appellate issue is whether the Court plainly erred in instructing the jury about the related-course-of-conduct element that increased the charged crime from a misdemeanor to a felony. *See* Exhibit 1 at 65-73. On that issue, the district court offered only this conclusory assertion to support its claim that it's not even fairly debatable that Polequaptewa can satisfy the plain-error standard: "Here, the Court's instruction was written using the statutory language, and Defendant fails to cite any precedent that is contrary to the challenged instruction." *See* Exhibit 5 at 8. That, of course, ignores that the clear text and structure of a statute may suffice to show plain error and that Polequaptewa's

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[5] The district court's assertion that, "on appeal, Defendant admits that UCI policy required him to return the Laptop when he was fired" is just plain wrong. *See* Exhibit 5 at 7 (district court pointing to page 50 of the opening brief). In his brief, Polequaptewa acknowledges the government's position that "he was *purportedly* 'required to return the laptop'" but then immediately explains why the declarations and documents presented by the government required an evidentiary hearing where the declarants could be cross-examined about whether "the *particular laptop* at issue" had to be returned, not to mention whether the totality of the circumstances were consistent with him having a reasonable expectation of privacy in the laptop. *See* Exhibit 1 at 50-51 (emphasis added), 55-56.

argument is based on the plain language of the charging statute (18 U.S.C. §1030), supported by the rule of lenity and the constitutional-avoidance doctrine. *See* Exhibit 1 at 65-71. Notably, the district court doesn't even acknowledge his plain-language points, let alone try to refute them. *See* Exhibit 5 at 8. Because §1030(a)(5)(A) must place *some* limit on the scope of the felony provision at issue, it's at least fairly debatable both what that limit is and whether the jury was inadequately instructed about it.

For all these reasons, the Court should find that Polequaptewa has presented at least one fairly-debatable question (if not more). Because of delays caused by his former counsel's withdrawal, court reporter extensions, COVID-19, and his new counsel's workload—all circumstances beyond Polequaptewa's control—this motion is being filed after he has already served a year in prison. *See* Declaration of James H. Locklin (attached). And the government's answering brief is not due until November 18. *Id*. If not released now, he will end up serving most of his sentence before the appellate process is finished. *Id*. Because both conditions for release pending appeal are satisfied, he should not have to do that. Polequaptewa

therefore respectfully requests that the Court grant this motion and order his release.

September 11, 2020

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

/s/ *James H. Locklin*
JAMES H. LOCKLIN
Deputy Federal Public Defender

Counsel for Defendant-Appellant

Declaration of James H. Locklin

I, James H. Locklin, hereby declare and state as follows:

I am a Deputy Federal Public Defender in the Central District of California. I represent appellant Nikishna Polequaptewa in this appeal.

In July 2019, the district court sentenced Polequaptewa to 27 months in prison but allowed him to self-surrender to the Bureau of Prisons two months later. He filed a timely notice of appeal.

Another attorney, Michael Khouri, represented Polequaptewa at trial and at sentencing. On September 18, 2019, this Court granted his motion to withdraw and appointed the Federal Public Defender's Office to represent Polequaptewa on appeal.

Thereafter, the Court granted the court reporters' requests for an extension of the deadline for filing transcripts. The last of the transcripts were filed on February 7.

Thereafter, I obtained extensions of the deadline for Polequaptewa's opening brief due to the voluminous record in this case, my workload, and logistical issues related to the COVID-19 virus.

On July 7, I filed Polequaptewa's opening brief, which is attached as Exhibit 1.

On August 10, the Court granted the government's motion for a 90-day extension, so its answering brief is currently due on November 18.

According to the Bureau of Prisons' website, Polequaptewa is projected to be released in August 2021.

On August 5, Polequaptewa filed a motion for release pending appeal in the district court, which is attached as Exhibit 2 (without its exhibit, the opening brief attached here as Exhibit 1).

On August 24, the government filed its opposition to Polequaptewa's motion for release pending appeal in the district court, which is attached as Exhibit 3.

On August 27, Polequaptewa filed his reply in support of his motion for release pending appeal in the district court, which is attached as Exhibit 4.

On September 4, the district court filed an order denying Polequaptewa's motion for release pending appeal, which is attached as Exhibit 5. There was no hearing on the motion.

As reflected in its district court filing, the government opposes Polequaptewa's motion for release pending appeal.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 11, 2020, at Los Angeles, California.

/s/ *James H. Locklin*

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UNITED STATES OF AMERICA,
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Appellant's Opening Brief

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Issues Presented

1. Erroneously determining that Nikishna Polequaptewa lacked Fourth Amendment standing, the district court (without holding any hearing) denied his motion to suppress the evidentiary fruits of sheriff deputies' unlawful entry into his hotel room to seize his laptop computer. Should the Court should reverse that ruling, reverse Polequaptewa's conviction, and remand for a new trial after a suppression hearing?
2. The charged crime was a misdemeanor unless the government proved that Polequaptewa intentionally caused loss of at least $5,000 through the offense and "a related course of conduct." The district court plainly erred in instructing the jury about this element. Should the Court reverse Polequaptewa's conviction and remand for a new trial?

Statement re Addendum

Pertinent authority is set forth in an attached addendum. *See* Circuit Rule 28-2.7.

Statement of Jurisdiction

A jury found Nikishna Polequaptewa guilty of one count of unlawfully damaging a computer in violation of 18 U.S.C. §1030(a)(5)(A), (c)(4)(B)(i), (c)(4)(A)(i)(I).[1] The district court, the Honorable Cormac J. Carney, Judge, presiding, had jurisdiction over this case under 18 U.S.C. §3231.

The district court entered its judgment on July 10, 2019.[2] Two days later, Polequaptewa filed a timely notice of appeal.[3] *See* Fed. R. App. P. 4(b).

This Court has jurisdiction to hear this appeal from the final judgment of a district court under 28 U.S.C. §1291.

Custody Status of Appellant

Nikishna Polequaptewa is in custody serving his 27-month sentence.[4] His projected-release date is August 2, 2021.

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[1] ER 235-39, 1202-05, 1255-57. "ER" refers to the appellant's excerpts of record.

[2] ER 1285-90, 1312-13.

[3] ER 1291.

[4] ER 1285.

Statement of the Case

1. A jury found Nikishna Polequaptewa guilty of knowingly transmitting a command to intentionally cause damage to a computer with at least $5,000 in loss resulting from the offense and a related course of conduct.

In 2016, a grand jury indicted Polequaptewa on one count of violating 18 U.S.C. §1030(a)(5)(A), (c)(4)(B)(i), (c)(4)(A)(i)(I).[5] Section §1030(a)(5)(A) provides that whoever "knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer ... shall be punished as provided in subsection (c)[.]" Unless certain additional conditions are satisfied, subsection (c) makes this crime a misdemeanor punishable by no more than one year in custody. 18 U.S.C. §1030(c)(4)(G)(i). Polequaptewa was charged under a felony provision making the maximum sentence ten years "if the offense caused" specific kinds of harms. 18 U.S.C. §1030(c)(4)(B)(i). One such harm is "loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting

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[5] ER 27-29.

from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value[.]" 18 U.S.C. §1030(c)(4)(A)(i)(I).

The original indictment alleged that Polequaptewa had worked for Blue Stone Strategy Group, a company based in Irvine, California, but on November 18, 2014, he resigned and deleted various data files belonging to that company, including files on the company's internal server and a Mac Pro desktop computer, thereby causing at least $5,000 in loss to Blue Stone.[6] Polequaptewa's first trial on that charge ended in a mistrial when the jury couldn't reach a verdict.[7]

Before the retrial, the government obtained a superseding indictment charging the same offense but making two significant changes to the allegations.[8] First, the violation of §1030(a)(5)(A) was premised only on the Mac Pro desktop computer (not also Blue Stone's internal server, as in the original indictment).[9] **Let's call this the core misdemeanor crime.** Second, the new indictment alleged a "related course of conduct" resulting in at least $5,000 in loss to Blue Stone that encompassed not only deletion of files from the Mac Pro desktop and Blue Stone's

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[6] ER 27-29.

[7] ER 206-34.

[8] ER 235-39.

[9] ER 238.

internal server but also deletion of Blue Stone's files on remote servers hosted by Google Inc., Bluehost Inc., MailChimp, and Cox Communications.[10] **Let's call this the felony enhancement.**[11]

At Polequaptewa's retrial, the district court instructed the jury that it could find Polequaptewa guilty of violating §1030(a)(5)(A) as "charged in the single-count First Superseding Indictment"—the core misdemeanor crime—only if the government proved three elements beyond a reasonable doubt: (1) that he knowingly caused the transmission of a program, a code, a command, or information to the Mac Pro desktop computer; (2) that, as a result of the transmission, he intentionally impaired, without authorization, the integrity or availability of data, a program, a system, or information; and (3) that the Mac Pro desktop computer was used in or affected interstate or foreign commerce or

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[10] ER 237-39. Although the original indictment mentioned the data deleted from these remote servers, it didn't allege a "related course of conduct" encompassing those acts. ER 28-29.

[11] Although the terms "core misdemeanor crime" and "felony enhancement" are useful given how the crime was charged and presented to the jury here, in truth the core crime and the fact triggering the heightened sentence together constitute a new, aggravated crime. *Infra* Argument, Part 2.A.1.

communication.[12] The district court also instructed the jury that if it found Polequaptewa guilty of that offense, it would then have to decide whether the government proved beyond a reasonable doubt that, "as a result of such conduct [and] a related course of conduct affecting one or more other computers used in or affecting interstate or foreign commerce or communication, the defendant caused 'loss' to Blue Stone Strategy Group during any one-year period of an aggregate value of $5,000 or more"—the felony enhancement.[13] The district court told the jury it would have a verdict form requiring it to find whether the government met that burden.[14] "Loss" was defined, but what constituted a "related course of conduct" was never explained.[15] And the jury was generally instructed that it was there only to determine whether Polequaptewa was guilty or not guilty of "the

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[12] ER 18-19, 1225.

[13] ER 20, 1229. According to the transcript, the district court used the phrase "as a result of such conduct, in a related course of conduct" (ER 20) when orally instructing the jury instead of the written version's "as a result of such conduct and a related course of conduct" (ER 1229). The jury was given a copy of the written instructions. ER 11, 1210.

[14] ER 24-26, 1235.

[15] ER 10-26, 1209-36.

charge in the First Superseding Indictment" because he was "not on trial for any conduct or offense not charged" therein.[16]

The jury found Polequaptewa guilty of the core misdemeanor crime and made the felony-enhancement finding.[17] The district court subsequently imposed a 27-month sentence,[18] and Polequaptewa appealed.[19] In this appeal, Polequaptewa raises two issues challenging his conviction: (1) that the district court erroneously denied his motion to suppress the evidentiary fruits of an illegal entry into his hotel room to seize his MacBook Pro laptop computer;[20] and (2) that the district court erred in failing to properly instruct the jury on the related-course-of-conduct element that increased the charged crime from a misdemeanor to a felony.[21] The remainder of this statement of the case will discuss the facts relevant to those issues.

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16 ER 17, 1223.

17 ER 1202-05, 1255-57.

18 ER 1285-90.

19 ER 1291.

20 *Infra* Argument, Part 1. Note that this is different from the Mac Pro *desktop* computer referenced in the indictments.

21 *Infra* Argument, Part 2.

2. Without any hearing on the matter, the district court denied Polequaptewa's motion to suppress the evidentiary fruits of an unlawful entry into his hotel room to seize his laptop computer.

A significant amount of evidence at Polequaptewa's trial was obtained from his laptop computer, purportedly the tool he used to remotely delete most of the data at issue.[22] Although there were material factual disputes about how police seized that laptop, the district court sidestepped those issues by concluding that Polequaptewa lacked standing to bring a suppression motion because he purportedly "stole" the laptop when he didn't return it to a former employer upon being fired.[23]

A. *The Evidence Pertaining to the Seizure*. It's undisputed that the laptop was taken from Polequaptewa inside his hotel room at a Residence Inn in Florida by Broward County Deputy Sheriff Laughten Hall and other deputies without a warrant at the prompting of Blue Stone employee William Moon.[24] Polequaptewa and Hall told very different stories about how that happened in the declarations they submitted in support of and in opposition to Polequaptewa's suppression

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[22] *Infra* Part 3.

[23] ER 1-8.

[24] ER 103-06, 184-90.

motion.[25] Because the district court didn't hold an evidentiary hearing on that motion, however, they weren't cross-examined and the court made no findings about what happened.[26] At Polequaptewa's retrial however, both Moon and Polequaptewa's wife testified about the circumstances surrounding the seizure, and their accounts are inconsistent with Hall's version in significant ways.[27] Each of the four accounts is summarized here:

1. *Polequaptewa's Declaration*. On November 18, 2014, Polequaptewa and other Blue Stone employees were in Florida for business meetings.[28] His wife and children accompanied him to Florida and stayed with him in his hotel room.[29] At about 7:25 p.m. EST,[30] Polequaptewa announced at a meeting that he was

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[25] ER 103-06, 184-90.

[26] ER 1-8.

[27] ER 461-70, 494-513, 517-18, 1067-90.

[28] ER 103.

[29] ER 104.

[30] Some events on November 18 happened on the East Coast and others happened on the West Coast, so the brief will distinguish between Eastern Standard Time (EST) and Pacific Standard Time (PST).

resigning from Blue Stone.[31] He then went to dinner with his family before returning to his hotel room a few hours later.[32]

Polequaptewa heard a loud pounding on his hotel-room door shortly before 11:00 p.m. EST.[33] Unsure about who it was and whether it was safe to answer, he called 911 to request police assistance.[34] Shortly thereafter, he again heard loud knocking on the door, which was eventually opened from the outside until stopped by the security latch.[35] Through the cracked-opened door, Polequaptewa saw two groups of sheriff deputies (totaling about five or six officers) and Moon.[36] Apparently, one group of deputies responded to Moon's call and the other responded to Polequaptewa's.[37] A deputy said he was checking on Polequaptewa in response to a wellness call.[38] Polequaptewa replied that he was not harming himself and that he was in the room with his wife and his three small children, who

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[31] ER 104.

[32] ER 104.

[33] ER 104.

[34] ER 104.

[35] ER 104.

[36] ER 104.

[37] ER 104.

[38] ER 104.

were sleeping.[39] The deputy then told Polequaptewa that the officers needed to come inside his room due to allegations that he was committing fraud on a laptop computer belonging to Blue Stone.[40] Polequaptewa told the deputy the computer was not Blue Stone's property and that the officers didn't have permission to enter his room.[41] In response, the deputy told Moon that the dispute was a civil matter and there was nothing more the officers could do, but Moon insisted that the computer belonged to Blue Stone.[42]

At that point, Polequaptewa asked everyone to leave and started to close the still security-latched door.[43] But the deputy put his hand inside the room to block the door and demanded that Polequaptewa open the door or else he would break it down and arrest him.[44] Polequaptewa said he wanted to exercise his Fourth

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[39] ER 104.

[40] ER 104.

[41] ER 104.

[42] ER 104.

[43] ER 105.

[44] ER 105.

Amendment rights and deny the officers entry into his room.[45] The deputies mocked that assertion of his constitutional rights.[46]

When Polequaptewa heard the deputy instruct his partner to "get the tools" to break down the door, Polequaptewa unlatched the door to protect his children.[47] As soon as Polequaptewa did so, two deputies pushed their way into his room despite him again telling them he did not want them there.[48] The deputies insisted they would not leave without the laptop unless Polequaptewa could present proof of ownership, which he couldn't find.[49] The deputies therefore told Polequaptewa that they would take him to jail if he didn't hand over the laptop.[50] Because Polequaptewa felt threatened, he gave them the laptop to avoid a physical confrontation that might harm him or his family.[51]

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[45] ER 105.

[46] ER 105.

[47] ER 105.

[48] ER 105.

[49] ER 105.

[50] ER 105.

[51] ER 105.

As soon as the deputies left Polequaptewa's room, they handed the laptop to Moon.[52] When Polequaptewa questioned that, the deputies told him to go into his room or things would go in a different direction.[53]

2. *Deputy Hall's Report and Declaration*. Deputy Hall wrote a short report near the time of the incident in November 2014, and then affirmed the accuracy of that report and asserted additional facts in a 2018 declaration.[54]

According to his report, Hall responded to a disturbance call and arrived at the Residence Inn shortly before 11:00 p.m. EST.[55] He met with the caller (Moon), who said Polequaptewa was an ex-employee not responding to calls or knocks at his hotel room.[56] Moon also told Hall that Polequaptewa had had used a company computer—still in his possession inside his hotel room—to delete files "in reference to an alleged identity fraud cases [sic]" such that "approximately (200) identities were compromised by" Polequaptewa.[57] Hall supposedly told Moon that

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[52] ER 105.

[53] ER 105.

[54] ER 184-90.

[55] ER 190.

[56] ER 190.

[57] ER 190.

unless he had proof of ownership, the computer could not be taken without the Polequaptewa's consent.[58]

In his report, Hall asserted that "[c]ontact was made with Mr. Polequaptewa to insure he was alive" and to evaluate whether he "was distraught over the loss of his job."[59] His declaration four years later embellished on that bald assertion, claiming that he wanted to keep Polequaptewa calm and ascertain his mental state to confirm that he would not harm himself or his family.[60] When Hall entered the hotel room, he supposedly "knew, among other things, that Mr. Polequaptewa was in a new state, no longer had a job, and his former employer was accusing him of engaging in fraud."[61] Notably, neither Hall's report nor his declaration recounted how he entered Polequaptewa's hotel room.[62]

Hall's police report described the encounter he had with Polequaptewa, apparently after he entered the hotel room with Moon.[63] Hall noted that Polequaptewa's child was asleep in the room where they spoke, with his wife and

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[58] ER 190.

[59] ER 190.

[60] ER 184.

[61] ER 184-85.

[62] ER 184-90.

[63] ER 190.

other children in another room in the suite.[64] According to Hall, Polequaptewa (fully dressed in a suit) appeared nervous, with shaking hands.[65] At one point, Polequaptewa and Moon "had a yelling match" over ownership of the laptop but neither could present proof of ownership.[66] Hall supposedly told Polequaptewa that "this was a civil matter and [his] presence was just to insure a peaceful interaction between the two parties."[67] But the report also stated that Hall told Polequaptewa "that if he had nothing to hide giving the computer to Mr. Moon would show that he was innocent and had nothing to hide."[68] Hall also supposedly advised Polequaptewa "to take pictures of the laptop and lock the device before giving it to Mr. Moon."[69] Although the report didn't memorialize Polequaptewa's response, Hall claimed in his declaration that his "memory is that Mr. Polequaptewa consented to turn over a laptop in his room to William Moon."[70]

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64 ER 190.

65 ER 190.

66 ER 190.

67 ER 190.

68 ER 190.

69 ER 190.

70 ER 186.

In his declaration, Hall disputed claims made in Polequaptewa's declaration, asserting that he did not recall any of the following: Polequaptewa claiming that the laptop didn't belong to Blue Stone;[71] Polequaptewa saying he didn't want the deputies to enter his hotel room; any deputy putting a hand inside Polequaptewa's room to block the door, demanding that he open the door, or threatening to break down the door and arrest him if he didn't do so; any deputies telling Polequaptewa that they needed to enter the room in response to Moon's fraud allegation; Polequaptewa asserting his Fourth Amendment rights; any deputy making derogatory statements in response; any deputy telling Polequaptewa they would not leave without the laptop unless he could present proof of ownership or that they would take him to jail if he did not hand over the laptop; or any deputy having the conversation described by Polequaptewa after they left his room.[72]

3. *William Moon's Trial Testimony*. Moon testified that John Mooers (Blue Stone's co-founder) called from Irvine to tell him that files were being deleted from somewhere in the Florida hotel.[73] Although Moon testified that Mooers

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[71] Notably, this was inconsistent with his report's assertion that Polequaptewa and Moon "had a yelling match" over ownership of the laptop. ER 190.

[72] ER 185.

[73] ER 461, 494; *see also* ER 587. Moon told an FBI agent he got this call at about 10:00 p.m. EST. ER 59.

instructed him to get Polequaptewa's computer, which they believed to be Blue Stone's property,[74] Mooers denied doing so, testifying that he only told Moon to find Polequaptewa and then to call the police.[75] It was undisputed that Moon and Mooers were mistaken in that the laptop at issue did not, in fact, belong to Blue Stone.[76]

Moon testified that he and others tried calling Polequaptewa several times from 9:00 to 9:30 p.m. EST but couldn't reach him.[77] Moon therefore went to Polequaptewa's hotel room with hotel staff, but no one answered their knocks on the door.[78] Moon's testimony was unequivocal—he had no concerns about Polequaptewa's well-being; his intent was to get Polequaptewa's laptop computer.[79] After Mooers informed Moon that files were still being deleted, Moon got the hotel staff to unlock the door to Polequaptewa's room, but it opened only a couple inches because it was latched from the inside.[80] Then the staff, at Moon's

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[74] ER 463-64, 494, 518.

[75] ER 616-17, 709-10.

[76] ER 617, 518.

[77] ER 461-62, 496.

[78] ER 462-64, 499.

[79] ER 465, 496, 500-03, 514.

[80] ER 465, 498-504.

request, called the police.[81] When two deputies arrived about 20-30 minutes later, Moon "explained the situation[,]" namely, what Mooers had told him about the files being deleted.[82]

Moon and the hotel staff person returned to Polequaptewa's room with the deputies and knocked again with no response.[83] The deputies instructed the staff person to unlock the door, which was still secured from the inside by a security latch such that it opened only a couple inches.[84] The deputies spoke through the crack for five to ten minutes but still got no response.[85] At some point, a second set of deputies arrived at the scene in response to a call made from inside the room, but they soon left and allowed the deputies already there to handle the matter.[86]

Eventually, those deputies got Polequaptewa to respond by repeatedly threatening over several minutes to enter the room without his consent.[87] As Moon described it: "[T]he sheriff officer finally said, look, we are going to go in there.

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[81] ER 465-66, 497, 504.

[82] ER 466, 504-06.

[83] ER 467, 506.

[84] ER 467, 506.

[85] ER 467, 506-07.

[86] ER 468-69, 507-08.

[87] ER 467, 508-11.

Let's make it easy. Can you please open the latch, open it and have a conversation and so forth. No response. The officer persisted in, you know, asking the door to be opened. But, you know, at some point the officer said one way or another we are going to go in, but let's make it easy. Repeated many times."[88] When that prompted a response from Polequaptewa, the deputy said something like, "we are trying to retrieve the computer[.]"[89] Polequaptewa opened the door.[90] Polequaptewa insisted it was his computer, and Moon insisted that the computer belonged to Blue Stone.[91] Moon said he never went inside Polequaptewa's room.[92] And although he never saw the deputies go inside the room, he wasn't with them the entire time.[93] But he did hear the deputies tell Polequaptewa that he would have to surrender the computer to them and work out the "formalities" of

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[88] ER 467.

[89] ER 467.

[90] ER 511-12.

[91] ER 467-68.

[92] ER 469, 517.

[93] ER 466-67, 512. Moon told an FBI agent that a deputy entered the room to speak with Polequaptewa and later came out with his laptop, which he then gave to Moon. ER 60.

ownership later.[94] Eventually, sometime around 1:00 to 1:30 a.m. EST, the deputies gave Moon the laptop they took from Polequaptewa.[95]

4. *Yolanda Polequaptewa's Trial Testimony*. Polequaptewa's wife Yolanda shared the hotel room—a suite consisting of a living-room area, a kitchenette, and a bedroom.[96] She testified that Polequaptewa returned to the room at about 5:30 p.m. EST and took the family out for dinner and shopping, returning to the suite by 7:00 p.m. EST.[97] Sometime between 8:00 and 8:30 p.m. EST, Moon started pounding loudly on the door and screaming angrily.[98] Moon left for a while but then returned, resumed his pounding, and demanded the laptop, so Polequaptewa called the police.[99] At some point, police deputies arrived and also started pounding on the door very loudly.[100] Later, a second set of deputies arrived, apparently in response to Polequaptewa's call.[101] The deputies were "saying to

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[94] ER 512-13.

[95] ER 469-70, 513.

[96] ER 1067-68, 1079.

[97] ER 1068-71, 1086.

[98] ER 1071-74, 1086.

[99] ER 1074-75, 1086, 1089.

[100] ER 1075-76, 1086.

[101] ER 1086-87, 1089.

'open up,' to 'give back the laptop,' like, if he didn't open up, that they were going to break down the door or open the door or get in."[102] Eventually, the door was opened from the outside, at least to the extent allowed by the inside security latch.[103] The deputies continued to tell Polequaptewa to open the door and hand over the laptop.[104] Polequaptewa responded that the laptop didn't belong to Blue Stone.[105] At that point, Polequaptewa invoked his Fourth Amendment rights, provoking a mocking response from the deputies.[106] Yolanda could hear Mooers on a speakerphone in the hallway telling Moon and the deputies to get the laptop.[107] The deputies again told Polequaptewa that they were going to open the door either way, so he needed to let them in and give them the laptop.[108] Yolanda was in the bedroom when the deputies entered the suite's kitchenette area, but she heard them tell Polequaptewa that they would not leave without the laptop,

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[102] ER 1076.

[103] ER 1076.

[104] ER 1076.

[105] ER 1076, 1090.

[106] ER 1076-77, 1089.

[107] ER 1077-78.

[108] ER 1078, 1089.

although he could password-protect it first.[109] When she came out of the bedroom sometime between 8:30 to 9:00 p.m. EST, the deputies and the laptop were gone.[110] When asked whether the events she described might have happened later in the evening, Yolanda said she didn't know.[111]

B. *The Suppression Motion*. Polequaptewa filed a motion to suppress the evidentiary fruits of the laptop seizure, arguing (among other things) that the sheriff deputies violated his Fourth Amendment rights by entering his hotel room and taking his laptop without a warrant and without his consent.[112] That motion was supported by Polequaptewa's declaration (discussed above).[113]

The government opposed the motion.[114] Its primary argument was that Polequaptewa had no reasonable expectation of privacy in the laptop because he had purportedly stolen it from the University of California, Irvine (UCI), his former employer, by not returning it after he was fired.[115] To support that

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[109] ER 1078-79, 1087, 1105-07.

[110] ER 1079-81, 1087.

[111] ER 1087-88.

[112] ER 30-47.

[113] ER 103-06.

[114] ER 109-37.

[115] ER 123-27.

argument, the government proffered declarations from UCI employees.[116] Alternatively, the government argued that the Florida sheriff deputies entered Polequaptewa's hotel room lawfully and took the laptop with his consent.[117] To support that argument, the government proffered Deputy Hall's declaration and police report (discussed above).[118] Finally, the government asserted that even if there was a Fourth Amendment violation, the independent-source and good-faith exceptions to the exclusionary rule applied.[119]

In his reply, Polequaptewa noted that the government's claim that UCI owned the laptop conflicted with his assertion that the laptop was his and Moon's claim in 2014 that it belonged to Blue Stone.[120] Furthermore, he argued that regardless of who owned the computer, the sheriff deputies violated the Fourth Amendment in entering his hotel room to seize it.[121]

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[116] ER 146-83.

[117] ER 128-31.

[118] ER 184-90.

[119] ER 132-36.

[120] ER 192-93.

[121] ER 192-94.

The government insisted that no evidentiary hearing was necessary because the district court could rule in its favor based on the declarations alone.[122] Polequaptewa, however, requested an evidentiary hearing where he could cross-examine the government's declarants.[123]

Without holding any hearing (evidentiary or otherwise), the district court issued a written order denying Polequaptewa's suppression motion.[124] That ruling was based entirely on the government's factual claim that UCI owned the laptop and its legal argument that that purported fact precluded Polequaptewa's Fourth Amendment claim.[125] Because it concluded that Polequaptewa lacked standing to challenge the search and seizure of the laptop, the district court decided that it "need not reach his arguments regarding the constitutionality of the search and seizure of that laptop."[126] The district court also didn't address the government's independent-source and good-faith arguments.[127]

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[122] ER 197-200.

[123] ER 200.

[124] ER 1-8.

[125] ER 6-8. The facts related to ownership of the laptop are discussed below. *Infra* Argument, Part 1.B.

[126] ER 8 n.2.

[127] ER 1-8.

3. At trial, the government's claim that Polequaptewa caused at least $5,000 in damage was based not only on the specifically-charged act of wiping a particular desktop computer but also on a purportedly related course of conduct affecting several other computers.

The jury learned that Blue Stone is a consulting business working primarily with Native American communities that was headquartered in Irvine in 2014.[128] In April of that year, the company hired Polequaptewa (a Native American himself) as a senior strategist to work on projects across the country, as well as marketing.[129] At that time, responsibility for handling Blue Stone's information-technology (IT) needs had been outsourced to Runner Boys, a company owned by Eldad Yacobi, for several years.[130] But shortly after Polequaptewa was hired, Blue Stone granted his request to expand his role to take over IT from Yacobi.[131] Thereafter, among other things, Polequaptewa switched the company to Google services, purchased Apple computers, began hosting Blue Stone's website on the

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[128] ER 277-81, 310-11, 435-38.

[129] ER 311-15, 334-35, 350-51.

[130] ER 318, 345-46, 349, 706, 806-11, 861-62.

[131] ER 316-18, 594-99, 706.

company's own Synology-brand server instead of having an outside company do that, and created a database for client relationship management (CRM) information.[132]

In August 2014, only four months after joining the company, Polequaptewa asked John Mooers (Blue Stone's co-founder and his supervisor at the time) for a raise and the title of chief technology officer, and he got the raise because he was doing a good job.[133] Around the same time, however, William Moon joined Blue Stone and became Polequaptewa's supervisor.[134] Soon thereafter, Moon informed Blue Stone's management that, in his opinion, Polequaptewa's IT and marketing duties distracted from his primary responsibilities as a senior strategist such that his job performance suffered across the board.[135] Moon also complained about Polequaptewa's reluctance to travel.[136]

On Friday, November 14, Blue Stone's management met with Polequaptewa to inform him that his IT duties would be reassigned back to Yacobi (also present at

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[132] ER 590-93, 782-83.

[133] ER 585-87, 601-05, 682-84.

[134] ER 439, 605, 685.

[135] ER 319, 439-51, 473-79, 605-06, 685-86.

[136] ER 447, 451-53.

the meeting) and that someone else would take over his marketing projects.[137] Polequaptewa wasn't demoted—he retained his position as a senior strategist—and he didn't exhibit any negative reaction to the news.[138] Moreover, Blue Stone offered Polequaptewa the opportunity to participate in a months-long project in Florida for an important client, and despite his purported dislike of travel, he agreed.[139]

Immediately after that meeting, Polequaptewa and Yacobi met to pass along IT-access information.[140] Yacobi claimed that Polequaptewa seemed displeased with the reassignment of his IT duties and was therefore uncooperative and provided incomplete information.[141] Thereafter, Yacobi had "administrator" access to Blue Stone's systems, but according to him, Polequaptewa also retained some ability to access certain systems as an administrator.[142] In addition, Polequaptewa remained able write and delete some data as a user even without administrator access, just

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[137] ER 318-20, 346, 472-73, 540-41, 607-08, 786-87, 799, 811-13.

[138] ER 351, 381, 608.

[139] ER 351-52, 454-55, 479-88, 684-87.

[140] ER 813-14, 819.

[141] ER 814-15, 868-70.

[142] ER 369-70, 696, 819-21.

like any other employee.[143] At some point later that day, Mooers, an office manager, and Yacobi decided to reset everyone's passwords except Polequaptewa's for a "fresh start."[144] Given Polequaptewa's prior role, other employees still occasionally sought his help for IT problems in the days that followed.[145]

On Monday, November 17, several Blue Stone employees, including Polequaptewa and Moon, were in Florida for client meetings, with everyone staying at the Residence Inn.[146] Yacobi (still in Irvine) testified that his meeting with Polequaptewa the prior Friday left him feeling that Polequaptewa "might do something with his computer remotely" and that "something [was] going on."[147] Therefore, early in the morning of Tuesday, November 18, he went to Blue Stone's offices to backup Polequaptewa's Mac Pro desktop computer to the company's internal Synology server.[148] Although Yacobi said he was able to access that

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[143] ER 821-23.

[144] ER 609-11, 695-96, 824.

[145] ER 611-14, 692-98, 788-91, 826-27.

[146] ER 371, 455-56, 525-26.

[147] ER 868-70.

[148] ER 824, 867-72, 876-77.

desktop computer without a password because Polequaptewa had left it on,[149] Polequaptewa's wife testified that she was with her husband when he left his office on Friday evening and saw that the computer was off.[150] Yacobi purportedly didn't recall accessing any of Polequaptewa's personal information when he went onto his desktop computer.[151] And while Yacobi acknowledged that he was familiar with software that allows IT specialists to access computers remotely, he insisted that he didn't have the ability to remotely access either Polequaptewa's Mac Pro desktop computer or the MacBook Pro laptop computer he had in Florida.[152]

At a group get-together with the client tribe in Florida that Tuesday at about 7:10 p.m. EST, Polequaptewa publically resigned without notice and then left.[153] But Polequaptewa didn't disparage Blue Stone as he did so; in fact, he told the tribe that the company would continue to do a good job.[154] Moon told Mooers (who was in California) about Polequaptewa's resignation.[155]

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[149] ER 824, 872-75.

[150] ER 1056-62, 1065-66.

[151] ER 872, 877-78, 896.

[152] ER 825, 846, 868, 882-83.

[153] ER 455-59, 491-93, 527-29.

[154] ER 528, 531.

[155] ER 459-60, 615-16.

According to the government, various computer records purportedly established that the following occurred on November 18:

- Someone using the Residence Inn's IP address accessed Blue Stone's account for MailChimp (a marketing service that maintained a database of Blue Stone's potential clients) and deleted its files.[156] Blue Stone could not recover that data.[157]
- Someone using IP addresses associated with the Residence Inn and Polequaptewa's phone, along with Polequaptewa's login credentials, accessed Blue Stone's Google Drive account (a file-sharing service) and deleted files there.[158] Blue Stone was able to recover that data.[159]
- Someone using Florida IP addresses and the login credentials for Polequaptewa and another employee (whose login credentials were purportedly available to Polequaptewa) accessed Blue Stone's internal Synology server (which held CRM data, website files, backups, and other

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[156] ER 281-82, 384, 403, 410-11, 418-19, 783-85, 1006-07, 1010, 1249.

[157] ER 794-95, 840-41.

[158] ER 820-21, 823, 829-31, 836, 1006-09, 1250.

[159] ER 546, 554-55, 836.

information) and deleted its data.[160] Blue Stone could not recover that data.[161]

- Someone using Polequaptewa's login credentials deleted Blue Stone's offsite backup files with Cox Communications.[162] Blue Stone could not recover that data.[163]
- Someone using Polequaptewa's login credentials purportedly deleted files held by Bluehost (the company that maintained Blue Stone's website before Polequaptewa moved the website to Blue Stone's internal server).[164] Blue Stone apparently recovered that information because it was used to rebuild its website.[165]

At some point on November 18 after Polequaptewa resigned, a Blue Stone employee in Irvine noticed that certain files were being deleted, so she told Mooers, who informed Moon.[166] The jury heard the above-described testimony

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[160] ER 791-94, 802-03, 816, 828-29, 832-35, 837, 1245.

[161] ER 829.

[162] ER 817-18, 841, 896-97, 993-96, 1251.

[163] ER 841-42.

[164] ER 782-83, 790, 801-02, 847, 920-21, 934-35, 1005, 1154-55, 1248.

[165] ER 793, 796-97.

[166] ER 461, 494, 544-45, 615-17, 707-08.

from Moon and Polequaptewa's wife about how Moon then came to get Polequaptewa's MacBook Pro laptop.[167] After passing through many more hands, the laptop eventually made it to the FBI.[168]

A significant amount of the government's evidence was derived from an FBI agent's forensic examination of the laptop.[169] Among other things, the agent testified that: the laptop was password protected with Polequaptewa as the only named user; on November 18, the laptop was used to access the websites for Blue Stone, Synology, Google, and Bluehost; that day, searches were run for "how to delete all files on a Synology DiskStation," "how to reset a Synology DiskStation," "how to reformat a Synology DiskStation," "Google apps for business," "MailChimp, what if I accidentally delete my list," "my Synology," "Synology, how to access my php admin remotely," and "Cox Business"; the laptop was last accessed and turned off at 11:40 p.m. EST on November 18; and settings permitting remote access were turned off (although the agent conceded on cross-examination that a skilled hacker could still gain access).[170]

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[167] *Supra* Parts 2.A.3 & 2.A.4.

[168] ER 470-71, 513-14, 617-18, 688-90, 972-73, 1028-29.

[169] ER 900-64, 1270-73, 1280-81.

[170] ER 910-55.

The evidence about Blue Stone's internal server and its accounts with Google, MailChimp, Cox, and Bluehost pertained to the felony enhancement for a "related course of conduct," not the core misdemeanor crime of impairing the Mac Pro desktop computer used by Polequaptewa at Blue Stone's offices.[171] Other evidence reflected that at 12:50 a.m. EST on November 19—in other words, *after* Polequaptewa's laptop was taken from him—someone using the Residence Inn's IP address and his Apple iCloud credentials initiated a "wipe" of that desktop computer.[172] A "wipe" (or "erase") command issued remotely using an application on an iPhone or Apple computer will delete the data on the target computer but will not damage the computer's hardware.[173] At about 4:00 p.m. PST on November 19, the Mac Pro desktop computer was turned on, received the wipe command issued earlier that day, and shut down.[174] Thereafter, that computer had

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[171] *Supra* Part 1.

[172] ER 816, 1011-13, 1020-21, 1246. Two minutes later, a "wipe" of Polequaptewa's MacBook Pro laptop was initiated in the same way, but because it never again connected to the internet, it didn't receive and execute that command. ER 769, 1012-13, 1026-27.

[173] ER 757-58, 760, 768-69, 772.

[174] ER 768, 845-46, 1013-14.

no data or system software, so it would not boot up.[175] The operating system could be recovered, rendering the computer useable again, but the data would be lost unless backed up elsewhere.[176] The wipe command did not affect any other computer.[177]

Polequaptewa's wife testified that after the police took her husband's laptop and left their hotel room by 9:00 p.m. EST on November 18, Polequaptewa discovered that he couldn't access his personal e-mail accounts or his Apple iCloud account, and he received an alert from his bank.[178] For the next hour or so, they tried to regain access, but apparently someone else in Irvine was trying to access the accounts.[179] Sometime around 10:00 or 10:30 p.m. EST, Polequaptewa (who wanted to totally disassociate from Blue Stone) deleted all the company files he had on his phone.[180] Polequaptewa's wife also testified that she and her husband

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[175] ER 846, 570, 988.

[176] ER 570-71, 573-74, 772-73.

[177] ER 1022, 1026.

[178] ER 1081.

[179] ER 1081-84.

[180] ER 1083-84, 1114, 1117.

were probably asleep at 12:50 a.m., when someone sent the command to wipe the Mac Pro desktop.[181]

On Wednesday, November 19, Polequaptewa arrived at Blue Stone's Irvine offices, and part of that visit was captured on cellphone video.[182] Polequaptewa tried to get personal belongings from his office, but Mooers prevented him from doing so, claiming at trial that police officers instructed him to not let Polequaptewa take anything without their approval.[183] At one point, Jaime Fullmer (Blue Stone's CEO) said he wanted to "get all of our stuff as well"—in his mind, referring to the deleted data.[184] Polequaptewa responded: "What stuff? I deleted it. That's the point."[185] Fullmer and Mooers acknowledged that Polequaptewa had his

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[181] ER 1085, 1103-04, 1116-17.

[182] ER 298-304, 364-69, 379-80, 618-19, 730, 733-36, 842-45, 892-94, 990-91, 1030-31. The video was Exhibit 66 and a transcript of it (shown to the jury but not in evidence) was Exhibit 66A. ER 302, 1237-41. Because this transcript and the trial record adequately describe what happened for purposes of this appeal, Polequaptewa is not seeking leave to transmit CDs with copies of the video pursuant to Circuit Rule 27-14, but if the Court nevertheless wants copies, he will gladly provide them.

[183] ER 372-73, 729-31, 736-39, 1062-65, 1238-41.

[184] ER 304, 1241.

[185] ER 740, 1241.

phone in his hand at the time, but they insisted that he could not have been referring to deleting company data from that phone in accordance with Blue Stone's confidentiality agreement.[186] In an interaction not captured by the video, Fullmer asked Polequaptewa "why he did it" and Polequaptewa supposedly responded something like, "I did it and it's done."[187] At that point, police arrived and told Polequaptewa to leave the premises.[188]

Blue Stone filed a civil suit against Polequaptewa in connection with the data deletion.[189] He filed a countersuit alleging that Blue Stone improperly paid tribal leaders to obtain contracts, that it retaliated against him for whistleblowing, that it hacked into his personal e-mail accounts, and that it failed to return his personal property.[190] There may have been settlement discussions at some point, but the civil case was stayed until the criminal case was over.[191]

Blue Stone claimed that it spent more than $50,000 responding to the data deletions, but it didn't break out how much of that loss was caused by the Mac Pro

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[186] ER 304-05, 373-79, 732-33, 740-41.

[187] ER 305-06.

[188] ER 306, 730-31.

[189] ER 307-08, 331-33, 1029.

[190] ER 308-10, 336-45, 381-82, 722-29, 1029-30.

[191] ER 308, 325-31, 720-22.

wipe.[192] Likewise, in its closing arguments, the government contended that the loss from all the activity exceeded $50,000, but it never suggested that any loss caused by wiping of the Mac Pro desktop alone exceeded the $5,000 threshold required to bump the charged crime from a misdemeanor to a felony.[193]

Summary of Argument

A jury found Nikishna Polequaptewa guilty of intentionally causing damage to a computer via transmission of a command (by itself, a misdemeanor) with the loss resulting from the offense and "a related course of conduct" amounting to at least $5,000 (making the crime a felony).

1. A significant amount of evidence at Polequaptewa's trial was obtained from his laptop computer—purportedly the tool he used to remotely delete most of the data at issue. Sheriff deputies seized that laptop from him after entering his hotel room without a warrant. Polequaptewa filed a motion to suppress the fruits of that Fourth Amendment violation, but the district court denied it on the ground that he lacked standing as to the laptop.

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[192] ER 296-98, 306, 320-25, 623-32, 678, 698-705, 711-12, 795-97, 847-49, 1242-43.

[193] ER 1139-41, 1162-63, 1197-98.

A. The district court ignored that, regardless of Polequaptewa's interest in the laptop, he undisputedly had Fourth Amendment standing to challenge an unlawful entry into his hotel room. He contended that the deputies unlawfully entered his room because warrantless searches and seizures are per se unreasonable, he did not consent to the entry or to the seizure of the laptop, and no other exception to the Fourth Amendment's warrant requirement rendered the deputies' conduct reasonable. The exclusionary rule encompasses both evidence seized during an unlawful search and any indirect products of such invasions—so-called "fruit of the poisonous tree." Because the laptop was the evidentiary fruit of the entry into Polequaptewa's hotel room, any evidence obtained from the laptop should have been suppressed if that entry was unlawful, regardless of whether he had independent standing to challenge the search of the laptop directly.

B. To the extent it matters whether Polequaptewa also had standing to directly challenge the seizure and search of the laptop, the district court erred in not holding an evidentiary hearing on that contested issue. Polequaptewa filed a declaration stating that the computer was his. In response, the government presented declarations from his former employer claiming that the laptop was its property and that Polequaptewa "stole" it when he didn't return it after being fired. Despite the factual dispute about the laptop's ownership, the district court

erroneously accepted the government-proffered declarations at face value, refusing Polequaptewa's request to cross-examine the declarants. Doing so not only conflicted with the well-established principle that cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested; it also infringed his constitutional rights under the Fourth Amendment, the Due Process Clause, and the Confrontation Clause.

C. Because of its faulty standing ruling, the district court didn't reach the merits of the suppression issues. In particular, the government claimed that the consent and emergency-aid exceptions to the Fourth Amendment's warrant requirement applied. It also argued that if a Fourth Amendment violation occurred, then the independent-source and good-faith exceptions to the exclusionary rule applied. The government bears the burden to prove all these exceptions, so an evidentiary hearing and express factual findings by the district court are required on these contested issues.

D. Precedent requires a new trial when evidence admitted through an erroneous analysis prejudices the opposing party but the record is too sparse to conduct a proper admissibility analysis and decide whether the admission itself was erroneous. That's what happened here, so the Court should reverse Polequaptewa's conviction and remand for the district court to first hold a hearing

on the suppression motion and then hold a new trial regardless of the ruling on the suppression motion.

2. The district court plainly erred in failing to properly instruct the jury about the element that increased the charged crime from a misdemeanor to a felony—that the core offense (wiping one particular computer) and "a related course of conduct" caused at least $5,000 in loss. The plain language of the charging statute establishes three things about this element. First, each step of the course of conduct must be equivalent to the core offense such that the government had to prove that each additional alleged transmission of a command satisfied all three elements of that crime. Second, the government also had to prove all of those transmissions were so connected that each individual act was part of a single episode with a common purpose. Finally, because the core crime required proof that Polequaptewa intentionally caused damage, the felony enhancement required proof of his intent to cause at least $5,000 in loss. There's a reasonable probability that the jury's verdict would have been different had it been properly instructed about these things. The Court should therefore reverse Polequaptewa's conviction and remand for a new trial.

Standards of Review

1. The Court reviews the denial of a motion to suppress de novo and the underlying factual findings for clear error. *United States v. Grey*, 959 F.3d 1166, 1177 (9th Cir. 2020). It reviews the denial of an evidentiary hearing for abuse of discretion. *United States v. Herrera-Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016).

2. Even when a defendant doesn't object to jury instructions, the Court may grant relief if the district court erred, that error was plain, the error affected his substantial rights, and the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Depue*, 912 F.3d 1227, 1232-33 (9th Cir. 2019) (en banc).

Argument

1. The Court should reverse the district court's denial of Nikishna Polequaptewa's motion to suppress evidence, reverse his conviction, and remand for a new trial after a suppression hearing.

The Fourth Amendment protects people from unreasonable searches and seizures and generally requires a warrant issued upon probable cause. U.S. Const., Amend. IV. Nikishna Polequaptewa filed a motion to suppress the evidentiary

fruits of the constitutional violations that occurred when Florida sheriff deputies entered his hotel room and took his laptop without a warrant and without his consent.[194] The government opposed the motion, asserting the following arguments: Polequaptewa lacked standing because he had no reasonable expectation of privacy in the laptop; anyway, he consented to the deputies entering his hotel room and taking the laptop; alternatively, the deputies properly entered the hotel room under the emergency-aid exception to the Fourth Amendment's warrant requirement; and finally, even if the deputies violated the Fourth Amendment, the independent-source and good-faith exceptions to the exclusionary rule applied.[195] At the government's request and over Polequaptewa's objection,[196] the district court denied the suppression motion without a hearing based entirely on its conclusion that he lacked standing as to the laptop; it therefore didn't reach the other issues.[197]

As discussed below, the district court erred because Polequaptewa had standing to challenge the unlawful entry into his hotel room, and the subsequent seizure of

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[194] ER 30-47, 191-94; *see also supra* Statement of the Case, Part 2.

[195] ER 109-37.

[196] ER 197-200.

[197] ER 1-8.

the laptop was suppressible as the fruit of that unconstitutional conduct regardless of whether the laptop was stolen (as the government alleged). Furthermore, the district court erred in concluding that Polequaptewa did not separately have a Fourth Amendment interest in the laptop itself without holding an evidentiary hearing on that disputed matter. An evidentiary hearing is also required to delve into the issues the district sidestepped with its erroneous standing ruling. The Court should therefore reverse the denial of the suppression motion, reverse Polequaptewa's conviction, and remand for a new trial after a suppression hearing.

A. Polequaptewa had standing to challenge the unlawful entry into his hotel room, and the seized laptop was suppressible as the fruit of that constitutional violation regardless of whether it was stolen.

Although the district court used the term "standing,"[198] the Supreme Court has explained that "Fourth Amendment 'standing' ... is not distinct from the merits and is more properly subsumed under substantive Fourth Amendment doctrine." *Byrd v. United States*, 138 S.Ct. 1518, 1530 (2018) (quotation marks omitted). "The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment

[198] ER 6-8.

interest in the place searched before seeking relief for an unconstitutional search," however. *Id*. Polequaptewa will use "standing" in this manner.

A defendant has Fourth Amendment standing if he had either a proprietary interest or a reasonable expectation of privacy in the area searched or property seized. *Florida v. Jardines*, 569 U.S. 1, 5 (2013); *United States v. Jones*, 565 U.S. 400, 404-08 (2012). A "guest in a hotel room"—like Polequaptewa—"is entitled to constitutional protection against unreasonable searches and seizures" because he has a reasonable expectation of privacy. *Stoner v. California*, 376 U.S. 483, 490 (1964); *see also Minnesota v. Olson*, 495 U.S. 91, 99 (1990) ("We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend. Society expects at least as much privacy in these places as in a telephone booth—a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable[.]") (quotation marks omitted); *Hoffa v. United States*, 385 U.S. 293, 301 (1966) ("A hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office."); *United States v. Young*, 573 F.3d 711, 716 (9th Cir. 2009) ("Part of what a person purchases

when he leases a hotel room is privacy for one's person and one's things."). The government did not contend otherwise below.[199] Thus, Polequaptewa had standing to challenge an unconstitutional entry into his hotel room.

If the factual disputes about the circumstances surrounding the deputies' entry into Polequaptewa's hotel room and the seizure of his laptop are ultimately resolved in his favor after a hearing, the entry violated the Fourth Amendment.[200] But the district court, following the government's lead,[201] jumped past Polequaptewa's undisputed Fourth Amendment interest in his hotel room to whether he also had an independent Fourth Amendment interest in the seized laptop.[202] Doing so ignored that the exclusionary rule encompasses both evidence seized during an unlawful search and any indirect products of such invasions—so-called "fruit of the poisonous tree." *United States v. Gorman*, 859 F.3d 706, 716 (9th Cir. 2017); *see also United States v. Pulliam*, 405 F.3d 782, 785 (9th Cir. 2005) ("The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and

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[199] ER 109-37.

[200] *Infra* Part C.

[201] ER 125-27.

[202] ER 6-8.

found to be derivative of an illegality or fruit of the poisonous tree. It extends as well to the indirect as the direct products of unconstitutional conduct.") (citation and quotation marks omitted). Because the laptop was the evidentiary fruit of the entry into Polequaptewa's hotel room, any evidence obtained from the laptop should have been suppressed if that entry was unlawful.

The district court accepted at face value the government's claim that Polequaptewa "stole" the laptop by not returning it to a previous employer when he was fired, and it cited two cases for the proposition that "a defendant does not have a reasonable expectation of privacy in stolen property."[203] First, it pointed to *United States v. Wong*, where (with little analysis) the Court asserted that a "laptop searched belonged to Wong's former employer" so he did "not have standing to object to the search of that laptop because he failed to establish that he had a reasonable expectation of privacy in it." 334 F.3d 831, 838 (9th Cir. 2003). In contrast to the present case, however, the laptop in *Wong* was not the evidentiary fruit of a constitutional violation because the defendant had abandoned that laptop when he left it behind upon quitting his subsequent job. *Id*. at 835. And in *United States v. Caymen*, police found and seized a laptop when executing a search warrant for the defendant's home based on probable cause that the laptop had been

[203] ER 6-7.

fraudulently purchased from a store with another person's credit card. 404 F.3d 1196, 1197 (9th Cir. 2005). Police then got the store's consent to search the laptop's hard drive. *Id*. at 1198. Given evidence developed at an evidentiary hearing, the Court held that the district court didn't clearly err in finding that the laptop did not belong to the defendant and therefore he had no reasonable expectation of privacy in its contents. *Id*. at 1200-01. In doing so, however, the Court expressly noted that the laptop was in police possession pursuant to the valid search warrant, so that case did not raise questions about whether the laptop had been unconstitutionally seized before it was searched. *Id*. at 1199.

Unlike in *Wong* and *Caymen*, the laptop at issue here was the fruit of an unlawful entry into Polequaptewa's hotel room. He had Fourth Amendment standing to seek suppression of the laptop evidence derived from that constitutional violation regardless of whether he had independent standing to challenge the seizure and search of the laptop directly. Analogously, the Court has held that although a car passenger with no possessory interest in the vehicle doesn't have standing to challenge a search of the car directly, he may still argue that the evidence found during the car search was evidentiary fruit of his own illegal detention. *Pulliam*, 405 F.3d at 786-87; *United States v. Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000). Similarly, the Tenth Circuit has recognized that while a

person driving a stolen van "lacks standing to object to the search of the van, he has standing to object to his detention[,]" so if that "detention was illegal, evidence obtained as a result of that illegal detention must be excluded to the extent it was fruit of the poisonous tree." *United States v. Miller*, 84 F.3d 1244, 1250 (10th Cir. 1996), *overruled on other grounds*, *United States v. Holland*, 116 F.3d 1353 (10th Cir. 1997). These cases are consistent with "the principle that the relevant inquiry in determining whether a defendant has standing to challenge evidence as fruit of a poisonous tree is whether his or her Fourth Amendment rights were violated, not the defendant's reasonable expectation of privacy in the evidence alleged to be poisonous fruit." *United States v. Olivares-Rangel*, 458 F.3d 1104, 1117 (10th Cir. 2006). The district court ignored this principle when it erroneously concluded that Polequaptewa lacked standing to bring his suppression motion.

B. To the extent it matters whether Polequaptewa also had standing to directly challenge the seizure and search of the laptop (separate from his standing to challenge the unlawful entry into his hotel room), the district court erred in not holding an evidentiary hearing on that disputed issue.

Although Polequaptewa's standing to challenge the unlawful search of his hotel room is sufficient for him to prevail on his motion to suppress the laptop evidence,

the district court erred in finding that he did not also separately have a Fourth Amendment interest in the laptop itself. It could not properly make that finding without first holding an evidentiary hearing because the motion, opposition, and declarations established that there were contested facts pertaining to that issue. *See United States v. Cook*, 808 F.3d 1195, 1201 (9th Cir. 2015).

Polequaptewa's suppression motion was supported by his declaration, in which he stated that he told the deputies the laptop was not Blue Stone's property and they demanded proof of his ownership.[204] His sworn declaration states: "I tried to search for proof of ownership of *my computer*, but I could not find anything in my email at that time."[205] He also asserted that the deputies did not have a warrant "to seize *my computer*."[206] Polequaptewa also submitted an FBI search-warrant affidavit recounting William Moon's statement that Polequaptewa claimed the laptop "was his personal computer."[207] Consistent with this evidence, Polequaptewa's suppression motion repeatedly referred to "Defendant's laptop."[208] Thus, the district court wrongly wrote that "Defendant did not address his

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[204] ER 104-05.

[205] ER 105 (emphasis added).

[206] ER 106 (emphasis added).

[207] ER 60.

[208] ER 31, 34, 38, 44, 47.

possessory or ownership interest in the [] laptop in his declaration or briefing on this motion."[209]

In an attempt to rebut Polequaptewa's claim that he owned the laptop, the government presented declarations from two employees of the University of California, Irvine (UCI).[210] These declarants claimed that Polequaptewa purchased the laptop using UCI funds when he worked there in July 2012.[211] Allegedly, his ownership interest in, and use of, the laptop was limited by UCI's policies,[212] but the government did not point to any particular relevant policy.[213] When Polequaptewa stopped working for UCI in March 2014, he was purportedly "required to return the laptop at that time, as documented in" his termination letter.[214] But that letter included only this general statement: "You are directed to immediately return all UC equipment, including without limitation computers, laptops, cell phone, other electronic devices and audio-visual equipment that is in

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[209] ER 8.

[210] ER 146-83.

[211] ER 146, 149-50, 176-77, 182-83.

[212] ER 146, 152-54.

[213] ER 116-18.

[214] ER 146.

your possession."[215] It did not specifically mention the particular laptop at issue. Tellingly, UCI did not send a letter to Polequaptewa asking for the laptop's return, or even seek its own police department's help in retrieving that laptop, until January 2015—*after* the laptop had been seized from Polequaptewa in Florida and made its way to the FBI.[216] Thus, UCI's contention that it viewed the laptop as "stolen property"[217] was an after-the-fact judgment apparently manufactured at the government's behest.

In his reply, Polequaptewa reasserted his ownership interest in the laptop, noting that it was included among his "personal property" he was seeking in his civil-suit cross-claim against Blue Stone, where he had identified the computer as

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[215] ER 157.

[216] ER 146-47, 174. That letter refers to the unreturned laptop as a "MacBook Pro, serial #CI2GX6SNDJQ5[.]" ER 174. A letter sent to Polequaptewa's wife on the same date refers to the same serial number. ER 172. But the serial number for the MacBook Pro at issue here is "CO2HX6SMDKQ5." ER 82, 115, 149, 182. The government tried to explain away this discrepancy in a footnote, claiming it's "clear that the typist shifted on certain parts of the serial number." ER 117. The declarants themselves never made such a claim, however. ER 146-47, 176-77. Those are the kind of details that must be flushed out at an evidentiary hearing.

[217] ER 147.

"Polequaptewa's personal laptop."[218] Thus, the district court wrongly wrote that Polequaptewa did "not contest that UCI is the rightful owner" of the laptop in his reply.[219]

Despite the factual dispute about who owned the laptop, the government asked the district court to rule without an evidentiary hearing, arguing that it should not have to make its declarants available for cross-examination because Polequaptewa didn't do more to contest UCI's purported ownership of the laptop.[220] Although Polequaptewa maintained that there should be an evidentiary hearing where the government's declarants could be cross-examined,[221] the district court refused based on its above-noted mischaracterizations of his declaration, motion, and reply.[222]

This Court's precedent doesn't allow a party to submit, and a court to rely on, a declaration as proof of a contested fact without giving the opposing party the opportunity to question the witness about that fact. "Cross-examination is the principal means by which the believability of a witness and the truth of his

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[218] ER 193.

[219] ER 8.

[220] ER 116, 126-27, 197-200.

[221] ER 200.

[222] ER 1-8.

testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Indeed, courts have described cross-examination as "the greatest legal engine ever invented for the discovery of truth." *Winzer v. Hall*, 494 F.3d 1192, 1197 (9th Cir. 2007) (quotation marks omitted). Thus, the "purpose of requiring an evidentiary hearing, rather than permitting a decision to be based solely on written declarations, is to ensure that the district judge is presented with the information necessary to evaluate the truthfulness of the declarants." *United States v. Mejia*, 69 F.3d 309, 318 (9th Cir. 1995). Therefore, once the government presented the UCI declarations to try to rebut Polequaptewa's claim that he owned the laptop, no more was necessary to establish his right to cross-examine the declarants.

Denying cross-examination under these circumstances infringed Polequaptewa's constitutional rights. First and foremost, is the core right to suppression of the fruits of warrantless seizures and searches under the Fourth Amendment. And at hearings meant to safeguard that right, the denial of cross-examination violates the Due Process Clause. *See Ching v. Mayorkas*, 725 F.3d 1149, 1156 (9th Cir. 2013) ("'in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.'"). It also implicates Confrontation Clause rights. *See United States v. Clark*, 475 F.2d 240, 246-47 (2d Cir. 1973)

(confrontation right applies at pretrial suppression hearing); *see also United States v. Campbell*, 743 F.3d 802, 808-09 (11th Cir. 2014) (citing *Clark* while leaving open whether Confrontation Clause applies to pretrial proceedings); *United States v. Stewart*, 93 F.3d 189, 192 & n.1 (5th Cir. 1996) ("we safeguard the right to cross-examine at the suppression hearing because the aims and interests involved in a suppression hearing are just as pressing as those in the actual trial."). As the D.C. Circuit explained:

> It is clear that a defendant has some right to cross-examine Government witnesses at a suppression hearing. For two centuries judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony. Thus cross-examination is not a mere privilege but is the right of the party against whom a witness is offered. The adversary procedure of suppression hearings is well established in the federal courts, and there is no suggestion before us that a District Court could totally eliminate a defendant's right of cross-examination at this stage of the criminal proceedings. Indeed, the suppression hearing is a critical stage of the prosecution which affects substantial rights of an accused person; the outcome of the

> hearing—the suppression vel non of evidence—may often determine the eventual outcome of conviction or acquittal. Thus, whether we describe the right of cross-examination as deriving from the fundamental concepts embedded in the Due Process Clause or as implicit in the rules governing federal criminal proceedings, we have no doubt of the applicability of the right here or of its importance.

United States v. Green, 670 F.2d 1148, 1154 (D.C. Cir. 1981) (citations and quotation marks omitted).

Notably, even if the UCI declarations accurately described how the laptop was purchased, that isn't inconsistent with Polequaptewa having a proprietary interest or an expectation of privacy in it. By not seeking the laptop's return (at least until after it had already been seized and given to the FBI), UCI effectively abandoned its proprietary interest the laptop. In fact, a UCI declaration reflects that the Polequaptewas returned another university laptop when asked,[223] suggesting there was a legitimate reason the laptop at issue was kept. Indeed, Polequaptewa's wife explained at trial that when her husband left UCI, the university gave him a list of items to return that did not include that laptop, and UCI signed off on that list.[224]

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[223] ER 146.

[224] ER 1116.

At a minimum, Polequaptewa still had an expectation of privacy in the laptop. This situation is somewhat akin to circumstances where a person continues to retain an expectation of privacy in a hotel room past checkout time. *See United States v. Dorias*, 241 F.3d 1124, 1128-29 (9th Cir. 2001) ("[T]he mere expiration of the rental period, in the absence of affirmative acts of repossession by the lessor, does not automatically end a lessee's expectations of privacy."); *cf. United States v. Bautista*, 362 F.3d 584, 590-91 (9th Cir. 2004) (defendant retained expectation of privacy where "motel's manager took no affirmative steps to repossess the room once she learned that it had been reserved with a stolen credit card."). Or in a rental car kept past its return deadline. *See United States v. Henderson*, 241 F.3d 638, 647 (9th Cir. 2000) (defendant had standing to challenge search of rental car even though rental agreement expired because rental-car company made no attempt to repossess the car). The devil is in the details, so to speak, so cross-examination of the UCI witnesses is necessary before any court can find that Polequaptewa did not have Fourth Amendment standing as to the laptop. *See Graham v. State*, 47 Md.App. 287, 294 (1980) ("There may well be situations, for example, in which the unlawfulness of an initial acquisition can become attenuated by other factors, such as the length of time the article is in the defendant's exclusive possession, or an honest, though mistaken, belief that the object in

question actually belongs to him—that his acquisition of it was not unlawful."). Furthermore, because (as discussed in the next section) an evidentiary hearing is required as to the other unresolved suppression issues anyway, there's no reason to not have the district court delve into this matter on remand as well.

C. An evidentiary hearing into the remaining suppression issues not reached by the district court is also necessary.

Because of its faulty standing ruling, the district court didn't reach the merits of the suppression issues, all of which require a suppression hearing.

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quotation marks omitted). The government therefore bears the burden to prove that police officers' actions fell within one of these exceptions. *United States v. Job*, 871 F.3d 852, 860 (9th Cir. 2017). The government raised two such exceptions—consent and emergency aid.

Consent is a "jealously and carefully drawn exception" to the Fourth Amendment's warrant requirement. *Georgia v. Randolf*, 547 U.S. 103, 109 (2006) (quotation marks omitted). Although Deputy Hall's declaration claimed that Polequaptewa consented to him taking the laptop (and was conspicuously silent on

how he entered the hotel room),[225] Polequaptewa's declaration stated unequivocally that he did not consent to the deputies entering his hotel room, that he opened the door only because the deputies threatened to break down the door otherwise, that the deputies then pushed their way into the room and refused his requests for them to leave, and that he let the deputies take the laptop only because they threatened to take him to jail if he did not.[226] Although officers may initiate a consensual encounter by knocking on a person's hotel-room door, "coercive circumstances" like announcing "police" while knocking, being "unreasonably persistent" in the attempt to gain access to the room, and commanding or otherwise compelling the person "to open the door under the badge of authority" render the encounter involuntary. *United States v. Crasper*, 472 F.3d 1141, 1145-46 (9th Cir. 2007) (quotation marks omitted); *see also Bautista*, 362 F.3d at 591 (officers effectuate a search when they gain visual or physical entry by commanding door be opened under claim of lawful authority); *United States v. Spotted Elk*, 548 F.3d 641, 655 (8th Cir. 2008) ("[A] police attempt to 'knock and talk' can become

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[225] ER 184-90; *supra* Statement of the Case, Part 2.A.2.

[226] ER 103-06; *supra* Statement of the Case, Part 2.A.1. As noted above, the trial testimony of William Moon and Polequaptewa's wife is also inconsistent with Hall's consent story. *Supra* Statement of the Case, Parts 2.A.3 & 2.A.4.

coercive if the police assert their authority, refuse to leave, or otherwise make the people inside feel they cannot refuse to open up[.]"). Thus, an evidentiary hearing is required to resolve the factual dispute about consent.

"The emergency aid exception permits law enforcement officers to enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Bonivert v. City of Clarkston*, 883 F.3d 865, 876 (9th Cir. 2018) (quotation marks omitted). The officers must have "an objectively reasonable basis for believing that an *actual or imminent injury* was unfolding in the place to be entered." *Id*. at 877 (emphasis in original). The government "bear[s] a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests because the emergency exception is narrow and rigorously guarded." *Id*. at 876-77 (citation and quotation marks omitted). In particular, the government must proffer "specific and articulable facts to justify invoking the exception[.]" *Sandoval v. Las Vegas Metropolitan Police Department*, 756 F.3d 1154, 1164 (9th Cir. 2014) (quotation marks omitted). A court must then determine whether: "(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the

need." *Ames v. King County, Washington*, 846 F.3d 340, 350 (9th Cir. 2017) (quotation marks omitted). An evidentiary hearing into "the totality of the circumstances" here is required. Hall claimed he needed to make sure Polequaptewa "was alive" and would not "do harm to himself or his family" because he "was in a new state, no longer had a job, and his former employer was accusing him of engaging in fraud."[227] Those facts don't provide an objectively reasonable basis to believe that an actual or imminent injury was unfolding within the room. At a minimum, Hall must be cross-examined about exactly what information he had and when, particularly given the trial testimony of William Moon (who summoned the police), who stated unequivocally that he was only concerned about the data deletions purportedly being accomplished via the laptop and not Polequaptewa's well-being,[228] and presumably told Hall the same. Finally, even taken at face value, Hall's report and declaration reflect that he dispelled any concern about Polequaptewa's mental state *before* turning to the dispute between

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[227] ER 184-85, 190.

[228] ER 465, 496, 500-03, 514; *supra* Statement of the Case, Part 2.A.3.

Moon and Polequaptewa over the laptop.[229] At that point, the emergency-aid exception no longer even arguably applied. *Id*.

The government also argued that, to the extent the Fourth Amendment was violated, the independent-source and good-faith exceptions to the exclusionary rule applied.[230] Again, the government bears the burden to prove each of these exceptions. *See United States v. Camou*, 773 F.3d 932, 944 (9th Cir. 2014) (good faith); *cf. United States v. Reilly*, 224 F.3d 986, 994 (9th Cit. 2000) (inevitable discovery). "[T]he independent source doctrine asks whether the evidence *actually* was obtained independently from activities untainted by the initial illegality." *United States v. Lundin*, 817 F.3d 1151, 1161 (9th Cir. 2016) (emphasis in original) (quotation marks omitted). And the "test for good faith is an objective one: whether a reasonably well trained officer would have known that the search was illegal *in light of all the circumstances*." *Camou*, 773 F.3d at 944 (emphasis added) (quotation marks omitted). These are factual inquiries, yet the government offered no affidavits to support its exclusionary-rule-exception arguments.

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[229] ER 184-90; *supra* Statement of the Case, Part 2.A.2; *see also* ER 121, 130 (government conceding this point).

[230] ER 132-36.

Assuming the government even proffered enough to put these exceptions at issue, an evidentiary hearing into all the relevant facts is necessary.

Finally, even if the record were fully developed as to any of these issues, the district court did not make findings as to them. "When factual issues are involved in deciding a motion, the [district] court must state its essential findings on the record." Fed. R. Crim. P. 12(d). This rule is mandatory. *United States v. Prieto-Villa*, 910 F.2d 601, 607-10 (9th Cir. 1990). "Essential factual findings are those which will permit appellate review of the legal questions involved." *Id*. at 610. The Court must remand for the district court to make the necessary findings; it cannot simply engage in "appellate fact-finding" to resolve the disputes itself. *Id*. at 608-10.

D. The Court should reverse Polequaptewa's conviction and remand for a new trial.

Because the district court erroneously denied Polequaptewa's suppression motion and therefore allowed the government to present evidence obtained from the laptop without first making the findings necessary to determine that the evidence was admissible, the Court should vacate his conviction and remand for a new trial.

In *United States v. Christian*, the Court concluded that the district court improperly excluded defense-proffered expert testimony because it erred in its gatekeeping function by applying the wrong analysis. 749 F.3d 806, 810-13 (9th Cir. 2014). Because the expert would have bolstered the defendant's diminished-capacity defense, exclusion of that evidence couldn't be dismissed as harmless. *Id*. at 813. Even though the Court recognized that, on remand, the district court might still exclude the expert testimony after a proper hearing, it still determined that reversal of the defendant's conviction and a remand for a new trial was the appropriate remedy. *Id*. at 813-14. It followed precedent holding that "a new trial is warranted when evidence admitted through an erroneous analysis prejudices the opposing party but the record is too sparse to conduct a proper admissibility analysis and decide whether the admission itself was erroneous." *Id*. at 813. The Court extended that precedent to criminal cases and to cases where evidence was erroneously excluded, rather than admitted. *Id*. at 814.

Christian applies here. Until the district court holds an evidentiary hearing and makes the required factual findings, "the record is too sparse to conduct a proper admissibility analysis" under the Fourth Amendment to "decide whether the admission [of the laptop evidence] itself was erroneous[,]" but the Court can and should find that that evidence was "admitted through an erroneous analysis[.]" 749

F.3d at 813. And, as in *Christian*, the admission of that evidence caused the requisite prejudice because it wasn't harmless. *Id*. The government bears the burden to prove a constitutional error harmless beyond a reasonable doubt. *United States v. Lustig*, 830 F.3d 1075, 1091 (9th Cir. 2016). Reversal is required under that standard because "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23-24 (1967) (quotation marks omitted). As detailed above, the forensic examination of Polequaptewa's laptop—the tool he purportedly used to delete most of the data—was central to the government's case.[231] Under these circumstances, the government can't meet its burden to prove beyond a reasonable doubt that the evidence did not contribute to the jury's verdict. The Court should therefore reverse Polequaptewa's conviction and remand for the district court to first hold a hearing on the suppression motion and then hold a new trial regardless of the ruling on the suppression motion.

[231] *Supra* Statement of the Case, Part 3.

2. The Court should reverse Polequaptewa's conviction and remand for a new trial because the district court plainly erred in failing to properly instruct the jury about the element that increased the charged crime from a misdemeanor to a felony.

The indictment required the government to prove beyond a reasonable doubt that the offense (wiping the Mac Pro desktop computer) and "a related course of conduct" caused at least $5,000 in loss.[232] The district court plainly erred in failing to properly instruct the jury about this element, which increased the charged crime from a misdemeanor to a felony.

A. To understand where the district court went wrong, the Court must apply the canons of statutory construction to 18 U.S.C. §1030.

1. Interpretation begins with the statutory text, and unless otherwise defined, terms are generally given their ordinary meaning. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). Moreover, a statute's language cannot be construed in a vacuum; its words must be read in context and in light of their place in the overall statutory scheme. *Sturgeon v. Frost*, 136 S.Ct. 1061, 1070 (2016).

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[232] *Supra* Statement of the Case, Part 1.

Polequaptewa was charged with violating §1030(a)(5)(A), (c)(4)(B)(i), (c)(4)(A)(i)(I).[233] Section §1030(a)(5)(A) provides that whoever "knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer ... shall be punished as provided in subsection (c)[.]" That subsection makes this crime a misdemeanor unless certain additional conditions are satisfied. 18 U.S.C. §1030(c)(4)(G)(i). Polequaptewa was charged with a felony under §1030(c)(4)(B)(i), which increases the maximum sentence from one year to ten years "if the offense caused" specific kinds of harms. And under §1030(c)(4)(A)(i)(I), the alleged harm was "loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value[.]"

The superseding indictment charged a single crime because any fact that increases the statutory penalty is an "element" of the offense such that "the core crime" and the fact triggering the higher sentence "together constitute a new, aggravated crime[.]" *Alleyne v. United States*, 570 U.S. 99, 108, 113 (2013). But

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[233] ER 235-39.

that's not the way it was presented to the jury. It was instructed that it could find Polequaptewa guilty of violating §1030(a)(5)(A) as "charged in the single-count First Superseding Indictment"—the core misdemeanor crime—if the government proved three elements beyond a reasonable doubt: (1) that he knowingly caused the transmission of a program, a code, a command, or information to the Mac Pro desktop computer; (2) that, as a result of the transmission, he intentionally impaired, without authorization, the integrity or availability of data, a program, a system, or information; and (3) that the Mac Pro desktop computer was used in or affected interstate or foreign commerce or communication.[234] The district court separately instructed the jury that if it found Polequaptewa guilty of that offense, it would then have to decide whether the government proved beyond a reasonable doubt that, "as a result of such conduct [and] a related course of conduct affecting one or more other computers used in or affecting interstate or foreign commerce or communication, the defendant caused 'loss' to Blue Stone Strategy Group during any one-year period of an aggregate value of $5,000 or more"—the fact triggering

[234] ER 18-19, 1225.

the higher sentence.[235] The jury found Polequaptewa guilty of the core misdemeanor crime and made the loss finding.[236]

"Loss" was defined as "any reasonable cost to Blue Stone Strategy Group including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service."[237] What constituted a "related course of conduct" was never explained, however.[238] But the jury was generally instructed that it was there only to determine whether the defendant is guilty or not guilty of "the charge in the First Superseding Indictment" because he was "not on trial for any conduct or offense not charged" therein.[239] Again, the jury was told immediately after that that the charge "in the single-count First Superseding Indictment" was only the core misdemeanor crime set forth in §1030(a)(5)(A) with the three elements set forth above.[240] Thus, the clear implication was that whatever

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[235] ER 20, 1229; *supra* footnote 13.

[236] ER 1202-05, 1255-57.

[237] ER 20-21, 1229.

[238] ER 10-26, 1209-36.

[239] ER 17, 1223.

[240] ER 18-19, 1225.

a "related course of conduct" was, it had nothing to do with these elements. That was wrong.

Section §1030 doesn't define "related course of conduct," but that phrase must be read in context: "the offense caused ... loss to 1 or more persons during any 1-year period []and ... loss resulting from a related course of conduct affecting 1 or more other protected computers[] aggregating at least $5,000 in value[.]" 18 U.S.C. §1030(c)(4)(A)(i)(I). Thus, the "course of conduct" must be "related" to "the offense." The plain meaning of this language has three consequences. First, each step of the course of conduct must be equivalent to the offense—in other words, here, the government had to prove that each additional alleged transmission of a command satisfied all three elements of the core §1030(a)(5)(A) crime. Second, the government also had to prove all of these transmissions were related, plainly meaning so connected that each individual act was part of a single episode with a common purpose. Finally, because §1030(a)(5)(A) requires the defendant to "intentionally cause damage[,]" it necessarily follows that the §1030(c)(4)(i)(I) felony enhancement requires his intent to cause at least $5,000 in loss. Other statutory-construction canons support these plain-language interpretations.

2. The rule of lenity requires resolving any ambiguity in §1030 in Polequaptewa's favor. *United States v. Davis*, 139 S.Ct. 2319, 2333 (2019). To

the extent the government can proffer any contrary plausible interpretation of §1030, that would simply render the statute ambiguous. And in that case, the "tie must go to the defendant." *United States v. Santos*, 553 U.S. 507, 514 (2008) (rule of lenity requires adopting most "defendant-friendly" of any plausible interpretations).

3. Finally, the doctrine of constitutional avoidance encompasses at least two different canons of construction applicable here: first, the Court should, if possible, interpret an ambiguous statute to avoid rendering it unconstitutional; and second, the Court should construe an ambiguous statute to avoid the need even to address serious questions about its constitutionality. *Davis*, 139 S.Ct. at 2332 n.6. The "doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process" (because "statutes must give people of common intelligence fair notice of what the law demands of them") and "separation of powers" (because "[o]nly the people's elected representatives in the legislature are authorized to make an act a crime"). *Id.* at 2325 (quotation marks omitted). "Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id.* If §1030 isn't given the defense-friendly interpretation demanded by its plain language, the

statute is unconstitutionally vague in that it deprived Polequaptewa of fair notice of exactly what conduct would make him guilty of a felony under §1030(a)(5)(A), (c)(4)(B)(i), (c)(4)(A)(i)(I), and it improperly allows unaccountable police, prosecutors, and judges to decide after the fact whether he engaged in such conduct.

B. The foregoing arguments establish not only that the district court erred in failing to instruct the jury about the felony-enhancement element but also that the error was "clear or obvious, rather than subject to reasonable dispute." *United States v. Wang*, 944 F.3d 1081, 1088 (9th Cir. 2019) (quotation marks omitted). "An appellate case need not answer the precise question to show plain error." *Id.* at 1089. "The clear text and structure of a statute ... may also suffice to show plain error." *Id.* Polequaptewa's argument is based on the plain language of §1030, supported by the rule of lenity and the constitutional-avoidance doctrine.

C. The instructional error affected Polequaptewa's substantial rights because there's a reasonable probability that it affected the outcome of the trial. *United States v. Garrido*, 713 F.3d 985, 995 (9th Cir. 2013); *see also United States v. Tydingco*, 909 F.3d 297, 304 (9th Cir. 2018) (prejudice "requires some intermediate level of proof that the error affected the outcome at trial: more than a mere possibility, ... but less than a preponderance[.]"); *United States v. Bear*, 439

F.3d 565, 570 (9th Cir. 2006) (substantial rights affected where erroneous instructions create "genuine possibility" that jury convicted on legally-inadequate ground); *United States v. Alferahin*, 433 F.3d 1148, 1157-58 (9th Cir. 2006) (substantial rights affected unless "strong and convincing evidence" on missing element). As discussed above, the evidence pertaining to the core misdemeanor crime of wiping the Mac Pro desktop (via a single command issued at one discrete moment) was distinct from the evidence pertaining to the felony enhancement (based on a series of many commands to multiple computers over an extended period of time).[241] If the jury had been informed that it had to find each of the elements for each and every one of those additional commands, it might have concluded that others (like William Moon or Eldad Yacobi) were responsible for some or all of those commands, or that Polequaptewa issued some of the commands accidentally. And if the jury had been informed that any commands attributable to Polequaptewa were related only if they were all part of a single episode with a common purpose, it might have concluded that the wipe command to the Mac Pro was distinct enough from the other commands in time and/or in nature to render them unrelated. And because the Blue Stone witnesses didn't

[241] *Supra* Statement of the Case, Part 3.

break down the loss resulting from each individual command,[242] the jury would have been unable to determine if the $5,000 loss threshold was crossed once it disregarded any of the commands. Furthermore, although the government presented evidence that the purported course of conduct caused a certain amount of loss, it didn't even try to prove that Polequapetwa intended to cause at least $5,000 in loss. For all these reasons, there's a reasonable probability the instructional error affected the verdict.

D. Finally, because the faulty instructions allowed the jury to rely on a legally-invalid theory to convict Polequaptewa and a properly-instructed jury probably wouldn't have found him guilty, the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Tydingco*, 909 F.3d at 306; *Garrido*, 713 F.3d at 998; *Bear*, 439 F.3d at 570-71; *Alferahin*, 433 F.3d at 1159-60. The Court should therefore reverse his conviction and remand for a new trial.

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[242] ER 296-98, 306, 320-25, 623-32, 678, 698-705, 711-12, 795-97, 847-49, 1242-43.

Conclusion

The Court should reverse the denial of Polequaptewa's suppression motion, reverse his conviction, and remand for a new trial after a suppression hearing.

July 7, 2020

Respectfully submitted,

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Interim Federal Public Defender

/s/ *James H. Locklin*
JAMES H. LOCKLIN
Deputy Federal Public Defender

Certificate of Related Cases

Counsel for appellant is unaware of any cases currently pending in this Court that are related for purposes of Circuit Rule 28-2.6.

July 7, 2020

/s/ *James H. Locklin*

JAMES H. LOCKLIN
Deputy Federal Public Defender

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Certificate of Compliance re Brief Length

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that: the foregoing brief uses 14 point Times New Roman proportionately spaced type; text is double spaced and footnotes are single spaced; a word count of the word processing system used to prepare the brief indicates that the brief (not including the table of contents, the table of authorities, the statement of related cases, the certificate of compliance re brief length, the addendum, or the certificate of service) contains approximately 13,977 words.

July 7, 2020

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Counsel for Defendant-Appellant

Addendum

U.S. Const., Amend. IV 1a

18 U.S.C. §1030 ..... 2a

United States Code Annotated
Constitution of the United States
Annotated
Amendment IV. Searches and Seizures; Warrants

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants

Amendment IV. Searches and Seizures; Warrants

Currentness

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

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for this amendment.>

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants, USCA CONST Amend. IV-Search and Seizure; Warrants
Current through P.L. 116-145.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 47. Fraud and False Statements (Refs & Annos)

18 U.S.C.A. § 1030

§ 1030. Fraud and related activity in connection with computers

Effective: November 16, 2018
Currentness

(a) Whoever--

(1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y. of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains--

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer;

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period;

(5)(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss. [1]

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if--

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States; [2]

(7) with intent to extort from any person any money or other thing of value, transmits in interstate or foreign commerce any communication containing any--

(A) threat to cause damage to a protected computer;

(B) threat to obtain information from a protected computer without authorization or in excess of authorization or to impair the confidentiality of information obtained from a protected computer without authorization or by exceeding authorized access; or

(C) demand or request for money or other thing of value in relation to damage to a protected computer, where such damage was caused to facilitate the extortion;

shall be punished as provided in subsection (c) of this section.

(b) Whoever conspires to commit or attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is--

(1)(A) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(2)(A) except as provided in subparagraph (B), a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or an attempt to commit an offense punishable under this subparagraph, if--

(i) the offense was committed for purposes of commercial advantage or private financial gain;

(ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or

(iii) the value of the information obtained exceeds $5,000; and

(C) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(3)(A) a fine under this title or imprisonment for not more than five years, or both, in the case of an offense under subsection (a)(4) or (a)(7) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(4),[3] or (a)(7) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(4)(A) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 5 years, or both, in the case of--

(i) an offense under subsection (a)(5)(B), which does not occur after a conviction for another offense under this section, if the offense caused (or, in the case of an attempted offense, would, if completed, have caused)--

(I) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value;

(II) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

(III) physical injury to any person;

(IV) a threat to public health or safety;

(V) damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security; or

(VI) damage affecting 10 or more protected computers during any 1-year period; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(B) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 10 years, or both, in the case of--

(i) an offense under subsection (a)(5)(A), which does not occur after a conviction for another offense under this section, if the offense caused (or, in the case of an attempted offense, would, if completed, have caused) a harm provided in subclauses (I) through (VI) of subparagraph (A)(i); or

(ii) an attempt to commit an offense punishable under this subparagraph;

(C) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 20 years, or both, in the case of--

(i) an offense or an attempt to commit an offense under subparagraphs (A) or (B) of subsection (a)(5) that occurs after a conviction for another offense under this section; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(D) a fine under this title, imprisonment for not more than 10 years, or both, in the case of--

(i) an offense or an attempt to commit an offense under subsection (a)(5)(C) that occurs after a conviction for another offense under this section; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(E) if the offender attempts to cause or knowingly or recklessly causes serious bodily injury from conduct in violation of subsection (a)(5)(A), a fine under this title, imprisonment for not more than 20 years, or both;

(F) if the offender attempts to cause or knowingly or recklessly causes death from conduct in violation of subsection (a)(5)(A), a fine under this title, imprisonment for any term of years or for life, or both; or

(G) a fine under this title, imprisonment for not more than 1 year, or both, for--

(i) any other offense under subsection (a)(5); or

(ii) an attempt to commit an offense punishable under this subparagraph.

[(5) Repealed. Pub.L. 110-326, Title II, § 204(a)(2)(D), Sept. 26, 2008, 122 Stat. 3562]

(d)(1) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section.

(2) The Federal Bureau of Investigation shall have primary authority to investigate offenses under subsection (a)(1) for any cases involving espionage, foreign counterintelligence, information protected against unauthorized disclosure for reasons of national defense or foreign relations, or Restricted Data (as that term is defined in section 11y of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)), except for offenses affecting the duties of the United States Secret Service pursuant to section 3056(a) of this title.

(3) Such authority shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section--

(1) the term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) the term "protected computer" means a computer--

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or

(B) which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States;

(3) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States;

(4) the term "financial institution" means--

(A) an institution, with deposits insured by the Federal Deposit Insurance Corporation;

(B) the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank;

(C) a credit union with accounts insured by the National Credit Union Administration;

(D) a member of the Federal home loan bank system and any home loan bank;

(E) any institution of the Farm Credit System under the Farm Credit Act of 1971;

(F) a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934;

(G) the Securities Investor Protection Corporation;

(H) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); and

(I) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

(5) the term "financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(6) the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;

(7) the term "department of the United States" means the legislative or judicial branch of the Government or one of the executive departments enumerated in section 101 of title 5;

(8) the term "damage" means any impairment to the integrity or availability of data, a program, a system, or information;

(9) the term "government entity" includes the Government of the United States, any State or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country;

(10) the term "conviction" shall include a conviction under the law of any State for a crime punishable by imprisonment for more than 1 year, an element of which is unauthorized access, or exceeding authorized access, to a computer;

(11) the term "loss" means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service; and

(12) the term "person" means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity.

(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses[4] (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). Damages for a violation involving only conduct described in subsection (c)(4)(A)(i)(I) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.

(h) The Attorney General and the Secretary of the Treasury shall report to the Congress annually, during the first 3 years following the date of the enactment of this subsection, concerning investigations and prosecutions under subsection (a)(5).

(i)(1) The court, in imposing sentence on any person convicted of a violation of this section, or convicted of conspiracy to violate this section, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person forfeit to the United States--

(A) such person's interest in any personal property that was used or intended to be used to commit or to facilitate the commission of such violation; and

(B) any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.

(2) The criminal forfeiture of property under this subsection, any seizure and disposition thereof, and any judicial proceeding in relation thereto, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except subsection (d) of that section.

(j) For purposes of subsection (i), the following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) Any personal property used or intended to be used to commit or to facilitate the commission of any violation of this section, or a conspiracy to violate this section.

(2) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this section, or a conspiracy to violate this section [5]

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 2102(a), Oct. 12, 1984, 98 Stat. 2190; amended Pub.L. 99-474, § 2, Oct. 16, 1986, 100 Stat. 1213; Pub.L. 100-690, Title VII, § 7065, Nov. 18, 1988, 102 Stat. 4404; Pub.L. 101-73, Title IX, § 962(a)(5), Aug. 9, 1989, 103 Stat. 502; Pub.L. 101-647, Title XII, § 1205(e), Title XXV, § 2597(j), Title XXXV, § 3533, Nov. 29, 1990, 104 Stat. 4831, 4910, 4925; Pub.L. 103-322, Title XXIX, § 290001(b) to (f), Sept. 13, 1994, 108 Stat. 2097-2099; Pub.L. 104-294, Title II, § 201, Title VI, § 604(b)(36), Oct. 11, 1996, 110 Stat. 3491, 3508; Pub.L. 107-56, Title V, § 506(a), Title VIII, § 814(a)-(e), Oct. 26, 2001, 115 Stat. 366, 382-384; Pub.L. 107-273, div. B, Title IV, §§ 4002(b)(1), (12), 4005(a)(3), (d)(3), Nov. 2, 2002, 116 Stat. 1807, 1808, 1812, 1813; Pub.L. 107-296, Title XXII, § 2207(g), formerly Title II, § 225(g), Nov. 25, 2002, 116 Stat. 2158; renumbered § 2207(g), Pub.L. 115-278, § 2(g)(2)(I), Nov. 16, 2018, 132 Stat. 4178; amended Pub.L. 110-326, Title II, §§ 203, 204(a), 205 to 208, Sept. 26, 2008, 122 Stat. 3561, 3563.)

Footnotes

1 So in original. The period probably should be a semicolon.
2 So in original. Probably should be followed by "or".
3 So in original. The comma probably should not appear.
4 So in original. Probably should be "subclause".
5 So in original. A period probably should appear.

18 U.S.C.A. § 1030, 18 USCA § 1030
Current through P.L. 116-145.

End of Document

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

NIKISHNA POLEQUAPTEWA,

Defendant.

Case No. CR-16-00036-CJC

Defendant's Motion for Release Pending Appeal

Hearing Date: September 14, 2020
Hearing Time: 9:00 a.m.
Hearing Place: Courtroom of the Hon. Cormac J. Carney

Motion for Release Pending Appeal

Defendant Nikishna Polequaptewa, by and through his attorney of record, Deputy Federal Public Defender James H. Locklin, hereby moves for release pending appeal. This motion is made pursuant to 18 U.S.C. §3143(b). The motion is based on the attached memorandum of points and authorities, the attached exhibit, the files and records of this case, and any further evidence as may be adduced at the hearing on this motion.

August 5, 2020

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

/s/ James H. Locklin
JAMES H. LOCKLIN
Deputy Federal Public Defender

Attorneys for Defendant

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2. Polequaptewa's appeal is not for the purpose of delay and raises substantial—in other words, "fairly debatable"—questions that, if decided in his favor, will likely result in reversal. 3

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Memorandum of Points and Authorities

Introduction

After a jury convicted Nikishna Polequaptewa on one count of unlawfully damaging a computer, the Court imposed a 27-month sentence. Polequaptewa appealed, and his opening brief in the Ninth Circuit is attached hereto as Exhibit A. He argues on appeal that a retrial is required for two reasons: (1) this Court erred in denying his motion to suppress evidence, and (2) the Court erred in instructing the jury about the element that increased the charged crime from a misdemeanor to a felony. Because the relevant facts and legal authority pertaining to those arguments are set forth in the attached brief, they will not be repeated here. Suffice it to say, the appellate issues are at least fairly debatable—one requirement for release pending appeal. And the government does not dispute the other requirement—that Polequaptewa, who was on pretrial, presentencing, and post-sentencing release for 3⅓ years without incident until he self-surrendered to the Bureau of Prisons to begin serving his sentence, is not likely to flee or pose a danger to the community if released while his appeal is pending. Therefore, Polequaptewa respectfully requests that the Court release him on bond pending appeal.

Argument

The Court should release Nikishna Polequaptewa on bond pending appeal.

Polequaptewa is entitled to release pending appeal if the Court finds (a) by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of any other person or the community, and (b) that the appeal is not for the purpose of delay and raises at least one substantial question of law or fact likely to result in reversal. 18 U.S.C. §3143(b); *see generally United States v. Handy*, 761 F.2d 1279, 1280-84 (9th

Cir. 1985). The Court should find that both requirements have been satisfied and therefore release Polequaptewa under appropriate conditions until his appeal is resolved.

1. The government does not dispute that Polequaptewa is not likely to flee or pose a danger to anyone.

With regard to the first requirement for release pending appeal, the relevant question is whether there are release conditions that will reasonably assure that Polequaptewa will appear as required and will not endanger any person or the community. 18 U.S.C. §§3142(b) & (c), 3143(b)(1)(A). There clearly are because he complied with such conditions during the 40 months he spent on pretrial, presentencing, and post-sentencing release.

At his initial appearance in May 2016, the magistrate judge (with the concurrence of the government and the Pretrial Services Agency) released Polequaptewa on a $25,000 appearance bond (signed by his wife) under certain conditions, including supervision by the PSA. *See* Docket No. 9 (minutes of initial appearance); Docket No. 25 (transcript of initial appearance).

At the end of his trial in November 2018, the government had no objection to Polequaptewa remaining released under the same conditions until sentencing, and the Court allowed that. *See* Docket No. 214 (trial transcript) at p. 29. That neither the Court nor the government thought he should be remanded after the guilty verdict is significant because, at that point, release pending sentencing required the Court to find by clear and convincing evidence that he is not likely to flee or pose a danger. 18 U.S.C. §3143(a)(1); Fed. R. Crim. P. 46(c). This is the same standard that applies to release pending appeal. 18 U.S.C. §3143(b)(1)(A).

In the presentence report, the probation office noted: "Pretrial Services records indicate Polequaptewa has complied with all Court-ordered conditions of release." *See* Docket No. 172 (PSR) at p. 4.

Even after the Court imposed a 27-month sentence in July 2019, it gave Polequaptewa two months to surrender to the Bureau of Prisons, again with concurrence of the government. *See* Docket No. 190 (judgment) at p. 3; Docket No. 211 (sentencing transcript) at pp. 44-45, 50. The Court stated: "This finding of self-surrender is based on Mr. Polequaptewa's full compliance with the conditions of his pretrial release as well as the nature of this offense and the government's nonopposition to a self-surrender." *Id.* at p. 50.

During the **3⅓ years** he was on pretrial, presentencing, and post-sentencing release without incident, Polequaptewa attended every one of the 15 court hearings in this case. *See* Docket Nos. 9, 61, 68, 70, 72, 73, 82, 112, 128, 139, 140, 141, 142, 144, 189. Moreover, his only prior criminal convictions (both ultimately expunged) were for two misdemeanor offenses committed when he was just 18 and 20 years old. *See* Docket No. 172 (PSR) at pp. 11-13. Furthermore, Polequaptewa is a 38-year-old married father of three young children who has the strong support of his family. *Id*. at pp. 13-16.

The government does "not object to a finding as to flight risk and danger supporting release"—it disputes only that Polequaptewa's appeal raises a substantial question (the requirement discussed in the next section). *See* Declaration of James H. Locklin (attached) at ¶9. Under these circumstances, the Court should conclude that the previously-imposed bond condition are sufficient to reasonably assure that, if released now, Polequaptewa will appear as required and won't endanger any person or the community.

2. Polequaptewa's appeal is not for the purpose of delay and raises substantial—in other words, "fairly debatable"—questions that, if decided in his favor, will likely result in reversal.

With regard to the second requirement for release pending appeal, the relevant question is whether Polequaptewa's appeal is not for the purpose of delay and will raise

a substantial question likely to result in reversal. 18 U.S.C. §3143(b)(1)(B). The "word 'substantial' defines the level of merit required in the question raised on appeal, while the phrase 'likely to result in reversal' defines the type of question that must be presented." *Handy*, 761 F.2d at 1281. A "substantial question" is one that is "fairly debatable" or "fairly doubtful." *Id*. at 1283.[1] Thus, for purposes of this provision, Polequaptewa does not have to show that reversal is more likely than not. *Id*. at 1280-81. And the Court may find a question to be "substantial" even though it would affirm on the merits of the appeal. *Id*. at 1281. In other words, it is not required "to certify that it believes its ruling[s] to be erroneous." *Id*.

Polequaptewa's appellate issues are fully developed in his attached opening brief. After reading that brief, the Court should conclude that both questions he has presented to the Ninth Circuit—or at least one of them—are, at a minimum, fairly debatable. Thus, the appeal is obviously not for the purpose of delay. Indeed, because of delays caused by his former counsel's withdrawal, court reporter extensions, COVID-19, and his new counsel's workload—all circumstances beyond Polequaptewa's control—this motion is being filed after he has already served 11 months in prison. *See* Declaration of James H. Locklin (attached) at ¶¶3-6. If not released now, he will end up serving most of his sentence before the appellate process is finished. *Id*. at ¶¶7-8. Because both conditions for bail pending appeal are satisfied, he should not have to do that.

---

[1] Although this requires "something more that the absence of frivolity," the "difference between the terms 'not frivolous' and 'substantial' is perhaps one of art" that's "subject to subtle analysis." *Id*. at 1282 & n.1 (quotation marks omitted). Thus, any difference is minor. *See United States v. Garcia*, 340 F.3d 1013, 1020 n.5 (9th Cir. 2003) ("The defendant, in other words, need not, under *Handy*, present an appeal that will likely be successful, only a non-frivolous issue that, if decided in the defendant's favor, would likely result in reversal or could satisfy one of the other conditions.").

Polequaptewa therefore respectfully requests that the Court grant this motion and order his release.

August 5, 2020

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

/s/ James H. Locklin
JAMES H. LOCKLIN
Deputy Federal Public Defender

Attorneys for Defendant

Declaration of James H. Locklin

I, James H. Locklin, hereby declare and state as follows:

1. I am a Deputy Federal Public Defender in the Central District of California. I represent defendant Nikishna Polequaptewa on appeal.
2. In July 2019, this Court sentenced Polequaptewa to 27 months in prison but allowed him to self-surrender to the Bureau of Prisons two months later. He filed a timely notice of appeal.
3. Another attorney, Michael Khouri, represented Polequaptewa at trial and at sentencing. On September 18, the Ninth Circuit granted his motion to withdraw and appointed the Federal Public Defender's Office to represent Polequaptewa on appeal.
4. Thereafter, the Ninth Circuit granted the court reporters' requests for an extension of the deadline for filing transcripts. The last of the transcripts were filed on February 7.
5. Thereafter, I obtained extensions of the deadline for Polequaptewa's opening brief due to the voluminous record in this case, my workload, and logistical issues related to the COVID-19 virus.
6. On July 7, I filed Polequaptewa's opening brief, which is attached as Exhibit A.
7. The government's answering brief is currently due on August 20. On July 22, Assistant United States Attorney Vibhav Mittal, who represents the government in this case, sent me an email indicating that he plans to seek a 90-day extension of that deadline. I responded that I would not oppose that extension given the extensions I got, but I would oppose any further motions to extend the answering-brief deadline given Polequaptewa's custodial status. The government has not yet filed its extension motion in the Ninth Circuit.

8. According to the Bureau of Prisons' website, Polequaptewa is projected to be released in August 2021.

9. On July 29, I sent AUSA Mittal an email asking for the government's position on release pending appeal. On August 3, he responded: "While we would not object to a finding as to flight risk and danger supporting release, we would submit that detention pending appeal is appropriate given that the appeal does not raise 'a substantial question of law or fact,' as required. 18 U.S.C. §3143(b)(1)(B)."

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 5, 2020, at Los Angeles, California.

/s/ James H. Locklin

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NIKISHNA POLEQUAPTEWA, Defendant.	No. SA CR 16-36-CJC THE GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL Hearing Date: September 14, 2020 Hearing Time: 9:00 a.m. Location: Courtroom of the Hon. Cormac J. Carney

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorney Vibhav Mittal, hereby files its opposition to defendant's motion for release pending appeal.

This opposition is based upon the attached memorandum of points and authorities, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: August 24, 2020

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In November 2018, a jury found defendant Nikishna Polequaptewa ("defendant") guilty of Unauthorized Impairment of the Integrity and Availability of Data, Programs, Systems, and Information, in violation of 18 U.S.C. §§ 1030(a)(5)(A), (c)(4)(B)(i), (c)(4)(A)(i)(I). (CR 144.) In July 2019, defendant was sentenced to 27 months of imprisonment followed by two years of supervised release. (CR 189.) Defendant was ordered to self-surrender on September 3, 2019. (Id.) According to BOP's inmate locator, defendant will be released on August 9, 2021.

Defendant filed a notice of appeal. (CR 192.) Defendant filed his opening brief on July 7, 2020. (Decl. Locklin, Ex. A.)[1] The government's answering brief is now due November 18, 2020, and defendant's optional reply brief is due 21 days after service of the answering brief.

Now, defendant is seeking bail pending appeal. (CR 221.) Because defendant has failed to raise a "substantial" question of fact or law (as required by 18 U.S.C. § 3143) in his opening brief, defendant's motion for bail pending appeal should be denied.

II. Relevant Procedural History

The government summarizes the relevant procedural history for the issues raised on appeal.

A. Motion to Suppress Litigation

In December 2014, the FBI seized and searched a laptop pursuant to a federal warrant after the victim company in this case, Blue

[1] The government cites to defendant/appellant's opening brief in this opposition as "AOB."

Stone Strategy Group ("Blue Stone"), had turned it over to the Irvine Police Department. (CR 33, Ex. A.)

Prior to the first trial in this matter, defendant moved to suppress evidence seized from the laptop, alleging that it was unlawfully seized by deputy sheriffs in Florida in November 2014 and the FBI's warrant lacked probable cause. (CR 33 at 3.) In opposition, the government argued that defendant lacked a reasonable expectation of privacy in the laptop because it was stolen from defendant's prior employer, the University of California, Irvine ("UCI"). (CR 36 at 11-13.) In addition, the government argued that the laptop was lawfully seized by deputy sheriffs in Florida. (CR 36 at 14-17.) The government contended that any illegal action by Bluestone employees with respect to the laptop had no bearing on the Fourth Amendment as they were not government agents. (CR 36 at 17-18.) The government contended that the FBI's search of the laptop pursuant to a federal warrant should not be suppressed because of the independent source doctrine, inevitable discovery exception, and good faith exception. (CR 36 at 18-22.) Finally, the government argued that defendant failed to show how the warrant lacked probable cause. (CR 36 at 22-23.)

In reply, defendant never opposed the fact that UCI was the rightful owner and possessor of the laptop or that the law cited by the government regarding the reasonable expectation of privacy was incorrect. (CR 37.)

The Court denied defendant's motion to suppress without an evidentiary hearing, finding that defendant lacked a reasonable expectation of privacy in the laptop. (CR 39.)

As mentioned, the FBI searched the laptop after getting a search warrant in December 2014. (CR 204 at 72-73, 118-19.) The FBI also later reviewed the laptop pursuant to UCI's consent. (CR 204 at 123.) As the Court may recall, defendant was tried twice in 2018 following the denial of the motion to suppress. The first trial ended in a mistrial after the jury deadlocked 10-2 favor of conviction. (CR 82.) Between the two trials, the FBI did an exam of the laptop in September 2018. (CR 204 at 72-73.) Some of the items that SA Mayo admitted at trial were from a second search she conducted in 2018, which was done pursuant to UCI's consent. (Id.)

At the re-trial where defendant was convicted, only some of the government's case relied on evidence from the laptop, a MacBook Pro, to show defendant did the charged deletions. (CR 153 at 14-16, 23-24.) There was ample evidence from other sources as well, like Apple Records showing defendant sent the "wipe" command to Blue Stone's Mac Pro computer and defendant's recorded admission to Blue Stone employees. (CR 153 at 11-13, 17-22, 24.)

B. Jury Instructions

Defendant was charged in the first superseding indictment with a violation of § 1030(a)(5)(A) for sending a "wipe" command to a desktop computer ("Mac Pro computer") that Blue Stone owned and used in Irvine, California. (CR 106 at 3-4.) In addition, to erasing everything on that Mac Pro computer, defendant deleted files on Blue Stone's internal server and other remote servers operated by third-parties ("related course of conduct"). (CR 106 at 3.) The loss from the "wipe" command and the related course of conduct was alleged as part of the sentencing enhancement stated in 18 U.S.C. §§ 1030(c)(4)(B)(i), (c)(4)(A)(i)(I). (CR 106 at 5.) For the

sentencing enhancement to apply, the "wipe" command and related course of conduct had to cause a loss of $5,000 or more. (Id.) With this sentencing enhancement, the offense was a felony with a 10-year statutory maximum sentence.

The Court instructed the jury on the three elements for a violation of § 1030(a)(5)(A) in Court's Instruction No. 15. (CR 143 at 17.) In addition, the Court provided various definitions related to the elements of the offense. (Id. at 18-20.) Because of the sentencing enhancement for a loss greater than $5,000, if the jury unanimously found defendant had violated § 1030(a)(5)(A), then the jury had to make a finding as to loss. 18 U.S.C. §§ 1030(c)(4)(B)(i), (c)(4)(A)(i)(I). The enhancement applied if the offense caused "loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value." Id. The Court followed the jointly submitted instruction (CR 116 at 66) as to this finding and instructed as follows:

> If you find the defendant guilty of the charge in Count One of the first superseding indictment, you are then to determine whether the government proved beyond a reasonable doubt that as a result of such conduct and a related course of conduct affecting one or more other computers used in or affecting interstate or foreign commerce or communication, the defendant caused loss to Blue Stone Strategy Group during any one-year period of an aggregate value of $5,000 or more.

(CR 143 at 21.) Likewise, the Court provided a verdict form, without any relevant objection from defendant, requiring the jury to unanimously find that the government had proven the $5,000 or greater loss beyond a reasonable doubt. (CR 118 at 5; CR 151 at 3.)

III. ARGUMENT

Defendant has failed to show that his appeal raises a "substantial" question of law or fact, as required by § 3143 to carry his burden for bail pending appeal. Hence, his motion should be denied and defendant should be detained pending appeal.

A. Legal Standard for § 3143 Motions

"[O]nce a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances." United States v. Miller, 753 F.2d 19, 22 (3d Cir. 1985). "The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law," and "release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where an appeal of the conviction may drag on for many months or even years." S. REP. NO. 98-225, at 26 (1983).

With those principles in mind, Congress enacted the Bail Reform Act of 1984, 18 U.S.C. § 3143 ("the Act" or "the Bail Act") to "toughen the law" and to "make[] it considerably more difficult for a defendant to be released on bail pending appeal." United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985). Pursuant to the Act, obtaining bail pending appeal should be "no easy matter." United States v. Gerald N., 900 F.2d 189, 191 (9th Cir. 1990) (per curiam). Indeed, the Act "establishes a presumption against the grant of such bail." United States v. Williams, 822 F.2d 512, 517 (5th Cir. 1987); accord Miller, 753 F.2d at 22 (the Act "reverse[d] the presumption in

favor of bail"); S. REP. NO. 98-225, at 27 (1983) (the Act imposed a "presumption in favor of detention").

As the moving party, the defendant bears the burden of proof. United States v. Montoya, 908 F.2d 450, 451 (9th Cir. 1990) (denying motion for bail pending appeal because defendant failed to show that his appeal would likely result in reversal). To overcome the presumption against bail pending appeal, the burden is on the defendant to prove by clear and convincing evidence: "the defendant is not likely to flee or pose a danger to the safety of any other person in the community if released"; "that the appeal is not for purpose of delay"; "that the appeal raises a substantial question of law or fact"; and "that if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed." Handy, 761 F.2d at 1283; Williams, 822 F.2d at 517.[2] The final requirement may also be satisfied by demonstrating "a likelihood of reduction to a non-prison sentence or a sentence less than the time that would be served by the end of the appeal process." United States v. Garcia, 340 F.3d 1013, 1020 n.5 (9th Cir. 2003); see also 18 U.S.C. §§ 3143(b)(1)(B)(iii)-(iv).

"[S]ubstantial" defines the level of merit required in the question presented and "likely to result in reversal or an order for a new trial" defines the type of question that must be presented. Handy, 761 F.2d at 1280. "[P]roperly interpreted, [the term] 'substantial' defines the level of merit required in the question

[2] The government is only contending that defendant has failed to raise a substantial question of fact or law in his opening brief. The government is not objecting to the Court making findings as to the other requirements for bail pending appeal.

presented." Id. To demonstrate a "substantial question," the defendant must show an appellate issue is "fairly debatable" or "fairly doubtful"; "it is one of more substance than would be necessary to a finding that it was not frivolous." Id. at 1281; United States v. Wheeler, 795 F.2d 839, 840 (9th Cir. 1986).

It remains defendant's burden, however, to demonstrate that her appeal is "likely to result in" meaningful relief. § 3143(b)(1)(B); Williams, 822 F.2d at 517.

B. Defendant Has Failed to Raise a "Substantial" Question of "Fact" or "Law" in His Opening Brief

Defendant raises two issues on appeal. (AOB at 41-74.) First, defendant contends that the motion to suppress was erroneously denied because no evidentiary hearing occurred. (Id. at 41-65.) Second, defendant contends that there was plain error in the jury instructions as to the sentencing enhancement. (Id. at 65-74.) Neither issue is a "substantial" question of fact or law. In other words, the issues raised on appeal are not fairly debatable or doubtful.

1. The Court's Denial of the Motion to Suppress Was Not Fairly Debatable or Doubtful

The denial of the motion to suppress here was not fairly debatable or doubtful. Defendant had standing to challenge the legality of the search on Fourth Amendment grounds only if he had a "legitimate expectation of privacy" in the laptop searched. United States v. Zermeno, 66 F.3d 1058, 1061 (9th Cir. 1995) (citing Rakas v. Illinois, 439 U.S. 128, 148 (1978)). Defendant had the burden of establishing his legitimate expectation of privacy in the laptop that the FBI searched. Id. (citing Rawlings v. Kentucky, 448 U.S. 98, 104 (1980)). After the government provided evidence that defendant's

prior employer was the proper owner and possessor of the laptop, defendant never provided any evidence that he had not stolen the laptop from UCI, that he owned the laptop, or that he had a legitimate possessory interest in the laptop. (CR 39 at 8.) Defendant all but conceded before the Court that he did not own or have a legitimate possessory interest in the laptop, claiming only that, at the time the laptop was seized, "there was at least an appearance that Defendant owned and/or possessed the computer." (CR 37 at 3.) Thus, the Court did not abuse its discretion when it denied the motion to suppress without an evidentiary hearing. United States v. Howell, 231 F.3d 615, 620 (9th Cir. 2000) (holding that a hearing is only required "when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist").

As the Court recognized in its denial, this case is virtually identical to the Ninth Circuit's decisions in United States v. Wong, 334 F.3d 831, 839 (9th Cir. 2003) and United States v. Caymen, 404 F.3d 1196, 1200-01 (9th Cir. 2005). Because defendant had no reasonable expectation of privacy in the laptop, the denial is not fairly debatable or doubtful. Defendant, on appeal for the first time, attempts to distinguish Caymen and Wong by citing case law related involving the illegal stops of stolen cars. (AOB at 47-48.)[3] These cases are materially different. The search at issue is the search done by the FBI pursuant to a warrant in late 2014.

[3] No such legal argument was raised to this Court previously. Accordingly, the legal argument was waived on appeal, because a defendant may not make a new legal argument in support of suppression, unless the issue does not affect or rely on the factual record developed by the parties. See United States v. Hawkins, 249 F.3d 867, 872 (9th Cir. 2001).

Accordingly, the starting point in the analysis is determining whether defendant had a legitimate expectation of privacy in the laptop. And he did not.

Moreover, this case is unlike a traffic stop where the same law enforcement agency illegally stops a stolen car and then searches the car. Here, it was undisputed that the FBI searched a laptop after receiving a complaint from the victim company. The cases defendant cites might have some persuasive effect if the FBI illegally obtained the laptop from defendant's hotel room and then obtained a warrant to search it. There are no facts supporting such a chain of events in this case. While the Court did not reach the government's independent source doctrine argument, that argument is also a basis for rejecting defendant's new argument in responding to Wong and Caymen. (CR 36 at 18-21.) In particular, United States v. Heckenkamp, 482 F.3d 1142, 1148-49 (9th Cir. 2007) (citations omitted) better fits the facts of this case rather than the illegal stop cases that defendant cites. There, the Ninth Circuit reviewed the affidavit and held that, assuming, without deciding, that the university police and a university computer network investigator violated the defendant's Fourth Amendment rights when they entered his dormitory room for nonlawenforcement purposes, the evidence obtained through the FBI search was nonetheless admissible under the independent source exception to the exclusionary rule because there was sufficient information in the affidavit to establish probable cause. Heckenkamp, 482 F.3d at 1148-49. Similarly, here, the FBI's investigation after Blue Stone obtained the laptop provided ample probable cause to search the laptop in late 2014.

In addition, defendant raises facts not presented to the Court in his motion to suppress to establish his reasonable expectation of privacy in the laptop, suggesting for the first time on appeal that UCI had abandoned the laptop or had not done enough to take ownership of the laptop. (AOB at 55-56.) Defendant attempts to use trial testimony from the re-trial to show that defendant had a reasonable expectation of privacy in the laptop. (Id.) No such facts were raised before the Court or relied upon by the Court; thus, these new facts cannot be raised on appeal be a basis for showing a reasonable expectation of privacy. United States v. Magdirila, 962 F.3d 1152, 1156-57 (9th Cir. 2020) (holding that a defendant may not rely on facts that were not raised before or relied upon by the district court (citing United States v. Guerrero, 921 F.3d 895, 898 (9th Cir. 2019))). Even if the Ninth Circuit could consider facts from the re-trial, they do not show that defendant had a reasonable expectation of privacy in the laptop. UCI asked repeatedly asked for the return of laptop and ultimately turned over the matter to its university police. (CR 36 at 2-4.) The record before the Court was clear that defendant had no reasonable expectation of privacy in the laptop.

While certainly the parties contested whether defendant allowed deputy sheriffs into his hotel room and consented to giving the laptop to Blue Stone, it was undisputed that the FBI investigation began after Blue Stone had obtained the laptop in Florida. Though the Court did not reach these issues, the record supports finding that the FBI lawfully seized and searched the laptop, pursuant to the independent source doctrine, inevitable discovery, and the good faith exception. (CR 36 at 18-22.) In addition to the basis that the Court provided (lack of a reasonable expectation of privacy), the

Ninth Circuit could affirm on those additional, uncontested grounds in the record. United States v. Campbell, 291 F.3d 1169, 1172 (9th Cir. 2002) (citing Matus-Leva v. United States, 287 F.3d758, 759 (9th Cir. 2002)). Any of the alleged illegality by a deputy sheriff in Florida would be too attenuated to the FBI investigation which had not even opened.

Finally, even if the Ninth Circuit were to find that the Court abused its discretion in not holding an evidentiary hearing, only some of the items admitted at trial were from the search done pursuant to the warrant at issue in defendant's motion to suppress. That search took place in January 2015. (CR 204 at 72-73, 118-19, 123.) However, following the mistrial in June 2018, the FBI searched the laptop again pursuant to UCI's consent in September 2018. (Id.) Defendant never moved to suppress the items seized pursuant to that consent search. Given that items seized from that September 2018 search and other evidence admitted at trial (including defendant's recorded admissions from November 2014, Apple records showing defendant's "wipe" command, and records from Google showing defendant's deletions) (CR 153), even if evidence seized from the first search of the laptop should have been subjected to an evidentiary hearing, its admission was harmless beyond a reasonable doubt because the evidence was merely cumulative. United States v. Studley, 783 F.2d 934, 941 (9th Cir. 1986) (citation omitted).

For these reasons, the Court's denial of the motion to suppress was not fairly doubtful or debatable. Defendant has not raised a substantial question of fact or law with respect to the motion to suppress.

2. The Jury Instruction Related to the Sentencing Enhancement Is Not Fairly Debatable or Doubtful, Especially Given the Plain Error Standard of Review

For the first time on appeal, defendant contends that the Court improperly instructed as to the sentencing enhancement in this matter. (AOB at 65-74.) Plain error review applies as the Court used the instruction and verdict form as to the sentencing enhancement which the parties jointly submitted. (CR 116 at 66; CR 118 at 5.) The Court instructed as follows:

> If you find the defendant guilty of the charge in Count One of the first superseding indictment, you are then to determine whether the government proved beyond a reasonable doubt that as a result of such conduct and a related course of conduct affecting one or more other computers used in or affecting interstate or foreign commerce or communication, the defendant caused loss to Blue Stone Strategy Group during any one-year period of an aggregate value of $5,000 or more.

(CR 143 at 21; CR 151 at 3.) Plain error is: (1) error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. United States v. Ameline, 409 F.3d 1073, 1078 (9th Cir. 2005) (citations omitted). But, defendant has not raised a fairly debatable or doubtful issue as to the sentencing enhancement jury instruction.

Defendant argues that the Court's instruction was faulty as to defining "related course of conduct" for three reasons. (AOB at 68-69.) None of these reasons demonstrates error—let alone plain error. As a preliminary matter, it should be noted that defendant's three arguments for error are framed as "plain meaning" arguments but they ignore the fact that the jury instructions were written and agreed-upon using the statutory language, 18 U.S.C. §§ 1030(c)(4)(B)(i), (c)(4)(A)(i)(I). (AOB at 69.)

First, defendant contends that the "related course of conduct" must be equivalent to the § 1030(a)(5)(A) offense. (AOB at 69.) This is not what § 1030 says. To satisfy the $5,000 loss threshold, the government may use loss from the charged § 1030(a)(5)(A) offense and "loss resulting from a related course of conduct affecting 1 or more other protected computers." § 1030(c)(4)(A)(i)(I). "Loss" is defined at § 1030(e)(11). Section 1030(c)(4)(A)(i)(I) does not require that the "loss resulting from a related course of affecting 1 or more other protected computers" be equivalent to a § 1030(a)(5)(A) offense. Defendant is effectively seeking to expand the plain language of § 1030(c)(4)(A)(i)(I).

Second, defendant argues that the Court needed to instruct that "related" means the transmissions were "so connected that each individual act was part of a single episode with a common purpose." (AOB at 69.) Defendant comes up with this definition of "related" without any legal support. Moreover, the general rule is that "the district court need not define common terms that are readily understandable by the jury." United States v. Hicks, 217 F.3d 1038, 1045 (9th Cir. 2000) (collecting cases discussing terms that need not be defined, including "commercial advantage," "private financial gain," "violence," "organizer," "supervisor," and "manager"). Given how the jury was instructed on the elements of § 1030(a)(5)(A) and "loss," no further definition of "related course of conduct" was needed. The jury expressed no confusion as to what "related" meant, and such a common term was easy to understand for the jury.

Third, defendant argues that the jury was required to find that defendant intentionally caused a loss of $5,000 or more. (AOB at 69.) This argument also ignores the language of the statute.

Indeed, § 1030(a)(5)(A) requires that defendant "intentionally cause[d] damage." But, that "intentionally" language is not present in the sentencing enhancement at issue. The sentencing enhancement states that a violation of § 1030(a)(5)(A) carries a 10-year statutory maximum penalty if "the offense caused . . . a harm provided in [§ 1030(c)(4)(A)(i)(I)]." 18 U.S.C. § 1030(c)(4)(B)(i) (modified for "harm" charged). The harm in § 1030(c)(4)(A)(i)(I) states, "loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value." Accordingly, the language in the sentencing enhancement does not require that defendant intentionally caused the loss described in § 1030(c)(4)(A)(i)(I). In addition, the government is not aware of any authority in § 1030(a)(5)(A) prosecutions finding that that the intent requirement applies to the loss. See, e.g., United States v. Goodyear, 795 F. App'x 555, 559 (10th Cir. 2019) (describing elements of § 1030(a)(5)(A) and no mention of an intent requirement for the loss amount). The Court correctly did not include an intent requirement for the loss amount.

Even if the Ninth Circuit were to find error, any error was not plain where the error affected substantial rights and that seriously affected the fairness, integrity, or public reputation of judicial proceedings. Defendant argues that, because of the alleged error, the jury could not have found that someone else issued the commands or that defendant accidently did it. (AOB at 72.) This ignores the evidence at trial where the issue at trial was whether defendant did

committed the commands and whether he did it intentionally. Also, those arguments about identity and intent were able to be made with the instructions given. The instruction still required the jury to find that defendant "caused" the loss. The argument by the government was not that someone engaged in a "related course of conduct." The argument was that defendant engaged in a "related course of conduct."

Likewise, defendant contends that if the jury was instructed that the commands were related only if they were all part of a single episode with a common purpose, then the jury might have concluded that the "wipe" command to the Mac Pro computer was distinct from the other commands in time and/or in nature to render them unrelated. (Id.) This argument ignores the evidence at trial which showed the deletions all occurred within a short period of time. Moreover, the use of the phrase "related" required the jury to find the relationship defendant highlights and permitted defendant to argue that the other deletions were unrelated. There was no prejudice to defendant without the additional instruction as to "related" that defendant is now seeking.

Indeed, as defendant points out, the loss evidence did not show the loss caused by each deletion but instead it was aggregated for all the deletions. (Id. at 72-73.) The government admitted proof that the loss was greater than $53,305.03 with the bulk coming from Blue Stone employees' time ($48,550.60). (PSR ¶ 19; CR 188.) But, defendant is incorrect that the jury, with the instructions given, could not have disregarded any of the commands as "unrelated" and still made a loss determination in defendant's favor. (AOB at 73.) Rather, with the instructions given, if the jury found that any of

the deletions were "unrelated" to the "wipe" command sent to the Mac Pro computer, then it could have found defendant did not cause a loss of greater than $5,000 because the loss evidence was aggregated. The jury was required to find defendant "caused" the loss and could have broken up the evidence however it saw fit with the instructions given.

Defendant attempts to claim that he was prejudiced by the sentencing enhancement jury instruction because the government did not prove that he intended to cause at least $5,000 in loss. (AOB at 73.) While § 1030 did not require such proof, defendant again ignores the evidence at trial, where defendant admitted in a recording to Blue Stone employees that he intentionally deleted their files. The evidence at trial did show that defendant intended to cause a loss of $5,000 or more to Blue Stone. Defendant's motive was clear to cause a financial harm to Blue Stone.

In addition to a plain meaning interpretation of § 1030, defendant contends that the rule of lenity and constitutional avoidance supported defendant's claims of plain error. (AOB at 69-71.) The rule of lenity and constitutional avoidance do not apply here because § 1030 is not vague. These arguments can be summarily rejected, as defendant had sufficient notice of the crime charged.

In sum, defendant's jury instruction argument is not a substantial question of fact or law, especially given the plain error review that will be applied on appeal.

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny defendant's motion for bail pending appeal.

Exhibit 3

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

NIKISHNA POLEQUAPTEWA,

Defendant.

Case No. CR-16-00036-CJC

Defendant's Reply to Opposition to Motion for Release Pending Appeal

Hearing Date: September 14, 2020
Hearing Time: 9:00 a.m.
Hearing Place: Courtroom of the Hon. Cormac J. Carney

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Exhibit 4

Memorandum of Points and Authorities

Nikishna Polequaptewa is entitled to remain released pending appeal if the Court finds (a) by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of any other person or the community, and (b) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal. 18 U.S.C. §3143(b)(1); *see* Docket No. 221 (motion for release pending appeal) (hereinafter "Motion") at pp. 1-2; Docket No. 222 (opposition to motion for release pending appeal) (hereinafter "Opposition") at p. 6. The government doesn't dispute that Polequaptewa is not likely to flee or pose a danger to anyone. *See* Motion at pp. 2-3; Opposition at p. 6 n.2. Nor does the government contest that he did not appeal for the purpose of delay. *See* Motion at p. 4; Opposition at p. 6 n.2. Thus, the only dispute is whether Polequaptewa has raised at least one substantial question of law or fact likely to result in reversal. *See* Motion at pp. 3-5 & Ex. A; Opposition at pp. 5-16. For the following reasons, the Court should find that he has cleared this low bar and therefore grant his motion.

1. The government acknowledges that, as explained in *United States v. Handy*, the second requirement for release pending appeal requires Polequaptewa to show only that his appeal raises at least one substantial—in other words, "fairly debatable" or "fairly doubtful"—issue likely to result in a reversal. 761 F.2d 1279, 1280-83 (9th Cir. 1985); Motion at pp. 3-4; Opposition at pp. 5-7.[1] Thus, regardless of whether §3143(b) creates

[1] Although the government asserts that Polequaptewa must establish a substantial issue "by clear and convincing evidence" (Opposition at p. 6), the plain language of §3143(b)(1) applies the clear-and-convincing standard only to the no-flight-risk-or-danger requirement in subsection (b)(1)(A). The purely-legal substantial-question issue

a "presumption" against release pending appeal, *Handy* undisputedly establishes Polequaptewa's relatively-light burden to rebut it. 761 F.2d at 1280-83 (considering *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985), and S. Rep. No. 98-225, both cited in Opposition at pp. 5-6). The government nevertheless cites *United States v. Gerald N.* for the proposition that obtaining release pending appeal under §3143(b) is "no easy matter[.]" 900 F.2d 189, 191 (9th Cir. 1990) (quotation marks omitted); Opposition at p. 5. The Ninth Circuit made that statement in passing when discussing a non-bail issue and without any mention of *Handy* (decided five years earlier). *Gerald N.* therefore doesn't change, or even undermine, the standard set by *Handy*.

2. "[T]he phrase 'likely to result in reversal' defines the *type* of question that must be presented[,]" not the merits thereof. *Handy*, 761 F.2d at 1281 (emphasis added); Motion at p. 4; Opposition at p. 6. The government doesn't dispute that each of Polequaptewa's issues is a type that, if successful on appeal, will result in reversal. *See* Opposition at p. 6 n.2 ("The government is only contending that defendant has failed to raise a substantial question of fact or law in his opening brief."). In particular, it doesn't contest that, under *United States v. Christian*, the case will be sent back for a retrial if the Ninth Circuit concludes that this Court admitted non-harmless evidence through an erroneous analysis when denying Polequaptewa's suppression motion, regardless of whether that evidence will ultimately be suppressed after a full hearing on remand. 749 F.3d 806, 810-14 (9th Cir. 2014); Motion, Ex. A at pp. 62-64; Opposition at pp. 7-11. Similarly, the government does not dispute that the remedy is a retrial if Polequaptewa satisfies the plain-error standard with regard to the jury instructions. *See* Motion, Ex. A at 71-73; Opposition at pp. 12-16.

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is not subject to that heightened evidentiary standard, although Polequaptewa prevails even if that standard applies for the reasons given in his motion and this reply.

3. As for the merits of the appellate issues, *Handy*'s fairly-debatable / fairly-doubtful standard sets a low bar. Although *something* more than the absence of frivolity may be required, it's not *much* more. *See United States v. Garcia*, 340 F.3d 1013, 1020 n.5 (9th Cir. 2003) ("The defendant, in other words, need not, under *Handy*, present an appeal that will likely be successful, only a non-frivolous issue that, if decided in the defendant's favor, would likely result in reversal or could satisfy one of the other conditions."); Motion at 4 n.1; Opposition at p. 7. Included within the fairly-debatable standard are "questions that are novel and not readily answerable." *Handy*, 761 F.2d at 1281. Also covered are issues that "present unique facts not plainly covered by the controlling precedents." *Id*. (quotation marks omitted). Even "application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable." *Id*. (quotation marks omitted). To put it another way, an issue is fairly debatable if there's a "school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail." *Id*. (quotation marks omitted). Given this standard, Polequaptewa will not—and does not need to—comprehensively respond to all of the government's arguments about the legal issues set forth in his opening brief; he will do that when replying to the government's answering brief in the Ninth Circuit to show that he should win on appeal. For now, he will focus on the points demonstrating that, at a minimum, his appeal raises at least one fairly-debatable issue.

4. Before turning to Polequaptewa's two appellate issues, it's important to note an overarching problem with the government's opposition to release pending appeal. As noted below, it ignores (and therefore doesn't refute) many of the arguments contained in the opening brief. The government can't deny the existence of fairly-debatable issues by simply refusing to engage with Polequaptewa's arguments.

5. Polequaptewa's first appellate issue is whether this Court erred in denying his motion to suppress evidence. *See* Motion, Ex. A at pp. 41-64. As noted above, the

government doesn't dispute that, under *Christian*, the Ninth Circuit will remand for a new trial—regardless of what evidence might end up suppressed after the remand—if (a) this Court's suppression-motion analysis was erroneous and (b) there's a reasonable possibility that the evidence complained of might have contributed to the conviction. *Id.* at pp. 62-64.

a. On appeal, Polequaptewa argues that the Court's suppression-motion analysis was erroneous for two independent reasons (which the government, to some extent, conflates).

1) First, this Court failed to appreciate that Polequaptewa had standing to challenge the unlawful entry into his hotel room and that the seized laptop was suppressible as the fruit of that constitutional violation regardless of whether it was stolen. *See* Motion, Ex. A at pp. 43-48. To argue otherwise, the government relies, as it did below, on *United States v. Wong*, 334 F.3d 831 (9th Cir. 2003), and *United States v. Caymen*, 404 F.3d 1196 (9th Cir. 2005). *See* Opposition at p. 8. Polequaptewa already explained in his opening brief why those cases don't support the government's position, and the government mostly ignores that analysis. *See* Motion at pp. 46-48.[2] At a minimum, it's at least fairly debatable that *Wong* and *Caymen* are materially distinguishable.

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[2] In a footnote, the government contends that Polequaptewa "waived" his "legal argument" about his standing issue being analogous to car-passenger-standing cases. *See* Opposition at p. 8 n.3. It overlooks the principle that because claims, not arguments, are deemed waived or forfeited, once a claim has been raised in the district court, a party can make any argument in support of that claim on appeal. *See United States v. Lillard*, 935 F.3d 827, 833 (9th Cir. 2019). At the very least, this is fairly debatable.

2) Second, to the extent it matters whether Polequaptewa also had standing to directly challenge the seizure and search of the laptop (separate from his standing to challenge the unlawful entry into his hotel room), this Court erred in not holding an evidentiary hearing on that disputed issue. *See* Motion, Ex. A at pp. 48-57. The government asserts that no such hearing was required because, purportedly, "defendant never provided any evidence that he had not stolen the laptop from UCI, that he owned the laptop, or that he had a legitimate possessory interest in the laptop." *See* Opposition at pp. 7-8. In doing so, the government ignores key points made in Polequaptewa's brief—that he asserted his possessory interest in the laptop in his declaration, suppression motion, and reply; and that once the government proffered the UCI declarants to dispute that, he had the constitutional right to cross-examine them about their assertions before those assertions could be accepted as true. *See* Motion, Ex. A at pp. 48-55. Offering no response whatsoever to these arguments, the government instead focuses on Polequaptewa's additional point that the UCI declarations, even if true, aren't inconsistent with him having a proprietary interest or an expectation of privacy in the laptop. *See* Motion, Ex. A at pp. 55-57; Opposition at pp. 10. Regardless of whether evidence from the retrial may be considered with regard to the suppression issues, however, the fundamental point stands: Because the devil is in the details, so to speak, cross-examination of the UCI witnesses was necessary before any court could find that Polequaptewa did not have Fourth Amendment standing as to the laptop. *See* Motion, Ex. A at p. 56. Again, at the very least, whether an evidentiary hearing was required is fairly debatable.

3) The government asserts that, despite the fruit-of-the-poisonous-tree doctrine, it doesn't matter whether Florida sheriff deputies violated Polequaptewa's constitutional rights by unlawfully entering his hotel room and seizing the laptop because it was the FBI that eventually searched the laptop. *See* Opposition at pp. 8-11. It relies on *United States v. Heckenkamp*, which dealt with the independent-source

exception to the exclusionary rule. 482 F.3d 1142, 1148-49 (9th Cir. 2007). Opposition at p. 9. It also invokes (without supporting authority) the inevitable-discovery and good-faith exceptions to that rule. Opposition at p. 10.[3] Those, however, are completely-different issues from the purported lack of standing that was this Court's exclusive basis for denying the suppression motion. *See* Docket No. 39 (order denying suppression motion). The government concedes that this Court "did not reach" the independent-source, inevitable-discovery, and good-faith issues. *See* Opposition at p. 10. Under *Christian*, the faulty standing analysis alone requires reversal regardless of how this Court might eventually rule on those exclusionary-rule exceptions if the case is remanded. *See* Motion, Ex. A at pp. 62-64. Furthermore, as explained in the opening brief, the invoked exceptions put the burden on the government to *prove the specific facts* necessary to avoid the exclusionary rule, but the government offered absolutely no supporting affidavits on the matter, so assuming it even proffered enough to put these exceptions at issue, an evidentiary hearing into all relevant facts followed by appropriate findings is necessary. *See* Motion, Ex. A at pp. 61-62. The government simply ignores that important issue. Whether it can successfully sidestep the significant standing and fruit-of-the-poisonous-tree issues on appeal by invoking exclusionary-rule exceptions without factual support and without this Court having reached those matters is, at the very least, fairly debatable.

b. To prevent a remand due to the erroneous suppression analysis, the government has the burden to prove that admission of evidence encompassed by the suppression motion was harmless beyond a reasonable doubt; if there's even a reasonable possibility that the evidence might have contributed to the guilty verdict,

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[3] In its opposition to the suppression motion, the government relegated its conclusory assertion of the inevitable-discovery doctrine to a footnote. *See* Docket No. 36 at p. 21 n.5.

reversal is required. *See* Motion, Ex. A at p. 64. The government attempts to meet this burden with a vague assertion that only "some" unspecified items admitted at Polequaptewa's trial were obtained during the January 2015 laptop search and other unspecified items were purportedly found during a subsequent laptop search in September 2018. *See* Opposition at pp. 3, 11. First of all, contrary to what the government suggests, Polequaptewa was not required to renew his suppression motion when the government researched the laptop. He moved to suppress the evidentiary fruits of the unlawful entry into his hotel room and seizure of his laptop therein. *See* Docket No. 33 (suppression motion). Under the fruit-of-the-poisonous-tree doctrine, the exclusionary rule would reach all subsequent searches of the laptop. *See* Motion, Ex. A at pp. 45-46. To the extent the government implicitly refers to its arguments about the independent-source and inevitable-discovery exceptions to the exclusionary rule with regard to the September 2018 search, those have already been addressed above in paragraph 5.a.3. Furthermore, to the extent the government's argument about the September 2018 search rests on UCI's purported consent, there must be an evidentiary hearing into UCI's alleged ownership as discussed above in paragraph 5.a.2. Anyway, the government's failure to specify *exactly* what trial evidence was derived from the later search, or how evidence derived from the earlier search was supposedly inconsequential to the verdict, is fatal to its claim of harmlessness. By the same token, the government's vague references to "ample" "other evidence" unconnected to the laptop doesn't meet its burden either. *See* Opposition at pp. 3, 11. In contrast, Polequaptewa's opening brief explains, in detail, how the forensic examination of his laptop—the tool he purportedly used to delete most of the data—was central to the government's case. *See* Motion, Ex. A at pp. 25-37, 64. Under these circumstances, it's at least fairly debatable that the government cannot meet its burden to prove harmlessness beyond a reasonable doubt.

6. Polequaptewa's second appellate issue is whether the Court plainly erred in instructing the jury about the related-course-of-conduct element that increased the charged crime from a misdemeanor to a felony. *See* Motion, Ex. A at pp. 65-73. The government does not dispute that the Court's instructions did not explain this element to the jury, or that the instructions created the false impression that that element was separate from "the charge in the First Superseding Indictment." *See* Motion, Ex. A at pp. 66-69; Opposition at pp. 12-16. The government argues only that (a) the Court did not obviously err in instructing the jury, and (b) if it did, the error did not affect the trial. *See* Opposition at pp. 12-16. It's wrong.

a. Polequaptewa's argument is based on the plain language of 18 U.S.C. §1030, which (as explained in the opening brief) requires the following: (1) each step of the course of conduct must be equivalent to the underlying offense such that the government had to prove that each additional alleged transmission of a command satisfied all three elements of the core §1030(a)(5)(A) crime; (2) the government also had to prove all of these transmissions were related, meaning so connected that each individual act was part of a single episode with a common purpose; and (3) the government had to prove his intent to cause at least $5,000 in loss. *See* Motion, Ex. A at p. 69. For purposes of the motion for release pending appeal, it matters only whether any one of these three points is fairly debatable. This reply will therefore focus on the government's response to the first two.

1) The government asserts that §1030 doesn't require each step of the "course of conduct" to be equivalent to the core §1030(a)(5)(A) crime, but it doesn't even try to offer an alternative interpretation of that phrase. *See* Opposition at p. 13. Surely, there must be some limit on the scope of "course of conduct," and the government's unwillingness (or inability) to proffer one establishes that, at a minimum, it's fairly debatable both what that limit is and whether the jury was inadequately instructed about it.

2) The government also complains that there's no support for interpreting "related" to mean "so connected that each individual act was part of a single episode with a common purpose." *See* Opposition at p. 13. But instead of proffering an alternative definition of this term, the government just baldly asserts that it's so common it needs no definition. *Id*. Strangely, it argues that "[g]iven how the jury was instructed on the elements of §1030(a)(5)(A) and 'loss,' no further definition of 'related course of conduct' was needed" even though it simultaneously (and somewhat inconsistently) argues in the preceding paragraph that "Section 1030(c)(4)(A)(i)(I) does not require that the 'loss resulting from a related course of affecting 1 or more other protected computers' be equivalent to a §1030(a)(5)(A) offense." *Id*. Once again, the term "related" must place some limit on the scope of the felony provision and the government's failure to proffer one establishes that, at a minimum, it's fairly debatable both what that limit is and whether the jury was inadequately instructed about it.

b. Polequaptewa explained in his opening brief that the instructional error probably affected the jury's finding that increased the crime from a misdemeanor to a felony. *See* Motion, Ex. A. at pp. 71-73. The government contends otherwise without any meaningful discussion of the trial evidence. *See* Motion, Ex. A at pp. 14-16. However, it's at least fairly debatable that if additional instructions on the related-course-of-conduct element were necessary, such instructions would also have probably made a difference.

7. Because at least one—if not both—of Polequaptewa's appellate issues is fairly debatable, he has satisfied all the requirements for release pending appeal. The Court should therefore grant his motion and order his release.[4]

August 27, 2020

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

/s/ James H. Locklin
JAMES H. LOCKLIN
Deputy Federal Public Defender

Attorneys for Defendant

[4] Regardless of how the Court rules, it should keep in mind that it must set forth the reasons for its ruling. *See United States v. Wheeler*, 795 F.2d 839, 840-41 (9th Cir. 1986) (order). In a concurrently-filed stipulation, the parties agree that the Court may rule without holding a hearing on the matter and that it should do so as soon as possible. In case the Court disagrees and thinks a hearing is necessary, Polequaptewa's waiver of presence is also being filed concurrently.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

NIKISHNA POLEQUAPTEWA,

Defendant.

Case No.: SACR 16-00036-CJC

ORDER DENYING MOTION FOR RELEASE PENDING APPEAL [Dkt. 221]

I. INTRODUCTION

Defendant Nikishna Polequaptewa was convicted of unauthorized impairment of a protected computer in violation of 18 U.S.C. §§ 1030(a)(5)(A), (c)(4)(B)(i), (c)(4)(A)(i)(I). The violation arose out of Defendant's alleged transmission of computer

information and files that damaged his former employer, Bluestone Strategy Group ("Bluestone"). He was sentenced to 27 months imprisonment. Before the Court is Defendant's motion for release on bond pending appeal. (Dkt. 221.) For the following reasons, the motion is **DENIED**.[1]

II. BACKGROUND

In 2012, Defendant, who was employed by the University of California Irvine ("UCI"), bought a laptop using UCI funds ("the Laptop"). (Dkt. 36-4 [Declaration of Nidavone Niravanh, hereinafter "Niravanh Decl."] ¶ 2.) Two years later, in 2014, UCI fired Defendant following his violation of UCI's sexual harassment policy. (*Id*. ¶ 2c, Ex. 3.) In Defendant's notice of termination, he was "directed to immediately return all UC equipment, including without limitation computers, laptops, cell phone[s], other electronic devices and audio-visual equipment that is in your possession." (*Id*. Ex. 3 at 2.) UCI also sent letters to Defendant and his wife stating that the Laptop must be returned to UCI, (*id*. ¶ 2e, Exs. 4, 5), but Defendant did not comply. (*Id*.)

Sometime after his termination from UCI, Defendant began to work with Bluestone, a consulting firm in Irvine, California. (Dkt. 33 Ex. A [hereinafter "FBI Search Warrant"] at 4.) On November 18, 2014, while Defendant was in Florida for a business meeting, he announced that he was resigning from Bluestone and began deleting Bluestone's digital files using the login of another employee, William Moon, without authorization. (*Id.* at 6.) Defendant deleted approximately 200 files, causing significant harm to Bluestone. (*Id.* at 6, 20–23; Dkt. 36-2.)

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Crim. P. 57(b). Accordingly, the hearing set for September 14, 2020 at 1:30 p.m. is hereby vacated and off calendar.

That night, when Bluestone learned that Defendant was deleting its files, Moon went to Defendant's hotel room with deputies from the Broward County Sheriff's Office. (FBI Search Warrant at 9.) The parties dispute whether Defendant or a deputy opened the door, whether Defendant voluntarily allowed the deputies to enter the hotel room, and whether Defendant voluntarily gave the deputies his Laptop. (33-1 [Declaration of Nikishna Polequaptewa, hereinafter "Polequaptewa Decl."] ¶¶ 6–17.) The parties agree, however, that at some point Defendant gave his Laptop to the deputies who then gave it to Moon. (*Id.*)

Moon never opened the Laptop and instead sent it to Bluestone's Irvine offices the next morning. (FBI Search Warrant at 10–11.) Defendant later came to Bluestone's Irvine offices and demanded that the Laptop be returned to him, but he was eventually escorted out of the building by the Irvine Police Department ("IPD"). (*Id*. at 15.) IPD eventually took possession of the Laptop on December 9, 2014. (*Id*. at 20–21.)

Two days after the incident in Florida, on November 20, 2014, Bluestone's CEO reported Defendant's alleged actions to the FBI. (Dkt. 36-3.) On December 11, a few weeks after the FBI investigation began, it obtained a warrant to seize and search the Laptop whose ownership was disputed by Defendant and Bluestone.

Based on this warrant, the FBI seized the Laptop from IPD custody and searched it. (Dkt. 36 [Opposition, hereinafter "Opp."] at 9.) The seized laptop's serial number matched that of the laptop Defendant had acquired from UCI. (Niravanh Decl. Ex. 1.) The evidence seized from the Laptop corroborated the FBI's other evidence showing that Defendant had hacked into Bluestone's systems and deleted files. (Opp. at 9.)

In November 2018, a jury found Defendant guilty of unauthorized impairment of a protected computer in violation of 18 U.S.C. §§ 1030(a)(5)(A), (c)(4)(B)(i),

(c)(4)(A)(i)(I). He was sentenced to 27 months imprisonment, a sentence that was enhanced by the jury's finding that he caused Bluestone over $5,000 in losses. Defendant appealed and now seeks release on bond pending the result of his appeal.

III. LEGAL STANDARD

Once a defendant is convicted and sentenced, he may obtain release on bond pending his appeal only if he satisfies the requirements of 18 U.S.C. § 3143(b). Section 3143(b) provides that a defendant seeking release pending appeal must show

> (A) by clear and convincing evidence that [he] is not likely to flee or pose a danger to the safety of any other person or the community if released . . . and (B) that the appeal is not for the purpose of delay and raises a *substantial question* of law or fact likely to result in—
>
> (i) reversal,
>
> (ii) an order for a new trial,
>
> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b) (emphasis added). "Substantial question" defines "the *level of merit* required in the question presented" on appeal and "'likely to result in reversal or an order for a new trial' defines the *type of question* that must be presented." *United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985). A "substantial question is one that is fairly debatable or fairly doubtful." *Id.* at 1283 (citations and quotations omitted).

IV. DISCUSSION

The government does not dispute that Defendant is unlikely to flee or pose a danger to others. Consequently, the Court focuses on whether Defendant's appeal "raises a substantial question of law or fact." *See* 18 U.S.C. § 3143(b). It does not. Defendant's motion is denied accordingly.

On appeal, Defendant challenges both the Court's denial of his motion to suppress the Laptop as well as the Court's jury instructions related to his sentencing enhancement.

A. Denial of Defendant's Motion to Suppress

Defendant argues that the Laptop should be excluded because (1) it was seized as the result of an unconstitutional search and (2) the Court failed to hold an evidentiary hearing on whether Defendant had a privacy interest in the Laptop. Neither argument raises a substantial question of law or fact.

First, even if the Laptop was seized as the fruit of an unconstitutional search, it is still admissible under the independent source doctrine.[2] The exclusionary rule prohibits the admission of both "primary evidence obtained as a direct result of an illegal search or seizure and, relevant here, evidence later discovered and found to be derivative of an illegality, the so-called 'fruit of the poisonous tree.'" *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016). However, due to the "significant costs" of the exclusionary rule, it is "applicable only where its deterrence benefits outweigh its substantial social costs." *Id.* "Suppression of evidence has always been our last resort, not our first impulse." *Id.* Accordingly, "the independent source doctrine allows trial courts to admit evidence

[2] While the Court "reached its conclusion through a different analysis, [the Ninth Circuit] may affirm on any basis finding support in the record. *United States v. Campbell*, 291 F.3d 1169, 1172 (9th Cir. 2002).

obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Id.*

At trial, the Court denied Defendant's motion to suppress the Laptop because he did not have a reasonable expectation of privacy in a stolen Laptop. (Dkt. 39.) He therefore lacked standing to challenge the Laptop's search and seizure. (*Id.*) On appeal, Defendant argues that even if Defendant lacked standing as to the Laptop, he had standing to challenge the unconstitutional search of his hotel room. (Dkt. 221 Ex. A [hereinafter, Defendant's Appellate Brief].) And because the Laptop was obtained as a result of this search, it must be excluded as fruit of the poisonous tree. (*Id.*)

Even if the Laptop was initially obtained as a result of an unconstitutional search, the Laptop was still admissible under the independent source doctrine because it would have "later [been] obtained independently from activities untainted by the initial illegality." *Murray v. United States*, 487 U.S. 533, 537 (1988). In *Segura v. United States*, police illegally entered a suspect's apartment where they discovered contraband. 468 U.S. 796, 800–01 (1984). The officers remained in the apartment for 19 hours until a warrant was granted. *Id.* at 801. Because the warrant constituted an independent source for the search, the Supreme Court declined to exclude the evidence found in the apartment. It reasoned that because "[n]o information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant[,] . . . the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged." *Id.* at 814.

Similarly here, the Florida Sheriffs may have entered Defendant's hotel room illegally, but the FBI later obtained a valid warrant to search the Laptop which did not rely on information obtained during the earlier entry. For example, the FBI's warrant

relied on information provided by Bluestone employees which showed that Defendant had logged into Bluestone's company system "using another employee's credentials" and "remotely delet[ed] files from the network." (FBI Search Warrant at 5, 7). This information established probable cause and was not obtained through the allegedly illegal search of Defendant's hotel room. Because the FBI warrant would have independently led to a search of the Laptop regardless of whether the initial search had occurred, the Laptop is admissible under the independent source doctrine. Accordingly, Defendant's appeal has failed to raise "a substantial question of law or fact" as to whether the Laptop is admissible. *See* 18 U.S.C. § 3143(b).

Second, Defendant has failed to create a substantial question as to whether the Court erred by declining to hold an evidentiary hearing addressing whether Defendant had a privacy interest in the Laptop. The Ninth Circuit will review the district court's denial of Defendant's "request for an evidentiary hearing on his motion to suppress for an abuse of discretion." *United States v. Herrera-Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016). "An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist." *United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000).

Here, the moving papers did not sufficiently allege that Defendant owned the Laptop because he never even claimed that was the case. He merely stated that he "told the deputy that the computer was not Bluestone's property." (Polequeptewa Decl. ¶ 8.) Furthermore, on appeal, Defendant admits that UCI policy required him to return the Laptop when he was fired. (Defendant's Appellate Brief at 50.) Accordingly, Defendant's appeal has failed to raise "a substantial question of law or fact" as to whether the Court abused its discretion by denying his request for an evidentiary hearing. *See* 18 U.S.C. § 3143(b).

B. Jury Instructions

Defendant also argues that the Court erroneously instructed the jury on his sentencing enhancement. In reviewing jury instructions, the Ninth Circuit "consider[s] jury instructions as a whole and evaluate[s] whether they were misleading or inadequate and whether any error was harmless." *Browning v. United States*, 567 F.3d 1038, 1041 (9th Cir. 2009) (citation omitted). Ordinarily, the Ninth Circuit reviews de novo whether the jury instructions accurately state the law, *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014), and it reviews the formulation of jury instructions for abuse of discretion, *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001). Here, however, defendant concedes that the Court's instructions will be reviewed for plain error because defendant failed to object to the sentencing-enhancement instructions at trial. *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (explaining that "failure to make the timely assertion of a right" results in "forfeiture" which leads to plain-error review on appeal).

Plain error is "(1) error, (2) that is plain, [] (3) that affects substantial rights," and "that (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005). "An error is plain if it is contrary to the law at the time of appeal." *Id.* (quotations omitted). Here, the Court's instruction was written using the statutory language, and Defendant fails to cite any precedent that is contrary to the challenged instruction. *See* 18 U.S.C. § 1030. Defendant has thus failed to raise "a substantial question of law or fact" as to whether the Court's sentencing-enhancement instruction was plain error. *See* 18 U.S.C. § 3143(b).

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V. CONCLUSION

For the foregoing reasons, Defendant's motion for release pending appeal is **DENIED**.

DATED: September 4, 2020

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE