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 Reply to Opposition to Motion for Release Pending Appeal

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Table of Contents

Table of Authorities iii

Memorandum of Points and Authorities 1

Certificate of Compliance re Reply Length 14

Table of Authorities

Cases

United States v. Caymen,
404 F.3d 1196 (9th Cir. 2005) 4

United States v. Christian,
749 F.3d 806 (9th Cir. 2014).....2, 7

United States v. Garcia,
__ F.3d __, 2020 WL 5417153 (9th Cir. Sept. 10, 2020).....8

United States v. Garcia,
340 F.3d 1013 (9th Cir. 2003) 3

United States v. Handy,
761 F.2d 1279 (9th Cir. 1985) 1, 2, 3

United States v. Litwin,
__ F.3d __, 2020 WL 5050383 (9th Cir. Aug. 27, 2020) 7

United States v. Wong,
334 F.3d 831 (9th Cir. 2003).....4

Statutes

18 U.S.C. §1030 ..... 11, 12

18 U.S.C. §3143 1

Rules

Fed. R. App. P. 10 7

Memorandum of Points and Authorities

Nikishna Polequaptewa should be 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. 27 (motion for release pending appeal) (hereinafter "MOT") at 2; Docket No. 30 (opposition to motion for release pending appeal) (hereinafter "OPP") at 9. The government doesn't dispute that Polequaptewa isn't likely to flee or pose a danger. MOT 2-5; OPP 1, 9-20. Nor does the government contest that he did not appeal for the purpose of delay. MOT 5; OPP 1, 9-20. Thus, the only dispute is whether Polequaptewa has raised at least one substantial question of law or fact likely to result in reversal. MOT at pp. 5-12 & Exhibit 1 (hereinafter "AOB"); OPP 1, 9-20. 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 disputed 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 reversal. 761 F.2d 1279, 1280-83 (9th Cir. 1985); MOT 6-7; OPP 9.[1]

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); MOT 5. The government doesn't dispute that each of Polequaptewa's issues is a type that, if successful on appeal, will result in reversal. OPP 1, 9-20. In a footnote, however, it baldly suggests that *United States v. Christian* is "not relevant" to the suppression issue, without even trying to meaningfully rebut Polequaptewa's argument that the case dictates the remedy here. 749 F.3d 806, 813-14 (9th Cir. 2014); AOB 62-64; OPP 16 n.2. And the pending en banc consideration of the *Christian* rule—which remains intact unless and until there is a contrary ruling by an en banc panel—at worst makes that a fairly-debatable issue. MOT 6-7. Thus, the *Christian* remedy satisfies the undisputed likely-to-result-in-reversal requirement. *See* OPP 16 n.2 (*Christian* "addresses which remedy is appropriate if the district court erred, not whether an error took place."). Similarly, the government doesn't dispute that the remedy is a retrial if Polequaptewa

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[1] Given the applicable standard for this motion, it's noteworthy that the government's statement of facts is inaccurately incomplete. *Compare* AOB 3-37, 49-52, 55 *with* OPP 2-8.

satisfies the plain-error standard with regard to the jury instructions. AOB 71-73; OPP 16-20.

3. Although the government notes that this Court reviews factual findings for clear error, it doesn't dispute that whether there's a substantial question (the only contested matter) is a pure legal issue reviewed de novo. MOT 1-2, 5; OPP 10.

4. 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) (defendant "need not, under *Handy*, present an appeal that will likely be successful, only a non-frivolous issue that, if decided in [his] favor, would likely result in reversal or could satisfy one of the other conditions."); MOT 6-7; OPP 9. 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 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.

5. Before turning to Polequaptewa's 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.

6. Polequaptewa's first appellate issue is whether the district court erred in denying his motion to suppress evidence. AOB 41-64.

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

1) First, the district 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. AOB 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). OPP 11. Polequaptewa already explained in his opening brief why those cases don't support the government's position, and the government mostly ignores that analysis. AOB 46-48. At a minimum, it's at least fairly debatable that *Wong* and *Caymen* are materially distinguishable.

In his motion, Polequaptewa explained that the district court didn't even try to refute his argument that its standing analysis was erroneous. MOT 7-8. Despite what the government claims, Polequaptewa did not say the district court "conceded" the issue. OPP 14 (conflating the standing issue and the separate evidentiary-hearing issue discussed below). But that court's failure to even *address* that issue, let alone *defend* its prior position, clearly makes the issue at least fairly debatable.

2) Second, to the extent it matters whether Polequaptewa 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. AOB 48-57. The government asserts that no such hearing was required because, purportedly, Polequaptewa "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." OPP 10-11. In doing so, the government (like the district court) 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. AOB 48-55; MOT 9-10. 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. AOB 55-57; OPP 11-12. 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. AOB 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. OPP 12-13. It invokes (without supporting authority) the independent-source, inevitable-discovery, and good-faith exceptions to the exclusionary rule. OPP 13-14.[2] Those, however, are completely-different issues from the purported lack of

[2] In its opposition to the suppression motion, the government relegated its conclusory assertion of the inevitable-discovery doctrine to a footnote. ER 135.

standing that was the district court's exclusive basis for denying the suppression motion. ER 1-8. The government concedes that the district court "did not reach" the independent-source, inevitable-discovery, and good-faith issues. OPP 13. Under *Christian*, the faulty standing analysis alone requires reversal regardless of how the district court might eventually rule on those unreached exclusionary-rule exceptions if the case is remanded. AOB 62-64.

As Polequaptewa pointed out in his motion, the district court improperly attempted to change its suppression-motion ruling in response to Polequaptewa's motion for release pending appeal by, for the first time, invoking a new reason for denying that motion—the independent-source doctrine. MOT 7-9. Although the government claims that the Court's recent decision in *United States v. Litwin* is a "red herring" (OPP 14-15), it doesn't dispute its holding that Fed. R. App. P. 10(e) "cannot be used to supplement the record with material not introduced *or with findings not made*[.]" __ F.3d __, 2020 WL 5050383, *15 (9th Cir. Aug. 27, 2020) (emphasis added) (quotation marks omitted). That's exactly what the district court tried to do here.

In any event, 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. AOB 61-62. The government simply ignores that important issue.[3] 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 the district court having properly reached those matters is, at the very least, fairly debatable. *Cf. United States v. Garcia*, __ F.3d __, 2020 WL 5417153, *6 (9th Cir. Sept. 10, 2020) ("[I] was the responsibility of the Government to introduce evidence on [the attenuation doctrine]. Yet the Government did not present *any* evidence regarding the officers' reasons for entering Garcia's home the second time, much less evidence sufficient to show that this decision had nothing to do with what they saw inside the home minutes earlier, during their unconstitutional search.") (emphasis in original).

b. To prevent a remand due to the erroneous suppression analysis, the government has the burden to prove that admission of evidence encompassed by

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[3] It wrongly claims, without citation, that Polequaptewa's "request for an evidentiary hearing was limited" and that the independent-source, inevitable-discovery, and good-faith issues were "uncontested," while simultaneously disregarding its failure to even proffer the facts relevant to these issues. OPP 13.

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, reversal is required. AOB 64. The government attempts to meet this burden by emphasizing the evidence regarding the wipe of the Mac Pro desktop computer while ignoring that the forensic examination of the laptop—the tool Polequaptewa purportedly used to delete most of the other data necessary to prove the charged *felony*—was central to the government's case. AOB 3-7, 32, 64, 72; OPP 5, 15.

The government also baldy asserts that some unspecified "subset of items" from the laptop admitted at Polequaptewa's retrial "were obtained via the search that [he] moved to suppress" and he "never moved to suppress the consent search done following the mistrial." OPP 15-16. First of all, contrary to what the government suggests, Polequaptewa wasn't 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. ER 30-47. Under the fruit-of-the-poisonous-tree doctrine, the exclusionary rule would reach all subsequent searches of the laptop. AOB 45-47. 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 latter search, those

have already been addressed above in paragraph 6.a.3. Furthermore, to the extent the government's argument about the second search rests on UCI's purported consent, there must be an evidentiary hearing into UCI's alleged ownership as discussed above in paragraph 6.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 assertions that it also "relied on other evidence" such that the evidence derived from the laptop was "cumulative" doesn't meet its burden either. OPP 7, 15. 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. AOB 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.

7. Polequaptewa's second appellate issue is whether the district 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. AOB 65-73; MOT 10-11. The government does not dispute that the 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." AOB 66-69; OPP 16-20. The government argues only that (a) the district court did not obviously err in instructing the jury, and (b) if it did, the error did not affect the trial. OPP 16-20. 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. AOB 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. OPP 17-18.

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." OPP 18. But instead of proffering an alternative definition of this term, the government just baldly asserts that it's so common it needs no definition. OPP 18. Strangely, it argues that "[g]iven how the jury was instructed on the elements of §1030(a)(5)(A) and 'loss,' ... no further definition 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." OPP 17-18. 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. AOB 71-73. The government contends otherwise without any meaningful discussion of the trial evidence. *Compare* AOB 25-37 *with* OPP 19. 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.

8. 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.

September 28, 2020

Respectfully submitted,

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Certificate of Compliance re Reply Length

I certify that the foregoing reply is formatted in accordance with Fed. R. App. P. 27(d)(1). Circuit Rule 27-1(1)(d) provides that a reply to an opposition to a motion "may not exceed 10 pages." Circuit Rule 32-3(2) provides that if a rule sets forth a page limit, the affected party may comply with that limit by filing a "document in which the word count divided by 280 does not exceed the designated page limit." Under this rule, a 10-page limit corresponds to a 2,800-word limit. I certify that a word count of the word-processing system used to prepare this response indicates that it contains approximately 2,780 words (not including the cover, table of contents, table of authorities, or certificate of compliance re reply length).

September 28, 2020

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