NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NIKISHNA POLEQUAPTEWA, AKA Nikishna Numkina Myron, AKA Nikishua Numkina Myron, AKA Nikishna Numkina Polequaptewa, Defendant-Appellant.	No. 19-50231 D.C. No. 8:16-cr-00036-CJC-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted May 5, 2021
Pasadena, California

Before: OWENS and LEE, Circuit Judges, and SIMON,** District Judge.

Nikishna Polequaptewa appeals from his jury conviction under 18 U.S.C. § 1030 for loss related to his deletion of files from his former employer's computer

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

** The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

and other accounts. Before trial, the district court denied Polequaptewa's motion to suppress the contents of his laptop, which he claims was seized during an unlawful search of his hotel room. On appeal, Polequaptewa challenges the district court's denial of his motion to suppress as well as the jury instructions. As the parties are familiar with the facts, we do not recount them here. We vacate the district court's denial of the motion to suppress and remand with instructions to conduct a new trial only if the district court grants the suppression motion on remand.

1. "The denial of [a] motion to suppress is reviewed de novo." *United States v. Magdirila*, 962 F.3d 1152, 1156 (9th Cir. 2020). "The district court's underlying factual findings are reviewed for clear error." *Id.*

The district court denied Polequaptewa's motion to suppress because he "lacks standing to object to the search and seizure" of a stolen laptop, in which he has no reasonable expectation of privacy. To have Fourth Amendment "standing" to "contest the legality of a search or seizure, the defendant must establish that he or she had a 'legitimate expectation of privacy' in the place searched *or* in the property seized." *United States v. Kovac*, 795 F.2d 1509, 1510 (9th Cir. 1986) (emphasis added) (citation omitted). While Polequaptewa may not have had a reasonable expectation of privacy in a stolen laptop, he did have a reasonable expectation of privacy in the hotel room from which it was allegedly illegally

seized. *See Stoner v. California*, 376 U.S. 483, 490 (1964). Therefore, under the Fourth Amendment exclusionary rule and "fruit of the poisonous tree doctrine," he has standing to object to the seizure of his laptop and the use of its contents against him as fruits of an allegedly illegal search of his hotel room.[1]

"It is well settled that evidence seized during an unlawful search cannot constitute proof against the victim of the search." *Frimmel Mgmt., LLC v. United States*, 897 F.3d 1045, 1051 (9th Cir. 2018) (citation omitted). The Supreme Court has expressly rejected the notion that a defendant must show an interest in the items seized by police during a search to establish standing. *See Alderman v. United States*, 394 U.S. 165, 176-77 (1969) (holding that the victim of a warrantless search may object to the use of its fruits "not because he had any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment").

Under the fruit of the poisonous tree doctrine, the exclusionary rule also extends to the contents of the laptop, regardless of whether Polequaptewa can establish a reasonable expectation of privacy in those contents. "[T]he exclusionary rule encompasses both the primary evidence obtained as a direct

[1] Polequaptewa raised these arguments in his motion to suppress, so this does not constitute a "new ground[] for suppression on appeal," *Magdirila*, 962 F.3d at 1156, contrary to the government's argument.

result of an illegal search or seizure and . . . 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) (internal quotation marks and citation omitted); *see also Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (ordering suppression of drugs illegally seized from a third party's house, in which defendant could not have had Fourth Amendment standing directly, as fruit of the poisonous tree). Our decision in *United States v. Wong*, 334 F.3d 831 (9th Cir. 2003), where we held that a defendant lacks standing with respect to the contents of a stolen laptop, is consistent with this principle and distinguishable from the instant case. In *Wong*, the laptop at issue had been abandoned prior to being seized and was searched pursuant to a warrant we deemed valid. *Id.* at 835, 839. The "tree" in *Wong* therefore could not have been "poisonous." *Id.* at 839.

The district court's error was not "harmless" because the government has not shown "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Evans*, 728 F.3d 953, 959 (9th Cir. 2013) (citation omitted). Moreover, at trial, the government relied on evidence from the laptop to link the deletions on third-party servers to Polequaptewa.

Nonetheless, rather than order a new trial, we vacate the denial of the motion to suppress and remand with instructions to conduct a new trial only if the district

court ultimately suppresses the laptop evidence. *See United States v. Bacon*, 979 F.3d 766, 769-70 (9th Cir. 2020) (en banc); *United States v. Fomichev*, 899 F.3d 766, 773 (9th Cir.), *amended by* 909 F.3d 1078 (9th Cir. 2018). This court "has discretion to impose a remedy as may be just under the circumstances," including a limited remand, when it "cannot tell from the record whether the admission or exclusion was nevertheless correct on other grounds." *Bacon*, 979 F.3d at 767, 770 (internal quotation marks and citation omitted). Therefore, we remand for the district court to consider in the first instance whether the warrantless search of Polequaptewa's hotel room was unlawful.

2. "When a defendant does not object to jury instructions at trial, as here, we review those instructions for plain error." *United States v. Sanders*, 421 F.3d 1044, 1050 (9th Cir. 2005). The jointly proposed jury instructions here tracked the statutory language closely, and Polequaptewa cites no authority for his alternative reading of the statute, which departs from its plain language. *See* 18 U.S.C. § 1030(c)(4)(A)(i)(I), (c)(4)(B)(i). The district court thus did not plainly err in instructing the jury.

VACATED AND REMANDED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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