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 Brief

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The Court should reverse Nikishna Polequaptewa's conviction for 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. First, the district court erred in denying his motion to supress key evidence derived from an unlawful entry into his hotel room. Second, 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.

1. The district court's denial of Nikishna Polequaptewa's suppression motion requires reversal.

The district court erroneously denied Polequaptewa's suppression motion because it failed to appreciate that the seized laptop was suppressible as the fruit of the unlawful entry into his hotel room, regardless of whether it was stolen. The district court also erred in not holding an evidentiary hearing on the disputed issue of whether Polequaptewa owned the laptop. Contrary to what the government claims, the Court cannot ignore these errors and affirm based on its faulty independent-source-doctrine theory, which the district court never reached. And because the government has not met its burden to prove that admission of the laptop evidence at trial was harmless beyond a reasonable doubt, these errors

require reversal. Under the circumstances, the Court should exercise its discretion to 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.

A. Regardless of whether it was stolen, the seized laptop was suppressible as the fruit of the unlawful entry into Polequaptewa's hotel room.

The heart of Polequaptewa's suppression motion has always been the unconstitutional conduct of Florida sheriff's deputies who unlawfully entered his hotel room and took his laptop computer, just to immediately hand it over to a private citizen, William Moon of Blue Stone Strategy Group.[1] In his opening brief, Polequaptewa described (in detail) the conflicting facts related to that incident.[2] The government, however, glosses over all that with one sentence: "With the assistance of the local sheriff's department, Moon obtained the laptop that was in defendant's hotel room."[3] At the same time, it concedes that an evidentiary hearing is necessary before any court can determine whether the deputies' conduct

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[1] 2-ER-30–106, 191–94.

[2] AOB-8–22.

[3] GAB-10; *see also* GAB-26 ("Eventually, Moon obtained the UCI laptop from defendant with the assistance of the local sheriff's office.").

complied with the Fourth Amendment.[4] In an attempt to avoid such a hearing, the government first mischaracterizes Polequaptewa's position on standing as an improper new argument, then it relies on inapplicable authority, and finally it shifts to a meritless independent-source-doctrine argument.

1. The government claims that, "[f]or the first time on appeal, defendant argues that he still has a legitimate expectation of privacy in his laptop even if it was stolen because Moon took it from his Florida hotel room, a place in which he did have a legitimate expectation of privacy."[5] And also that he "wait[ed] for his appeal to argue that his expectation of privacy in his hotel room can support his motion to suppress the search that took place pursuant to the warrant for the laptop."[6] The government has mangled Polequaptewa's argument almost beyond recognition. First, the problem isn't that *Moon* took the laptop from Polequaptewa's hotel room; it's that *law-enforcement officers* did that.[7] Second, this particular argument doesn't require Polequaptewa to have a separate expectation of privacy in his laptop because the undisputed expectation of privacy

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[4] GAB-48 n.8.

[5] GAB-39.

[6] GAB-42.

[7] AOB-8–22.

in his hotel room is enough.[8] Finally, although his suppression motion also challenged the probable cause for the warrant to search inside the laptop,[9] what's at issue here is his separate and independent claim that the initial seizure of the laptop was the fruit of a constitutional violation such that all other evidence derived therefrom (including data it contained) had to be suppressed.[10]

The government's asserts its first-time-on-appeal claim to invoke this Court's rule that Fed. R. Crim. P. 12(c)(3)'s good-cause standard applies when "the defendant attempts to raise new theories on appeal in support of a motion to suppress." *United States v. Guerrero*, 921 F.3d 895, 898 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 1300 (2020).[11] Assuming that rule is valid,[12] it simply doesn't apply here. Although the government broadly complains about "new arguments,"[13] the Court's precedent is clear about what requires good cause—"a new legal argument" raising a new "ground" or "theory" for suppression not raised below. *See United States v. Magdirila*, 962 F.3d 1152, 1156-57 (9th Cir. 2020);

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[8] AOB-43–48.

[9] 2-ER-44–46. That is not an issue on appeal.

[10] 2-ER-39–44.

[11] GAB-32, 39–40.

[12] *See id.* at 897 (noting circuit conflict).

[13] GAB-30, 39–48.

Guerrero, 921 F.3d at 896-98; *United States v. Keese*, 358 F.3d 1217, 1219-20 (9th Cir. 2004). It doesn't mean, as the government suggests, that a defendant is limited to parroting the precise words he used in the district court, with no ability to provide further legal support or additional analysis to support the "ground" or "theory" raised below. The only relevant question is whether Polequaptewa's contention on appeal that the seized laptop was suppressible as the fruit of the unlawful entry into Polequaptewa's hotel room is a completely new "ground" or "theory" for suppression. It isn't.

In his motion, Polequaptewa argued that (a) he had a reasonable expectation of privacy in his hotel room, (b) so the deputies violated the Fourth Amendment by entering that room and taking his laptop without a warrant and with no applicable exception to the warrant requirement, (c) the exclusionary rule therefore applies and extends to both the direct and indirect products of the illegal invasion (in other words, to fruit of the poisonous tree), and (d) as a result, the district court had to suppress the laptop and any data retrieved from it.[14] Even after the government claimed the laptop was stolen from University of California, Irvine (UCI), Polequaptewa argued that regardless of who owned the computer, the deputies

[14] 2-ER-39–44.

violated the Fourth Amendment in entering his hotel room to seize it, so the computer and any evidence derived from it must be suppressed.[15]

Ignoring all this, the government offers only this weak claim that Polequaptewa makes an improper new argument on appeal as to this issue—he "attempts to distinguish *Caymen* and *Wong*" (government-cited cases discussed below) with "distinctions that could have been presented to the district court" and he "cites to case law involving the illegal stops of cars where the defendant had no reasonable expectation of privacy in the car" but that "line of authority was not cited to the district court."[16] In other words, the complaint is not that Polequaptewa is raising a new "ground" or "theory," but only that he's distinguishing government-cited cases and citing additional cases. Again, the good-cause rule doesn't apply to "arguments" in this general sense. If it did, a defendant appealing a suppression issue could do no more than cut-and-paste the exact text from his motion into his opening brief. Nothing in this Court's precedent prohibits Polequaptewa from presenting any available authority or line of reasoning to support the ground / theory for suppression that he plainly raised below.

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[15] 2-ER-192–94.

[16] GAB-42.

2. It's understandable why the government wants to avoid reaching the merits of this issue. It doesn't dispute that Polequaptewa had Fourth Amendment standing in his hotel room.[17] Nor does it dispute that if the factual conflicts about the circumstances surrounding the deputies' entry into his hotel room and the seizure of his laptop are ultimately resolved in his favor after a hearing, the entry violated the Fourth Amendment.[18] Finally, the government doesn't dispute that (absent an applicable exception) the exclusionary rule requires suppression of any evidence obtained from the laptop if that entry was unlawful.[19] It has therefore waived any contrary arguments. *See United States v. Ramirez*, 976 F.3d 946, 955 n.3 (9th Cir. 2020) (government waives arguments not made in answering brief).

The government again relies primarily on two cases that Polequaptewa has already distinguished: *United States v. Wong*, 334 F.3d 831 (9th Cir. 2003), and *United States v. Caymen*, 404 F.3d 1196 (9th Cir. 2005).[20] In *Wong*, the defendant abandoned the laptop before the police found and searched it. 334 F.3d at 835.[21] And in *Cayman*, police seized the laptop when executing a valid search warrant for

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[17] AOB-43–45.

[18] AOB-45, 57–61.

[19] AOB-45–46.

[20] AOB-46–47; GAB-34, 42–44.

[21] AOB-46.

the defendant's home. 404 F.3d at 1197, 1199.[22] Accordingly, those cases considered only whether the defendants had standing to directly challenge subsequent police searches of the stolen laptops *in the absence of any preceding constitutional violations concerning how the police got the laptop in the first place*. Neither case dealt with a situation like this one, where seizure of the purportedly stolen laptop was itself the fruit of a constitutional violation (the unlawful entry into Polequaptewa's hotel room). As previously explained, precedent from this Court and persuasive authority from other circuits support the following applicable principle—"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).[23] Thus, if the deputies violated Polequaptewa's Fourth Amendment rights by entering his hotel room and taking the laptop, the laptop is fruit of the poisonous tree regardless of whether he also had a separate expectation of privacy in it.

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[22] AOB-46–47.

[23] AOB-47–48.

3. The government claims all is fine because probable cause for the warrant later used to search inside the laptop "does not rest on the events in Florida and is therefore not derived from those events."[24] That misses the point entirely. *The laptop itself is fruit of the poisonous tree!* It doesn't matter what rationale was used to search it later if the computer should have never been taken from Polequaptewa in the first place. The government's contrary position is like saying police can unconstitutionally seize drugs from a car, then get a warrant to test those drugs, and then present the results in court as long as the affidavit in support of the warrant doesn't talk too much about the illegal stop.

Anyway, it's noteworthy that the warrant affidavit twice asserted that Polequaptewa "voluntarily provided the laptop to" the deputies.[25] Again, the heart of the suppression motion was that he did not do that.[26] Thus, if he prevails on the factual disputes after an evidentiary hearing, then the warrant was secured with a misrepresentation—that the laptop was obtained from Polequaptewa in manner allowed by the Fourth Amendment.

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[24] GAB-44–45.

[25] 2-ER-57, 60.

[26] 2-ER-34–44, 104–06; AOB-9–13.

Finally, this warrant argument is part of the government's reliance on the independent-source doctrine, an exception to the exclusionary rule.[27] As discussed below, however, that theory is invalid, plus the district court never held an evidentiary hearing or made findings on that factual issue, so this Court cannot decide in the first instance that the doctrine applies here.[28]

B. The district court erred in not holding an evidentiary hearing on the disputed issue of whether Polequaptewa owned the laptop.

There's no dispute that Polequaptewa had Fourth Amendment standing to challenge the laptop evidence if he owned or otherwise retained an expectation of privacy in that computer.[29] The parties also agree that the district court could not resolve that issue without an evidentiary hearing if the motion, opposition, reply, and declarations established that there were contested facts pertaining to that issue.[30] As explained in the opening brief, a criminal defendant has the right to cross-examine government declarants at a suppression hearing.[31] The government

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[27] GAB-46–48.

[28] *Infra* Part 1.C.

[29] AOB-43–44, 48–49; GAB-33.

[30] AOB-49; GAB-32–33, 35–37.

[31] AOB-52–55.

does not dispute that but contends that defendants can waive that right.[32] The question, therefore, is whether the papers below raised the factual dispute about who owned the laptop. They did.[33]

1. The government does not dispute that Polequaptewa's suppression motion repeatedly referred to "Defendant's laptop," was supported by his declaration referring to it as "my computer," and also by the search-warrant affidavit reflecting his assertion that the laptop was his.[34] And after the government claimed in its opposition that he "stole" the laptop, Polequaptewa's reply reasserted his ownership interest in the laptop, calling it his "personal property" and his "personal laptop."[35] He also asserted his right to an evidentiary hearing where he could cross-examine the government-proffered UCI witnesses,[36] a pointless exercise unless he contested their stolen-laptop story. Given all this, it cannot reasonably be questioned that the papers before the district court established with "sufficient definiteness, clarity, and specificity" that Polequaptewa's ownership interest in the laptop was a "contested issue[] of fact" requiring an evidentiary hearing. *United*

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[32] GAB-34–35.

[33] AOB-22–24, 49–52.

[34] 2-ER-31, 34, 38, 44, 47, 60, 105–06; AOB-49–50.

[35] 2-ER-193; AOB-51–52.

[36] 2-ER-200; AOB-52.

States v. Cook, 808 F.3d 1195, 1201 (9th Cir. 2015) (quotation marks omitted). The Court should reject the government unreasonable mischaracterization of Polequaptewa's repeated assertions that he *owned* the laptop as mere expressions of "his subjective belief in his expectation of privacy in the laptop."[37]

In short, Polequaptewa said "the laptop is mine," and the government (via the UCI witnesses) said, "no, it isn't." Resolving that kind of dispute is what evidentiary hearings are for. Contrary to what the government claims,[38] once *it created the factual dispute* by contesting Polequaptewa's claim of ownership, he wasn't required to do anything more—and certainly nothing more than what he did—to establish the factual dispute that had *already* been raised by the motion and opposition. At that point, he had the right to cross-examine the witnesses *the government proffered* to create the factual dispute.[39]

2. In his opening brief, Polequaptewa gave examples illustrating why it was necessary to expose the UCI witnesses to cross-examination, "the greatest legal engine ever invented for the discovery of truth." *Winzer v. Hall*, 494 F.3d 1192,

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[37] GAB-34.

[38] GAB-37–39.

[39] AOB-52–55.

1197 (9th Cir. 2007) (quotation marks omitted).[40] First, the government (in its opposition) tried to explain away an important discrepancy in the laptop serial number in the UCI exhibits without having the declarants themselves endorse that explanation.[41] Second, UCI apparently did not view the laptop as "stolen property" until it was in the government's interests for it to do so.[42] Third, even if the UCI declarations accurately described how the laptop was purchased, that isn't necessarily inconsistent with Polequaptewa having a proprietary interest or an expectation of privacy in it.[43] The government ignores the serial-number issue and claims that the other points run afoul of the no-new-ground-or-theory rule discussed above.[44] That rule is inapplicable here because the point goes to a procedural issue—whether the district court should have granted an evidentiary hearing on the issue *raised by the government*—not a new ground for suppression. Anyway, both points mainly highlight what should be obvious, namely, that details matter. Things are rarely as simple as stated in a one-sided party-drafted declaration. *See, e.g.*, *United States v. Ewing*, 638 F.3d 1226, 1228 n.2 (9th Cir.

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[40] AOB-53.

[41] AOB-51 n.216.

[42] AOB-50–51.

[43] AOB-55–57.

[44] GAB-40–41; *supra* Part 1.A.1.

2011) ("Although Deputy Doke stated in his declaration that Smith had bloodshot eyes, the officer admitted on cross-examination that he did not observe this further indication of intoxication until after he had removed and examined the bills."). Moreover, whenever a party proffers a declaration, it puts the declarant's credibility at issue, and the district court (after observing his demeanor) "may believe everything a witness says, or part of it, or none of it." *Cf.* Ninth Circuit Manual of Model Criminal Jury Instructions, §3.9 (2010 ed.). That's why we have evidentiary hearings: "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).[45] The district court therefore erred in refusing to hold such a hearing on the disputed laptop-ownership issue.

C. The Court cannot affirm based on the government's independent-source-doctrine theory.

Conceding that the district court never reached the issue, the government contends that this Court can ignore the above-described errors and affirm on a theory that the independent-source doctrine applies here.[46] It can't.

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[45] AOB-52–53.

[46] GAB-47–48. In the district court, the government also invoked the good-faith doctrine and (in a footnote) the inevitable-discovery doctrine. 2-ER-135–36 & n.5.

1. The general principle that the Court can "affirm on any basis in the record" doesn't apply where (as here) the facts have not been fully developed and the district court has not made the essential factual findings required by Fed. R. Crim. P. 12(d). For example, the Supreme Court held in *Murray v. United States* that the independent-source doctrine is fundamentally a factual inquiry into "whether the search pursuant to warrant was in fact a *genuinely* independent source of the information and tangible evidence at issue[.]" 487 U.S. 533, 542 (1988) (emphasis added). "The Supreme Court vacated the judgment with orders to remand to the district court, stating that in order to apply the independent source doctrine it must make factual findings that the police would have obtained the search warrant regardless of the discovery of the evidence through the first unlawful search." *United States v. Prieto-Villa*, 910 F.2d 601, 608 (9th Cir. 1990) (citing *Murray*, 487 U.S. at 543-44). Following *Murray*, this Court found that "[w]hen factual issues are involved in deciding a motion," Rule 12(d) *requires* that the district court—not the court of appeals—make the essential factual findings, which are "those which will permit appellate review of the legal questions involved." *Id*. at

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It has not raised either of those exceptions to the exclusionary rule on appeal, nor has it raised any other exceptions, like the attenuation doctrine. It has therefore waived all such arguments. *See Ramirez*, 976 F.3d at 955 n.3.

606-10; *see also Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982) ("Factfinding is the basic responsibility of district courts, rather than appellate courts, and the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.") (quotation marks omitted).[47]

That should be the end of the matter. The district court has not yet delved into the facts relevant to the independent-source doctrine by holding an evidentiary

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[47] AOB-62 (citing *Prieto-Villa*). The government cites authority for the proposition that "[w]here the district court does not make a finding on a precise factual issue relevant to the Fourth Amendment analysis, we 'uphold a trial court's denial of a motion to suppress if there was a reasonable view to support it.'" *Magdirila*, 962 F.3d at 1156 (quoting *United States v. Gooch*, 506 F.3d 1156, 1158 (9th Cir. 2007)). This authority appears to be in conflict the above-cited precedent. *See, e.g.*, *Prieto-Villa*, 910 F.2d at 607 (recognizing that prior uphold-motion-denial-if-reasonable-view-of-evidence-will-sustain-it cases failed to consider Rule 12's requirements). At best, the reference to "a precise factual issue" means that the district court still must make the *ultimate* factual finding in the first instance—here, that the evidence at issue actually was obtained independently from activities untainted by the initial illegality evidence—even if it does not support that ultimate conclusion with its precise underlying factual findings. To hold otherwise would condone the kind of appellate factfinding that *Murray*, *Pullman-Standard*, and *Prieto-Villa* prohibit.

hearing and making essential findings about "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). This Court therefore can't affirm on an independent-source-doctrine theory.

2. Even if the Court could reach that theory, the evidence in the record does not get the government where it needs to go. It bears the burden to prove by a preponderance of the evidence that there was a truly independent source of the evidence in question. *See United States v. Siciliano*, 578 F.3d 61, 68 (1st Cir. 2009); *see also United States v. Twilley*, 222 F.3d 1092, 1097 (9th Cir. 2000) ("The government has the burden to show that the evidence is not 'the fruit of the poisonous tree.'"); *cf. United States v. Reilly*, 224 F.3d 986, 994 (9th Cit. 2000) (government bears burden to prove inevitable discovery). In the district court, however, the government presented absolutely no supporting affidavits to even try to meet its burden on this fact-dependent issue. The Court's recent decision in *United States v. Garcia* is therefore apropos. 974 F.3d 1071 (9th Cir. 2020). That case concerned the attenuation doctrine rather than the independent-source doctrine, but the government bears the burden to show attenuation as well. *Id*. at 1078. Accordingly, "it was the responsibility of the Government to introduce

evidence on this point." *Id*. "Yet the Government did not present *any* evidence regarding the officers' reasons for entering [the defendant'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." *Id*. (emphasis in original). That "dearth of evidence" was fatal to the government's case. *Id*. at 1078-79; *see also id*. at 1079 (complaining that "the Government offers nothing more than its say-so to explain" the officers' actions). The same is true here.[48]

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[48] 2-ER-132–35. Despite this omission, the government claims that its independent-source argument "rests on undisputed facts[.]" GAB-47. It also contends that the argument was unchallenged below, *assuming* without support that the general rule precluding a defendant from arguing on appeal a new "ground" or "theory" not raised in his suppression motion (*supra* Part 1.A.1) creates an obligation to expressly and affirmatively respond in a reply to every argument raised by the government in its opposition. GAB-46 n.7 & 47. Anyway, Polequaptewa didn't concede the issue; he continued to argue in his reply that suppression of all laptop-derived evidence was necessary due to the unlawful entry into his hotel room. 2-ER-191–94. Thus, the government has never been relieved of its burden under the independent-source doctrine.

3. In any event, the government's independent-source argument suffers from the problem already noted above.[49] It matters not whether "[t]he probable cause showing in the warrant adequately rests on grounds that are not tainted by any so-called illegality in Florida."[50] As the government apparently recognizes, the initial illegality was the unlawful entry into Polequaptewa's hotel room and the seizure of the laptop from him therein. Therefore, to successfully employ the independent-source doctrine, the government had to prove that the laptop itself "*actually* was obtained independently from activities untainted by [that] initial illegality." *Lundin*, 817 F.3d at 1161 (emphasis in original) (quotation marks omitted). It did not, and could not, do that. There's a direct line from the illegal seizure of the laptop by Florida sheriff deputies to its use by the government at trial.[51] Although the government notes that the FBI did not get involved in the case until after the

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[49] *Supra* Part 1.A.3.

[50] GAB-46–47. And as noted above, that's not true anyway. *See* 2-ER-57 (warrant affidavit stating: "Polequaptewa voluntarily provided the laptop to the responding officer, who then provided it to Moon outside of the hotel room."), 60 (warrant affidavit stating: "Moon believed that Polequaptewa had voluntarily provided the laptop to the officer."); AOB-8–22.

[51] 3-ER-470–71, 513–14; 4-ER-617–18, 688–90; 5-ER-972–73, 1028–29; AOB-32; GAB-45–47.

Florida deputies' unconstitutional actions,[52] the government is regularly stuck with the consequences of state officers' constitutional violations even after federal law enforcement takes over the investigation. *See, e.g.*, *Garcia*, 974 F.3d at 1073-82 (suppressing evidence in federal criminal case due to unconstitutional conduct by city police officers). The government offers no support for its assumption that it can skirt those consequences by getting a warrant to seize illegally obtained evidence from a police-department evidence room when the evidence shouldn't have been there in the first place.

D. The government has not met its burden to prove that admission of the laptop evidence at trial was harmless beyond a reasonable doubt.

The government claims that the Court can ignore any errors in the suppression-motion proceedings because the laptop-derived evidence presented at trial was "merely cumulative" and therefore its admission was harmless.[53] The government concedes that because a Fourth Amendment violation is at issue, it has the burden to prove harmlessness *beyond a reasonable doubt*.[54] Reversal is required under that standard if there's even "a *reasonable possibility* that the evidence complained

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[52] GAB-45–46.

[53] GAB-48–49.

[54] AOB-64; GAB-48.

of *might have* contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23-24 (1967) (emphasis added) (quotation marks omitted). The government has not met, and cannot meet, its heavy harmlessness burden.

First of all, the government concedes in a footnote in its statement of the case that it hasn't even described evidence introduced at trial that was purportedly found on the laptop during a search conducted with UCI's consent between the first and second trials.[55] The government suggests that the products of that search are somehow unassailable because "that consent search was not contested below or raised in the opening brief."[56] But it makes no attempt to support this assertion with authority or argument, so it has waived the matter. *See United States v. Mitchell*, 502 F.3d 931, 953 n.2 (9th Cir. 2007) (summary mention of issue without supporting reasoning insufficient to raise issue on appeal). Anyway, contrary to what the government suggests in this footnote, 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.[57] Under the fruit-of-the-poisonous-tree doctrine,

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[55] GAB-20 n.5.

[56] GAB-20 n.5.

[57] 2- ER-30–47; AOB-22–23.

the exclusionary rule would reach all subsequent searches of the laptop.[58] 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) before any such consent could be deemed valid.[59] Given all this, the Court should reject the government's conclusory allegation in its statement-of-the-case footnote that "those additional items would not have a bearing on the harmless error argument made in this brief[.]"[60] Indeed, that's reason enough to find that the government hasn't proved harmlessness beyond a reasonable doubt.

In any event, the government's one-paragraph harmlessness argument inflates the weight of its other evidence.[61] First, it claims that Polequaptewa "admitted" guilt,[62] but the complete facts show that the comments at issue were (at worst) ambiguous.[63] The government also argues that Polequaptewa "was motivated by

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[58] AOB 45–48; *supra* Part 1.A.

[59] *Supra* Part 1.B.

[60] GAB-20 n.5.

[61] GAB-48–49.

[62] GAB-2, 18–19, 48.

[63] AOB-35–36.

revenge and frustration to do the deletions,"[64] whereas the complete story of his time at Blue Stone (including his resignation, where he told the client that the company would continue to do a good job) contains no suggestion that he would engage in the kind of behavior with which he was charged.[65]

Next, the government claims that records establish that Polequaptewa wiped the Blue Stone Mac Pro desktop computer.[66] Again, the full story shows there was a genuine dispute about that, with Polequaptewa's wife testifying in support of his defense.[67] More important, the Mac Pro wipe concerned only the core misdemeanor crime, not the significant felony enhancement based on all the other deletions.[68]

As explained in the opening brief, the forensic examination of Polequaptewa's laptop—the tool he purportedly used to delete most of that other data—was central to the government's case.[69] The government responds with a general assertion that it presented "records from third-party providers and Blue Stone's server showing

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[64] GAB-48–49.

[65] AOB-25–29.

[66] GAB-49.

[67] AOB-33–35.

[68] AOB-3–7.

[69] AOB-30–32, 64.

the deletions" and "forensic evidence from the wiped desktop computer[.]"[70] And elsewhere it asserts that these records show that Polequaptewa deleted Blue Stone's files.[71] In fact, the records (at best) show that someone among the several Blue Stone employees (including William Moon) staying at the Florida hotel used Polequaptewa's login credentials at the relevant times.[72] That's why the evidence purportedly obtained from Polequatewa's own laptop was so significant to the government's case.[73] The testimony of its FBI forensic computer expert covered about 65 transcript pages,[74] in which she identified about 35 exhibits representing what she found on the laptop.[75] In litigating a pretrial motion about this evidence, the government asserted: "The evidence seized from the MacBook Pro laptop is highly probative evidence related to the intent and loss requirements for the charged crime."[76] The government emphasized the importance of this evidence even more during its rebuttal argument to the jury:

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[70] GAB-48.

[71] GAB-13–18.

[72] AOB-28–31.

[73] AOB-32.

[74] 5-ER-900–64.

[75] 5-ER-909–10; 6-ER-1271–73, 1280–81.

[76] FER-6.

> The laptop. And I'm going to address the "someone else did it" defense, the conspiracy theory that the defense is putting out there. There's nothing to substantiate this. During the closing argument, counsel didn't put up one thing from that laptop to support his claim because it's all incriminating. It all supports one conclusion. The defendant did those deletions.[77]

Under these circumstances, the government cannot meet its heavy burden to show that it's not even reasonably possible that the laptop evidence might have contributed to the conviction. *Chapman*, 386 U.S. at 23-24.

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

In the opening brief, Polequaptewa argued that the Court had to remand for a new trial under these circumstances, citing *United States v. Christian*, 749 F.3d 806 (9th Cir. 2014).[78] Subsequently, the Court overruled *Christian* on this point in *United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020) (en banc). It held that when the Court concludes that the district court has admitted or excluded evidence at trial through a non-harmless erroneous analysis, "the panel has *discretion* to

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[77] 6-ER-1195.

[78] AOB-62–64.

impose a remedy as may be just under the circumstances." *Id*. at 770 (emphasis added) (quotation marks omitted).[79] "Circumstances may require a new trial in some instances; circumstances may dictate a limited remand in others." *Id*.[80] Here, although the remedy requested in the opening brief is no longer mandatory, it's still just under the circumstances. A limited remand for only an evidentiary hearing "would create an undue risk of post-hoc rationalization." *Id*. at 769 (quotation marks omitted). After all, the district court would have a strong incentive to deny the suppression motion to avoid having to hold a new trial. On the other hand, if the district court knows a new trial will happen regardless, that will not be an issue. The Court should therefore remand for a new trial.

2. The district court's plainly erroneous jury instructions concerning the felony-enhancement element also require reversal.

Regardless of what relief the Court grants with regard to the suppression issue, a retrial is required anyway because the district court plainly erred in failing to

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[79] *Christian* and *Bacon* concern expert-witness testimony, but the general rationale is applicable to erroneous suppression-motion analysis. AOB-63–64.

[80] The government cites *Waller v. Georgia*, 467 U.S. 39 (1984), but the fact that a particular remedy was granted in that case doesn't undermine *Bacon*'s holding that the Court has discretion to order a new trial. GAB-50.

properly instruct the jury about the element that increased the charged crime from a misdemeanor to a felony.[81] The government doesn't dispute that the instructions did not explain the related-course-of-conduct 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."[82] It argues only that the district court did not obviously err in instructing the jury and that, if it did, the error did not affect the trial.[83] It's wrong.

A. The government attempts to short-circuit Polequaptewa's plain-meaning interpretation of 18 U.S.C. §1030 with the observation that the jury instructions used some "statutory language[.]"[84] That simply ignores the problem that the overall text and structure of §1030 establishes the language used in the instruction

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[81] AOB-65–73.

[82] AOB-3–7, 66–69.

[83] GAB-51–57.

[84] GAB-52. Although the government also notes that the district court used a jointly-submitted jury instruction pertaining to the felony enhancement, it concedes that the plain-error standard still applies. AOB-41; GAB-51. *See United States v. Depue*, 912 F.3d 1227, 1233 (9th Cir. 2019) (en banc) (plain-error standard applies even where defendant submitted erroneous instruction).

was insufficient to advise the jury about three important points concerning the phrase "related course of conduct."[85]

1) First, 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.[86] The government disputes that but doesn't even try to offer an alternative interpretation of the key phrase.[87] Surely, there must be *some limit* on the scope of "related course of conduct," and the government's unwillingness (or inability) to proffer one supports Polequaptewa's interpretation.

2) The government also had to prove all of the transmissions in the "related course of conduct" were so connected that each individual act was part of a single episode with a common purpose.[88] The government complains that there's no support for this position.[89] But Polequaptewa's interpretation is consistent with how Congress has defined "course of conduct" in another context. *See* 18 U.S.C. §2266(2) ("The term 'course of conduct' means a pattern of conduct composed of

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[85] AOB-65–69.

[86] AOB-69.

[87] GAB-52.

[88] AOB-69.

[89] GAB-52–53.

2 or more acts, evidencing a continuity of purpose."). And adding the word "related" must narrow the scope of the provision even further. Even as the government disputes Polequaptewa's interpretation and insists that the phrase is so common it needs no definition, it fails to proffer an alternative definition.[90] Furthermore, it strangely argues that "[g]iven how the jury was instructed on the elements of §1030(a)(5)(A) and 'loss,' ... no further instruction as to 'related' 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."[91] Once again, the phrase "related course of conduct" must place *some limit* on the scope of the felony provision, so the government's failure to proffer one is significant.

3) Finally, the government had to prove Polequaptewa's intent to cause at least $5,000 in loss.[92] The government's argument to the contrary focuses entirely on the text of §1030(c)(4) without even acknowledging (let alone rebutting) Polequaptewa's point that the §1030(a)(5)(A)'s intent-to-cause-damage element

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[90] GAB-53.

[91] GAB-52–53.

[92] AOB-69.

logically extends to §1030(c)(4) when that provision is used to enhance the penalty for a §1030(a)(5)(A) violation based on loss.[93] For example, in *Rehaif v. United States*, the Supreme Court recently considered the text of 18 U.S.C. §924(a)(2), which covers "[w]hoever knowingly violates" (among other provisions) 18 U.S.C. §922(g), which in turn prohibits an alien unlawfully in the United States from possessing a firearm. 139 S.Ct. 2191, 2195 (2019). Applying "the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text[,]" the Supreme Court extended §924(a)(2)'s knowingly mens rea to §922(g)'s status element, such that the government must prove that the defendant knew he was an alien unlawfully in the county. *Id*. at 2195-200; *see also id*. at 2197 ("We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question. And we have interpreted statutes to include a scienter requirement even where 'the most grammatical reading of the statute' does not support one.") (citation omitted). By the same token, §1030(a)(5)(A)'s intent-to-cause-damage element must apply to §1030(c)(4)'s over-$5,000-in-loss

[93] GAB-53–54. The fact that an unpublished out-of-circuit case did not mention this intent element in a case where the issue was never raised means nothing. GAB-54 (citing *United States v. Goodyear*, 795 Fed.Appx. 555 (10th Cir. 2019)).

requirement; after all, it's that requirement that increases the crime from a misdemeanor to a felony punishable by up to ten years in prison.

B. As explained in the opening brief, the rule of lenity and the doctrine of constitutional avoidance support Polequaptewa's interpretation of §1030.[94] The government brushes off those arguments with a conclusory assertion that "§1030 is not vague."[95] As noted above, however, the government simultaneously disputes Polequaptewa's interpretation of "related court of conduct" while refusing to say exactly what it does mean. Because that phrase must place *some limit* on the scope of the felony provision, it must be narrowly construed as proposed by Polequaptewa; otherwise, it would violate the doctrine prohibiting the enforcement of vague criminal laws.[96]

C. The district court's failure to instruct the jury on the three important points discussed above was plainly erroneous.[97] The government doesn't dispute that the text of a statute alone can establish plain error; an appellate case answering the precise question isn't required. *United States v. Wang*, 944 F.3d 1081, 1088-89

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[94] AOB-69–71.

[95] GAB-57.

[96] AOB-70–71.

[97] AOB-71–73.

(9th Cir. 2019).[98] The government contends that any instructional error could not have affected the guilty verdict because (purportedly) the jury would have still convicted even if properly instructed.[99] To the extent that argument assumes that the given instructions were good enough, that basically just denies that any error occurred, and that argument has been refuted above. And to the extent the government's argument is based on the trial evidence, Polequaptewa has already explained that the totality of the evidence establishes a reasonable probability a properly instructed jury might not have found Polequaptewa guilty of the felony.[100] Finally, the government asserts that the fourth prong of the plain-error standard isn't satisfied, but it doesn't dispute the authority cited in the opening brief holding that where (as here) faulty instructions allowed a jury to rely on a legally invalid theory to convict and a properly-instructed jury probably would not have convicted, instructional error seriously affects the fairness, integrity, or public reputation of judicial proceedings.[101]

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[98] AOB-71.

[99] GAB-54–57.

[100] AOB-25–37, 71–73.

[101] AOB-73; GAB-57.

For the foregoing reasons, and for the reasons stated in the opening brief, the Court should reverse the denial of Polequaptewa's suppression motion, reverse his conviction, and remand for a new trial after a suppression hearing.

February 8, 2021

Respectfully submitted,

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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 6,425 words.

February 8, 2021

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